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Right for Conciliation and Family Welfare

by

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Abstract

By enhancing some of the solutions proposed in a previous study on female work and family needs, the essay focuses on the role of family as a privileged forum to reconcile family plans and professional careers.

The research aims at proposing a convergence of social family policies (macro-choice) and the choices shared among individual family members (micro-choice).

The article, therefore, examines the policies carried out by some European states to support families and the different models of social support to the family in Europe, including the one that has recently inspired the Job's act in Italy.

Through a (re) reading of some constitutional principles on the family social factor and an analysis on the way to intend subsidiarity, in view of the enhancement of the right to conciliation, the authors also propose a regulatory model that, summing up the already existing sectoral legislation in favor of the family in a systematic way, introduces new "reconciliation measures", some of which may be proposed directly to businesses for their implementation as virtuous models to adopt spontaneously.

Keywords: family welfare - right to conciliation - constitutional relevance of the family - social policies – subsidiarity - local autonomy

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1. INTRODUCTION¹

In previous studies we have demonstrated that although Italian women have a high level of education and skills and they access quite easily to the job market, they have to cope with many difficulties to maintain their job in a certain period of their lives², explicitly when they decide to have a child or, in general, to take charge of the family duties deriving from a “traditional family”.

The public offer of child care and family support explains a lot of the differences among different countries, but it is a complex datum, really hard to detect, collect and interpret.

A systematic analysis has shown that we have, both at a national and European level, legal rules and models which should promote equal opportunities³, but we unfortunately lack of cultural premises⁴ gearing to support families and encourage the preservation of female job places.

We have investigated and suggested two different kinds of solutions, analysing and comparing micro-choices (technical instruments) and macro-choices (legal policies) adopted by different legal systems in the European context to promote an effective integration between life and job time, to support families in terms of public services and suggest new possible instruments connected with partnership of public and private programmes⁵.

The solutions offered in those previous studies affect the traditional approach which focuses female occupation or non-occupation, looking mainly to the individual dimension of possible remedies. In other words the traditional perspective afford the issue analysing the parental leave regime and other instruments used to support parenthood.

In this work, we will follow another “complementary path”, which affect the collective family dimension in cooperation with virtuous choices by welfare policies, both public and corporate’s ones.

¹ The article is the product of the Authors share study. Having regard to research evaluation criteria adopted in Italy, the paragraphs can be assigned to every single Author as follow: Marina Nicolosi par. 1; 4; 6; Alessandra Pera par. 2, 3, 5.

² It is worthy of note that according to ISTAT (i.e. the Italian Institute for Statistics) (*Rapporto 2013*), in 2012 female workers increased by 110,000 units compared to 2011. In addition to the occupied ones, the number of women willing to work and the share of those who passed to the potential labour force or unemployment grew from 16.5 to about 24%. Three factors emerge from this data: the increase in female foreign workers, increased by 76,000 (+7.9%); the 148,000 over-fifty women who, as a result of the pension reform, have remained in their jobs (+6.8%), a datum which has moreover offset the decline in employment of young women; and the growth of women induced by the current economic crisis to enter the labour market (even under conditions that were previously considered not acceptable) to replace the loss of male revenue. For a further in-depth understanding, see R. CARLINI-G. PAVONE, *L'Istat: Italia all'ingù, le donne corrono al lavoro*, in www.ingenere.it/articoli/list-at-italia-allingiu-le-donne-corrono-al-lavoro.

³ For a further comparative analysis on the legislative and case law rules in some EU countries, we can refer to the complete version of this study: M. NICOLOSI-A. PERA, *Female work, family needs and equal opportunities. a comparative analysis among some EU legal systems*, in www.temilavoro.it *Sinossi internet di diritto del lavoro e della sicurezza sociale*, vol. 5, n. 2, 2013.

⁴ In particular, the idea of a *Pink New Deal* has been launched, which could succeed in carrying out the above mentioned revolutions, D. DEL BOCA-L. MENCARINI, S. PASQUA, *Valorizzare le donne conviene*, Il Mulino, Bologna, 2012, *passim*.

⁵ A.PERA-M.NICOLOSI, *Family needs and female work: a comparative survey of public policies and private choices on equal opportunity*, in N. POPOV-A. WISEMAN (eds.), *Comparative Science: Interdisciplinary Approaches, International Perspectives on Education and Society*, Vol. XXVI, 2015, Emerald Publ., pp. 245-268.

In particular, part I of this article focuses on the different trends in social family policies (macro-choice) and in private choices shared by individual family members (micro-choice). It also examines the policies carried out by some European states to support families and the different models of social family support in Europe, including the one that has recently inspired the Job's act in Italy (paragraphs 1-2-3-4).

Part II provides a (re) reading of some Italian constitutional principles on the family social factor, which will be functional to the third and final issues of this study (paragraph 5).

Finally, in view of the enhancement of the right to conciliation, Part III proposes a regulatory model that, summing up the already existing sectorial legislation in favor of families with a systematic approach, introduces new "reconciliation measures", some of which may be proposed to businesses as virtuous models to be adopted spontaneously (paragraph 6).

A systematic approach and analysis of the collected data lead us to consider that, both at an Italian and European level, the rules and legal models adopted seem more than adequate to promote the goals of equal opportunity and redistribution of family and work responsibilities within families, albeit with different nuances highlighted by the comparative analysis⁶. However, the cultural premises which lead us to assist and support families in a perspective functional to the presence of women in the labor market (by broadening the scope of this formula in terms of both the sphere of the access to it, as well as that of employment maintenance and career progression) are quite weak.

Some of the suggested solutions affected, respectively, the education sector, employment and labour market measures for gender equality in the workplace, and others were thought in terms of cultural changes of attitudes.

In other words we have proposed some technical legal solutions (*microchoices*) which respond to different models of legal policies (*public macrochoices*), some of which have been adopted in several Countries of the European Union to promote an effective integration between life-time and working time to support families⁷.

⁶ See F. BETTIO-M. CORSI-C. D'IPPOLITI-A. LYBERAKI-M. SAMEK LODOVICI-A. VERASHCHAGINA, *The Impact of the Economic Crisis on the Situation of Women and Men and on Gender Equality Policies*, in http://ec.europa.eu/justice/genderequality/files/documents/enege_crisis_report_dec_2012_final_en.pdf; and also European Commission, (2011) *Labour Market Developments in Europe, 2011*. Directorate-General for Economic and Financial Affairs. [http://ec.europa.eu/economy_finance/publications/european_economy/2011/pdf/ee-2011-2_en.pdf].

⁷ In particular, we have surveyed many instruments and among them, we want to cite a French and German example. These legal systems have introduced a model of social insurance to support the costs of care and family support, as well as the services for children, elderly and disabled, with the possibility for the insured to modulate premiums, requiring specific benefits in terms of services or economic support to address the peculiar family needs. This model allows the family to choose the right mix of care and support of a public or private nature and avoids the "social sanction" reserved for those who rely on care services acquired on the market, rather than providing for them in person, yet giving up something else. The system requires the insurance market to provide for sophisticated and comprehensive services, which results in the creation of job opportunities for traditional and new skills, such as caregivers, baby-sitters, housekeepers, psychologists, and

The above-mentioned situation suggests that *public services* or private choices are then needed, as well as instruments combining the provision of public services with private programs⁸.

It is true that these solutions are not always harbingers of an effective *welfare policies* since their costs rest on the shoulders of families⁹ or entrepreneurs-employers. As a matter of fact, the need to coordinate work and family results in an excessive load for the woman-mother-worker or in an obligation for the employer to reorganize the company in accordance with the needs of flexibility. Therefore, public intervention in support of private choices – such as careers, house nurseries, *babysitters in co-share*¹⁰ and female entrepreneurship that are more easily adaptable to different needs related to the individual career and the peculiar family context (*private microchoices*), and also to the different cultural, educational and social contexts (*private macrochoices*) – is the most appropriate and less damaging to the private autonomy of the two parties in the employment contract (employer and employee, man or woman it may be)¹¹.

Thus, shifting our attention to the dynamics within the family, it seems that a key factor for an effective search for solutions aiming at reconciling family plans and careers tends to be a greater cooperation within the couple¹².

So, it should be at first understood when a social policy (macrochoice) is family oriented and affects the choices of individual household members, resulting also in a microchoice.

Moreover, it should be said that social policies could be considered family oriented when explicitly aimed at supporting the social functions and the added social value of the family as such, considering the family as social capital¹³.

doctors using a formula which moreover is appropriate to help in reducing the creation of additional undeclared work. On undeclared and irregular work, for all see A. BELLAVISTA, *Il lavoro sommerso*, Giappichelli, Torino, 2002.

⁸This model seem to be the one that the Italian legislative has implemented in the already cited D. M. 22 December 2012, artt. 4-8.

⁹ See T. BOERI-D. DEL BOCA, *Chi lavora in famiglia?*, in www.lavoce.info/news/view.php?id=10&cms_pk=2713.

¹⁰ S. PASQUINELLI, «Assistenti familiari: le questioni aperte», *Prospettive Sociali e Sanitarie*, n.14, 2006; and many other interventions on the newsletter www.qualificare.info. See D. MESINI-S. PASQUINELLI-G. RUSMINI, *Il lavoro privato di cura in Lombardia*, Milano, 2006; and also <http://www.qualificare.info/index.php?id=92>.

¹¹ See L. CALAFÀ, *Paternità e lavoro*, Il Mulino, Bologna, 2007; for an interesting comparison between European and USA policies on motherhood and work see C. J. RUHM, *How well do parents with young children combine work and family life?*, in *Working paper* 10247, *National Bureau of Economic Research*, 2004; R. LALIVE-J. ZWEIMULLER, *Does parental leave affect fertility and return-to-work? Evidence from a true natural experiment*, in *Working Paper n.242*, *Institute for Empirical Research in Economics*, University of Zurich, 2005; M. BAKER-K. MILLIGAN, *How does job-protected maternity leave affect mothers' employment and infant health?*, in *Working paper* 11135, *National Bureau of Economic Research*, 2005; J. KLERMAN-A. LEIBOWITZ, *Job continuity among new mothers*, in *Demography*, 36, 2, 1999, pp. 145- 155; C.L. BAUM, *The effect of state maternity leave legislation and the 1993 Family and Medical Leave Act on employment and wages*, in *Labour Economics*, 10, 2003, pp. 573-596.

¹²This is also evident from the data collected in ISTAT, *Le difficoltà nella transizione dei giovani allo stato adulto e le criticità nei percorsi di vita femminili*. Anno 2007, “Approfondimenti”, 2009 available at http://www.istat.it/salastampa/comunicati/non_calendario_20091228_oo/testointegrale20091228.pdf The study shows how the couples in which the woman is more educated are able to mobilize more market resources, goods, services and time than their family members, including partners, and to use them more efficiently to solve the problems of conciliation.

¹³ P. DONATI, *La famiglia come capitale sociale primario*, in ID. (ed.), *Famiglia e capitale sociale nella società italiana*, Edizioni S. Paolo, Cinisello Balsamo, 2003, pp. 31. According to the author, a country without a strong connective tissue made up of strong

An effective social-family policy has to put aside the all endo-family dialectic between a single individual-family component and the family as a whole. This dialectic, indeed, is often characterized by the presence of conflicting or opposing individual interests, which need to be reconciled at the level of individual choices rather than at the level of policy choices¹⁴. Thus, the single social-family policies must give family members a variety of instruments to agree on how to manage their family routine and take their career choices.

It is a land where the reconciliation between family and work is closely related to the theme of personal identity, insofar as it involves decisions at issue, which bring together different times, life strategies and conceptions of the family model which reflect the individual aspirations and the order of priority that the individual gives them.

However, the so-called right for conciliation has slowly found autonomous citizenship in the Italian legal system¹⁵. A concept of conciliation as a key link between employment policy, labor law and social services and child care (under Law no. 328/2000, framework law for the implementation of the integrated system of interventions and social services) began to emerge probably from the so-called "Luxembourg process", behind the major thrust of the Community institutions¹⁶. In this concept, an almost perfect synthesis can be found of two subject areas, that were originally considered as opposites, but will genetically meet at a certain point in life: equality and family¹⁷, to be conceived now as functionally interconnected tools. According to this new approach, the full right to the former can effectively be achieved through a significant and careful rethinking of the right to the latter, and vice versa.

2. EUROPEAN POLICIES FOR SOCIAL SUPPORT TO FAMILIES.

The new concept of reconciliation, as above-described, has been well expressed in the Council

families, which generate relational goods, tends in the long run to deplete the human capital at its disposal and is unable to regenerate it.

¹⁴ As drawn from the statistics, there is a strong connection between the progressive delay in the birth of the first child and the rising levels of education in women (mothers who only have attended primary school have almost disappeared), which results in a greater participation to work in higher positions. This requires working mothers to multiply on several fronts trying to manage two jobs, outside and inside their house. See ISTAT, *l'uso del tempo. Anni 2002-2003*, "Informazioni", 2007, 2, available at http://www.istat.it/dati/catalogo/20070301_oo/info7o2uso%2odel%2otempoo2_o3.pdf. The female output from the domestic sphere, however, does not result in an equitable redistribution of family labor within the couple, which remains committed to the woman for a share ranging from 70% to 80%. For employed women and couples with children, the phase between 25 and 34 represents the moment of maximum pressure coming from both work and family.

¹⁵ L. CALAFÀ, *Strumenti di conciliazione: un approccio giuridico: il caso dei congedi*, survey presented at the conference "Che genere di conciliazione? Famiglia, lavoro e genere: equilibri e squilibri", held in Turin on May 28-29 2003.

¹⁶ The reference is made to Law n. 328 of November 8, 2000, called *Legge quadro per la realizzazione del sistema integrato di interventi e servizi sociali*, published in the *Gazzetta Ufficiale* n. 265, November 13, 2000 - *Supplemento ordinario* n. 186.

¹⁷ A. JUNTER LOISEAU-C.TOBLER, *La conciliazione tra lavoro domestico e di cura e lavoro retribuito nella legislazione internazionale, nelle politiche sociali e nel discorso scientifico*, in *Ragion Pratica*, 1996, pp. 145-176.

Resolution (of June 29, 2000: 2000/C 218/02), where the idea of the so-called social gender-based contract became real through the annexation of the rights and duties of care (also by men), through a new policy on the times (both individual and collective, managed or not by companies, of work and life) and a more modern concept of welfare. The second recital of the same Resolution also deals with the refusal of "a partial view of the principle of equality" that should be read together with the right "of both men and women" to "reconcile work and family". This implies that the step from the right for conciliation of the single individual to the right to "reconcile within the family" (as an instrument of micro-choice) is very short¹⁸, although it has not been accomplished yet, and in Italy at the very least.

It, also, responds to the commitment of the Republic - consecrated in the Constitution - to take on all the measures necessary to allow the individual to reconcile work, as a fundamental value of the Charter, and the individual responsibilities, which are also covered by the Constitution.

As shown later in this contribution, there could be a constitutional basis for the "right of conciliation" in such essential spheres of life, to be combined as a right of the single individual and the family at the same time¹⁹.

As a matter of fact the following part is devoted, as it were, to a "familistic" reading of Articles 31-37 and 3, paragraph 2 of the Constitution, based on the primary consideration that an excessive load of family commitments, not adequately supported by a welfare-workfare legislation, is likely to prevent the worker from an effective participation in the political, economic and social development of the country. It is a hermeneutic option that returns the family - the first and lasting place in which individuals develop their personality - a central role, functional to the growth of the person and the consolidation of social cohesion for a balanced development of the country and family welfare²⁰.

¹⁸For instance, think of the issue of the absences granted only to women who have, in the community vision, a potentially segregating effect, that can also result in significant reductions of their wages; or the need to move, for this reason, the focus on services for children.

¹⁹ F. TOMASONE, *La legislazione sociale per la famiglia in Italia*, in P. DONATI (ed.), *La famiglia in Italia. Sfide sociali e innovazioni nei servizi*, vol. I, 2012, Carocci Editore, Roma, cited before, p. 40.

²⁰This, however, does not necessarily lead us towards a "publicistic" importance of the family, to the detriment of the protection of the rights and interests of its members, but once again it suggests a conciliation, in which the private autonomy is functional and arbiter to the interests of the group. It is a concept that maintains the State interest in the primordial cell of the social organism, functional to the pursuit of public interest also. Therefore, the single individual, as a member of a community, is protected, that is an alternative to the higher unity of the family and to the purposes and interests pursued by it. This vision has been more recently subverted in favour of a modern interpretation of the Constitutions: so, despite the reference to the particular role of the State, the marriage is recognized the ability to form a community having personality, whose "higher or publicistic" purpose are yet struggling to be distinguished from those of its components. On the nature and singling out of personality rights and their influence on family legislation see J. PERREAU, *Les droits de la personnalité*, in *Rev. tr. dr. civ.*, 1909, pp. 501 *et seq.*; R. NERSON, *Le droits extrapatrimoniaux*, Thèse, Lyon, pp. 1939 *et seq.*. On the deep transformation of the regulation on family under the pressure of the individualistic libertarian idea, see J. CARBONNIER, *Terre et ciel dans le droit français du mariage*, in *Études offerts à George Ripert*, LGDJ, Paris, 1950, pp. 325 *et seq.*; and ID., *Flexible droit*, LGDJ, Paris, 1960, pp. 128 *et seq.*; C. GEARTY, *Principles of human rights adjudication*, Oxford University Press, Oxford, 2005, pp. 20 *et seq.*; L.J. LAWS, *The limitations of Human Rights*, in *PL*, 1999, pp. 254-258; see also D. BARBERO, *I diritti della famiglia nel matrimonio*, in *Justitia*, 1955, p. 455; as well as P. STANZIONE, *Rapporti personali nella famiglia: l'esperienza europea*, in *Familia*, 2001, pp. 1097 *et seq.*; on the common tendencies of those systems characterized by the centrality of the rule of law and of the secularity of law, see T.R.S. ALLAN, *Dworkin and Dicey: The rule of law as integrity*, in *OJLS*, 1998, pp. 266 *et seq.*; J.

Even the European Union, therefore, has adopted the theme of reconciling family and work, as a subject traditionally linked to competences of economic nature, and nowadays particularly related to new social skills. Which explains how, in this matter, European policy aims at increasing employment rates, to ensure economic growth and the sustainability of welfare systems in individual states on the one hand, and to promote social inclusion on the other²¹.

It is a line of regulatory action of both binding and non-binding nature, to support the employment of women and to promote equal opportunities also by increasing the supply of care services. Moreover, a model prevails among these interventions, focusing strongly on a culture of individual rights that is at the same time male-oriented and "mother friendly"²². This dystonia has to be added to the lack of consideration of certain key elements, such as the family culture of each European country and the different cultural approach to conciliation. Indeed, the needful attempt to harmonize often makes the interventions – that have been concretely carried out – uncertain, contradictory and inconsistent.

On the other hand, the analysis of data on various national legal systems regarding occupational choices shows how different welfare systems and different cultural contexts represent factors affecting significantly job orientation, the organization of daily life and the possibility of an effective conciliation. Although complex and multiple, all these elements are not able to give concrete answers to the issues raised, as the real balance of power lies in the decision-making process that takes place within the couple and that answers the question: "Who does what?".

There is also a fundamental connection between the strategy within the family and what the social policy offers in the different contexts considered so far. For example, in Germany, France²³, Belgium and Great Britain a model of "voucherization" of family care services, in which intermediate bodies both of private and public nature constitute a network supporting families by providing various services, has recently spread.

This "voucher model", despite the diversity of the forms which characterize it, can be considered the expression of a welfare system that improves the relationship between demand and supply of services,

GOLDSWORTHY, *Homogenising Constitutions*, in *OJLS*, 2003, pp. 483 *et seq.*; J. JOWELL, *Beyond the rule of law*, in *PL*, 2000, pp. 671 *et seq.*

²¹ On family welfare policies among different legal systems see, A. BLOME-W. KECK-J. ALBER, *Family and the welfare state in ageing of societies*, Edward Elgar Publishing Limited, The Lyptatts, Cheltenham, 2009; G. CAMERON-N.COADY, *Moving toward positive systems of child + family welfare, Current issues+Future directions*, Wilfrid Laurier University Press, 2007. For an overview among European countries see the special issue of the *International Journal of Child and family welfare*, vol. 5, n. 3, 2002; P.L. RUNCAN-G. RATA-M.BOGDAN IOVU, *Child and Family welfare*, Cambridge Scholars Publishing, New Castle, 2014; B. PFAU-EFFINGER, *Welfare state policies and development of care arrangements*, in *European societies*, vol. 7, n. 3, 2005, pp. 321-347; Id., *Culture and welfare state policies: reflections on a complex interrelation*, in *Journal of Social Policy*, vol. 34, n. 1, 2005, pp. 1-18; C. UNGERSON, *Gender, labour market and care work in five European funding regimes*, in B. PFAU-EFFINGER-B. GEISSER (eds), *Care and Social Integration in European Societies*, Policy Press, Bristol, 2005.

²² S. MAZZUCHELLI, *Conciliazione famiglia e lavoro. Buone pratiche di welfare aziendale in Lombardia, Piemonte, Friuli Venezia Giulia, Marche*, in P. DONATI (ed.), *La famiglia in Italia. Sfide sociali e innovazioni nei servizi*, vol. II, 2012, Carocci Editore, Roma, p. 43.

²³ For a comparison between the French and the German models, see P. BOLING, *The Politics of Work-Family Policies*, Cambridge University Press, Cambridge, 2015.

improves the quality of the service offered, helps the surfacing of irregular work; moreover, such a model creates a market of higher quality and new jobs. It enables those strategies of personalized conciliation according to the internal changes in the family system (lengthening-shortening of the cycle of family life; change in the choices of consumer spending and investment, including those depending on the relationship with the economic political and social environment).

The comparative analysis of the different national experiences and the specific solutions adopted by each state, has allowed us to estimate some dogmatic categories/negotiating patterns through which it is possible to carry out flexible tools:

- A) relations of trust/contract: outsourced services with service contracts between two private parties;
- B) partnerships between public and private that also participate in the formulation of measures;
- C) coordination alliances (agreements and protocols providing the services subsidized or agreed, in which the public authority pays all or a *pro-rata* for the service provided by a private and the provision of services is autonomous);
- D) competition, i.e. the private who implements measures alternative to or overlapping the public ones.

The success of each model in the different systems depends on the strength of the actors involved. In particular, in the countries of Continental and Northern Europe the model of contracting services with a private, even social, is widespread and accompanied by an action of lobbying mainly carried out by representatives of various categories.

In Continental and Mediterranean Europe, by contrast, the model of public-private partnership is more prevalent, variously declined according to the pervasive role of the private market.

In general, the trend is towards an increase in public-private relations due to specific national strategies of public management as well as to subsidiarization, and both strategies and priorities are related to the functioning of the European Structural Funds²⁴.

It is clear that a strong factor of heterogeneity between the solutions adopted at a national level descends from the "rhetoric of subsidiarity" which, among other things, is particularly effective in the European economic and labor policies. This is all exacerbated by the nature and mechanisms of the European Structural Funds and their budget constraints²⁵.

In particular, the ESF can be used for interventions on a regional or, however, local basis, even though

²⁴ See the document by the European Commission *Partnerships for more family-friendly living and working conditions. How to obtain support from the European structural funds*, 2008, available at <http://ec.europa.eu/social/BlobServlet?docId=2047&langId=en>. And also E. BARBERIS, *Governance, innovazione e crisi nelle città medie: una lettura sulla dimensione locale delle politiche sociali a partire dal caso pesarese*, in P. DONATI (ed.), *La famiglia in Italia. Sfide sociali e innovazioni nei servizi*, vol. II, 2012, Carocci Editore, Roma, cited before, p. 109.

²⁵ See M. KURONEN (ed.), *Research on families and family policies in Europe. State of the Art*, in *Family-platform, mimeo*, 2010, available at http://www.familyplatform.eu/en/doc/247/WPi_Final_Report.pdf.

the relationship between welfare and territory is in itself a critical aspect of the distribution of resources and responsibilities in social family policies.

The coexistence of two trends, sometimes dystonic, deserves to be reported: one towards a greater autonomy of local authorities, the other in the direction of a control - although indirect - by the higher-level institutions, not only after the employment of the measure, but also upstream of the funding, with reference to the choice of the instruments used for the implementation of the measure²⁶.

3. MODELS OF POLICIES FOR SOCIAL SUPPORT TO FAMILIES IN EUROPE.

From the above considerations, what emerges is a framework in which different and interesting programs of social policy have been developed. Financial instruments have been used in order to ensure the access to care services and various kinds of conciliation to satisfy both the internal transformations of family (e.g. changes of the needs during the course of family life; changes in the choice of priorities of consumer spending and investment; different composition of family groups) and the changes inherent the relationship between the family and the economic, social and political environment (increasing and changing challenges from the world of work; difficulties in reconciling work and caring responsibilities; weakening of some protections from the social standpoint and the corresponding increase in load of family care; design and implementation of new services and new logics in support of family cohesion within a subsidiary perspective)²⁷.

Here subsidiarity plays a key role, having to build instruments of conciliation theoretically and then implement them, as in the case of vouchers, to adapt them to the specificities of local contexts. As evidenced by the brief comparative analysis proposed here, subsidiarity indeed can be articulated in different ways depending on the way the relationship between welfare and territory is understood, according to how much social responsibility the State and the family must take on, with different effects on the networks of governance and the construction of spatial scales²⁸.

For the sake of completeness, three models of decentralization (A; B; C) and their effects on work-family reconciliation policies (A1, B1-B2, C1) are here listed:

A. *Models carried out through centrally-coordinated local autonomy*: Nordic countries widely apply a model

²⁶ Y. KAZEPOV (ed.), *Rescaling social policies: towards multilevel governance in Europe*, Ashgate, Farnham, 2010.

²⁷ L. MARCHIGLIANI, *Tra workfare e capacitazione: le semantiche della conciliazione famiglia-lavoro promosse tramite dispositivi e buoni servizio*, in P. DONATI (edited by), *La famiglia in Italia. Sfide sociali e innovazioni nei servizi*, vol. II, 2012, Carocci Editore, Roma, cited before, p. 139.

²⁸ Y. KAZEPOV (ed.), *Rescaling social policies*, cited.

according to which the municipal autonomy is extensive, but within national regulatory frameworks. They have provided tools to limit the discretion of local governments in order to enhance local skills, according to a proper use of the ESF, but also of state funding. These tools can be divided into soft measures, such as non-binding recommendations, and hard ones, such as funds with target bond and quality standards. In Sweden, in particular in the nineties, a great attention was paid to the central level (state) in the creation of standards concerning both the financial coverage and the rights of access to nurseries, although managed and funded locally²⁹.

A1. These systems are characterized by a very high employment rate, even for women, high continuity of employment along the course of life, the highest incidence of households with two income earners and relatively low gender differences in the labor market³⁰. The most important impact of family formation is given by the temporary reduction of working hours in favour of a greater use of part-time during the first years of children lives. The system of leave is quite generous, but not enough to make it convenient for the mother leaving her job for long periods of time. Also the instrument of paternity leave is much enhanced, to try to make men responsible for family care. The system of services for young children is properly developed, mainly public and well funded.

B. *Models carried out through regionally-coordinated local autonomy*: in Spain, Italy and Germany, social policies are anchored to a regional dimension, although with differences related to the type of federalism or regionalism in force in the three Countries. Some scholars have noted with interest the attempt of these legal systems to rebuild from scratch a form of sub-national, constitutionally protected legislative autonomy, even in the face of rooted territorial inequalities³¹. In particular, Spain and Italy have been characterized by a centralism that has only recently moved towards more political-administrative rather than fiscal forms of decentralization. In the Mediterranean and southern Europe the prevailing model

²⁹ On Scandinavian models and British ones see T. KROGER-S. YEANDLE (eds), *Combining paid work and family care. Policies and experiences in international perspective*, Policy Press, University of Bristol, Bristol, 2014; On the Sweden one, in particular, F. G. CARO, *Family and Aging Policy*, Routledge, New York, 2012, pp. 13 et seq.; G. Andersson, Child and family welfare in Sweden, in N. Freymond-G. Cameron, *Towards positive systems of child and family welfare: International comparison of child protection, family services and community caring systems*, University of Toronto Press, Toronto, 2006, pp. 171-190.

³⁰ See the detailed study available at www.weforum.org/docs/WEF_GenderGap_Report_2012.pdf. The research reports the major gender-based unequal treatments and traces the evolution on such an issue in many different Countries all over the world. The index employed to measure the “national gender gaps” is based on economic, political, educational and healthcare criteria, through which Countries are ranked, by comparing the same index, and divided into groups. In particular, the four “pillars” to examine the gap between men and women are represented by as many fundamental categories: *economic participation and opportunity, educational attainment, health and survival, and political empowerment*. In order to measure these gender based gaps the access to certain resources and opportunities in the single Countries are evaluated, but also and most importantly the current levels of availability of resources and the opportunities in the same Countries are taken into account, so as to ensure that the *Global gender gap index* is an independent measure for the level of development of each Country, making variables, such as the African Countries and the so-called developed ones, commensurable. According to these variables – such as female and male labour force participation; wage equality survey; estimated earn income; enrolment of primary, secondary and tertiary education; and many others, that we do not think interesting to emphasize here – the other countries that we examine in the comparative section of this study have been ranked: United Kingdom as 18th; Spain as 26th; France as 57th.

³¹ E. BARBERIS, *Governance, Innovazione e crisi nelle città medie*, cited, in P. DONATI (ed.), *La famiglia in Italia. Sfide sociali e innovazioni nei servizi*, vol. II, 2012, Carocci Editore, Roma, cited, p. 112.

sees a heavy delegation of responsibilities to the family for the economic support and care of its members³², with a corresponding weak public support, through a form of *subsidiarity* which is defined - not for nothing - *passive*³³.

B.1 In Spain and Italy the employment rate of women is particularly low, inversely proportional to the rate of households with the man being the only income earner (though declining)³⁴. In these two countries there is a very high gender gap in employment and income, which coexists with not particularly high rates of part-time working women. The creation of families and, above all, the birth of children are associated with the dual practice of leaving the labor market or having to continue working full-time³⁵, although younger women are shyly showing different and opposite behaviours to those of their mothers³⁶. In these systems, the public offer of services for young children is limited and balanced by forms of intergenerational solidarity³⁷. The system of leave is good, but it draws a difficult situation for the return to work, with very few substantial guarantees³⁸.

B.2 However, in other continental European countries such as Germany and England the welfare system (public) and that of workfare (corporate) finance family responsibilities and the third sector,

³² For a comparative overview among some of these systems, C. SARACENO (ed.), *Families, Ageing and Social Policy. Intergenerational Solidarity in European Welfare States*, Edward Elgar Publishing Limited, The Lyptatts, Cheltenham, 2008, *passim*.

³³ On the concept of passive subsidiarity, above all, see S. PALUMBO, *Il welfare fatto in casa: un bilancio*, in G. LAZZARINI-A.GAMBERINI-S. PALUMBO, *L'home-care nel welfare sussidiario*, Franco Angeli, Roma, 2011, pp. 257.

³⁴ Once again, see the Gender Gap study, commented in depth by M. NICOLOSI-A. PERA, *Female work, family needs and equal opportunities. a comparative analysis among some EU legal systems*, in www.temilavoro.it *Sinossi internet di diritto del lavoro e della sicurezza sociale*, vol. 5, n. 2, 2013.

³⁵ Among the many more recent statistic studies on the state of female occupation see www.istat.it/it/files/2011/06/16_Occupazione-e_Disoccupazione-per-regione.pdf; and also R. CARLINI-G. PAVONE, *Istat: l'Italia all'ingiù: le donne corrono al lavoro*, in <http://www.ingenere.it/articoli/listat-italia-allingi-le-donne-corrono-al-lavoro>; another extremely interesting report, which was commissioned by *Save The Children Italia*, is "Mamme nella crisi" ("Mothers in the crisis") and it can be consulted at www.immages.savethechildren.it/It/£/img_pubblicazioni/img190_b.pdf.

³⁶ It is worthy of note that according to ISTAT, *Rapporto 2013*, in 2012 female workers increased by 110,000 units compared to 2011. In addition to the occupied ones, the number of women willing to work and the share of those who pass to the potential labour force or to unemployment grew from 16.5 to about 24%. Three factors emerge from this data: the increase in female foreign workers, increased by 76,000 (+7.9%); the 148,000 over-fifty women who, as a result of the pension reform, have remained in their jobs (+6.8%), a datum which has moreover offset the decline in employment of young women; and the growth of women induced by the period of economic hardship to enter the labour market (even under conditions previously considered not acceptable) to replace the loss of male revenue. For a further understanding, see R. CARLINI-G. PAVONE, *L'Istat: Italia all'ingiù, le donne corrono al lavoro*, in www.ingenere.it/articoli/list-at-italia-allingu-le-donne-corrono-al-lavoro. According to the *Rapporto ISTAT 2013*, 2012 saw an increase in the number of female workers, but this increase occurred mainly in the involuntary *part-time* and was segregated in low-skilled jobs: since 2008 the growth in unskilled occupations is in fact more than double compared to men (+24.9% compared to 10.4%), so that to explain half of male employment 51 professions need to be mentioned, and only 18 for women. The presentation of the report states: "retail trade shop assistant, domestic worker and secretary are the professions that are receiving the greatest number of occupied". For an account on scholastic writings about the purpose and the use of *part-time* see E. RUSTICHELLI, *Il nuovo part-time: la concertazione della flessibilità*, *Monografia Isfol Mercato del lavoro 7/05*, in www.isfol.it; M.C. BOMBELLI - S. CUOMO, *Il tempo al femminile: l'organizzazione temporale tra esigenze produttive e bisogni personali*, Etas, 2003; M. BROLLO, *Il lavoro a tempo parziale*, in C. CESTER (ed.), *Il rapporto di lavoro subordinato: costituzione e svolgimento, diritto del lavoro*, in *Commentario* directed by F. CARINCI, Utet, Torino, 2007, 1301.

³⁷ A. PERA, *Elderly care-taking: caretakers versus welfare policies – family needs have only private answers*, in H. FULCHIRON (ed. by), *Les solidarités entre générations*, 2013, Bruylant Paris, pp. 791 et seq.

³⁸ On parental leave see, among others, F. TORELLI, *La difficile condivisione del lavoro di cura. Spunti sui congedi parentali*, in *Lav. dir.*, 2010, 463.; L. CALAFÀ, *Congedi e rapporto di lavoro*, Cedam, Padova, 2004; R. DEL PUNTA-D. GOTTARDI (ed.), *I nuovi congedi*, il Sole 24 ore, Milano, 2001; L. CALAFÀ, *Paternalità e lavoro*, Il Mulino, Bologna, 2007.

which provides for services to families, according to a model defined of *active subsidiarity*.

The formation of the family and the birth of a child push mothers towards part-time work and not out of the labor market. The system of childcare and parental leave is adequate, but less than the standards of the Scandinavian systems³⁹.

C. *Models carried out through functional decentralization*: in France and Eastern Europe local governments are not autonomous, but forms of functional decentralization are recognized. Therefore, the role of the central institutions and the national coordination of the actions of welfare remain significant. In particular, French policies for children have tested a model in which the register of *assistantes maternelles*, individualized services, tax benefits, the fares of the services for children and other things⁴⁰ are organized at the state level.

C1. In France, the formation of the family has a strong impact on career and conciliation choices, as the birth of a child is often a good reason to leave the labor market⁴¹.

Over the past two decades, the above-analysed legal systems have seen a growing role of local authorities, but the different cogency and breadth of national regulation have also had an important role in determining the effects and results of the policies implemented.

The issue of subsidiarity, therefore, is both crucial and problematic, but at the level of macro-choices it is not desirable to have just individuals “of good will” as interlocutors. It is rather necessary to build instruments of government appropriate for the purpose, aware that the multiplication of the negotiating tables has a meaning only if it proves to be effective. Therefore, it is better to aim at a model that requires the actors of government to abdicate from the idea of a mere hierarchical redistribution of the resources, and calls instead for building interventions together with civil society, albeit with its own, specific responsibilities of transparency and democratic accountability dictated by the public role.

Unitary states, where the national *legal formant*⁴² has a considerable weight in determining the structure of the system, have different forms of coordination if compared to federal states. The *scholar-doctrine formant*, indeed, has a crucial condition for the success of their welfare in the size and in the socio-economic and territorial homogeneity of the Nordic countries and shows that in these countries the

³⁹ S. COLTRANE, *Family Man. Fatherhood, Housework and Gender Equity*, Oxford University Press, New York, 1996; For a complete study on parental leave legislation in Europe, USA and Japan, see S. TANAKA, *Parental leave and child health across OECD countries*, in *The Economic Journal*, 2005, p. 115.

⁴⁰ J. FAGNANI-A. MATH, *Reformas recentes nas políticas da família em França e na Alemanha*, in *Sociologia, Problemas e Práticas*, 64, 2010, pp. 11 *et seq.*

⁴¹ See E. BARBERIS, *Come rendere riflessiva la relazione tra famiglia e lavoro*, in P. DONATI (ed.), *La famiglia in Italia. Sfide sociali e innovazioni nei servizi*, vol. I, 2012, Carocci Editore, Roma, cited, p. 19.

⁴² On legal formants theory, see R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law*, in 39 *The American Journal of Comparative Law*, 1991, pp. 1-34 and pp. 343-402; R. SACCO-A. GAMBARO (eds.), *Sistemi Giuridici Comparati in Trattato di Diritto Comparato* (UTET 1996) 4-7; R. SACCO, *Introduzione al diritto comparato*, UTET, 1992, p. 43; A. WATSON, *From legal transplants to legal formants*, 1995, in 43, 3, *Am L J of Comp Law*, pp. 469 *et seq.*

"chain of command" between state and territory is less articulate and more efficient. In federalist countries, however, each level having legislative power can influence and "perform" the structure of the system through forms of decentralization, sometimes exasperating territorial asymmetries.

Therefore, some literature points out specific problems of welfare reform in these systems, since in the more articulate states there is still a fragmented distribution of power relations, leading to coordination difficulties related to their diversification and multiplication of points in the network. This results in greater difficulties to implement reforms of effective – family, in our case - welfare. This is not to argue that the system of federal checks and balances or the forms of decentralization are by nature and ontologically insurmountable obstacles, because consultation is a valuable tool to give breath to the choices made in the national implementation of the principle of subsidiarity. The proof is given by the development of the German welfare, which is tied hand in glove to forms of cooperative federalism. However, recent cases of development of the family policies in Germany show a problematic puzzle effect, for example, with reference to the reform of policies for children: the federal strong decentralization and the large number of *stake-holders* involved have increased the financial and organizational complexity⁴³.

4. CONCILIATION OF LIFE TIME AND WORKING TIMES IN THE JOB'S ACT IN ITALY.

Recently, the Job's Act has given the chance to discuss about families welfare policies at an institutional level⁴⁴. The Italian government agenda foresees the adoption of one or more legislative decrees concerning the "review and update of the measures to protect maternity and the forms of conciliation of life and work."

In exercising its powers, the Government may be bound by certain principles and criteria, from which, in our view and in the light of the above-described setting, the main weaknesses of the intervention emerge.

Firstly, as usual the right for conciliation is addressed only to women (i.e. the identification of the categories of workers to which extend some forms of protection, as mothers or as holders of work incentives). Thus, the legislative delegation does not foresee the desired shift of interest from the individual to the family, in which individuals are arbiters of the choices regarding their family routine

⁴³ J. FAGNANI-A. MATH, *Reformas recentes nas políticas da família em França e na Alemanha*, in *Sociologia, Problemas e Práticas*, 64, 2010, pp. 11 .

⁴⁴ Available at <http://www.parlamento.it/841> and in G.U.R.I. n. 290 published on December 15, 2014.

and individual professional development, on the basis of several instruments available under law. In other words, except for the treatment of biological motherhood, the tools offered need not be considered necessarily in terms of the worker-parent's gender, but rather should be designed in a neutral manner so as to leave maximum space to private autonomy.

Only some of the criteria identified in the delegation look at the interest in the family as a whole (art. 1, paragraph 9, letter d) e) f) g)), restricting it however to the "offer of childcare services provided by companies and funds or bilateral bodies in the public-private system of personal services." And, actually in addition, the criterion "of the greater flexibility of its mandatory and parental leave favouring opportunities for conciliation"⁴⁵ appears neutral.

However, the Job's Act still seems quite far from the perspective that considers the family as an environment where individuals can select models of reconciliation according to multiple combinations suitable to grasp the peculiarities of both the individual and group (family). This is the second critical aspect of the proposed legislative action. As a matter of fact, the delegating legislature neglects the issue of family pluralism⁴⁶ and the different family needs related to the pulverization of family models that are gradually spreading throughout the country (*de facto*, single-parented, extended, reconstructed, rainbow, immigrant families...). These new models of family are often carriers of heterogeneous needs that, if met, may indirectly facilitate employment in the broadest sense.

In truth, the occupation that should be protected, preserved or promoted varies according to the type of household and the status of the individual (contextually, exclusively or alternatively parent and/or worker; mother and/or worker, father and/or worker). Therefore, the legal situation to be protected is not necessarily that of the woman/mother, especially if the only employee is the woman and not the man, as often "implied".

Yet, it is true that the Job's Act results from an approach that has its historical and cultural roots in the form of technical legal choices, in which the intervention of the legislature has never succeeded in granting the family factor a full constitutional significance, transversal to a plurality of sectorial policies. As known, the development of a regulatory system came out of this setting, through subsequent

⁴⁵ See the already cited analysis carried out in depth in M. NICOLOSI - A. PERA, *Female work, family needs and equal opportunities. a comparative analysis among some EU legal systems*, in www.temilavoro.it, vol. 5, n. 2, 2013, cited, which shows that the Italian model of parental leave responds to a standard of protection among the highest in Europe and to an almost equal distribution of leave between both parents.

⁴⁶ With regard to the emergence of social issues ranging inevitably now in the direction of family pluralism, policy issues tend to grow exponentially. This is acutely observed by E. MILLARD, *La dimension politique du pluralisme familial*, in O. ROY (ed.), *Réflexions sur le pluralisme familial*, 2010, Presses Universitaires de la Paris Ouest, Paris, pp. 229-240; and also C. CLÉMENT, *La place du modèle familial dans un système pluraliste*, pp. 123 et seq.; and even S. ROBIN OLIVIER, *Le regroupement familial confronté au pluralisme familial*, pp. 167-182; V. COUSSIRAT COUSTIÈRE, *La notion de famille dans les jurisprudences de la Commission et de la Cour européenne des droits de l'homme*, in VV. AA., *Internationalisation des droits de l'homme et évolution du droit de la famille*, Université de Lille II, Paris, 1996; ID., *Famille et Convention européenne des droits de l'homme*, in VV. AA., *Protection des droits de l'homme: la perspective européenne: Mélanges à la mémoire de Rolv Ryssdal*, Köln-Berlin-Bonn-München, 2000, pp. 281 et seq.; A. BUCHER, *La famille en droit international privé*, in *Recueil des Cours*, t. 283, 2000, pp. 9 et seq.

layering, summing up the steps taken in various ways and for different purposes, both in the legal system as a whole and, more specifically, in the welfare system in general⁴⁷. In particular, we refer to various fields of interest: tax matters⁴⁸, composition and income of the household, family allowances, parental leave, child care, family services system, as regulated by Law n. 328/2000. Therefore, these measures are classifiable in terms of social legislation for the family, where social legislation was intended as the set of rules aimed at protecting the so-called social rights and related forms of exercise, historically seen as the vehicle to protect the single individual as holder of the status of worker, in relation to the different events characterizing his life: accidents, illness, parenthood, old age, unemployment. All things considered reveal an approach where, traditionally, the "social" has weighed more than the "family" in the social family hendiadys, thus inhibiting a more lay attitude to grasp the new dynamics and pressures from society and involve all actors in the system, in order to provide concrete answers to the new needs.

5. THE CONSTITUTIONAL RELEVANCE OF THE FAMILY AS A SUBJECT RECIPIENT OF SOCIAL POLICIES.

A further reading of the above-mentioned data, under a greater valuing of the family, would seem even more consistent with the Constitution. More specifically, given that we do not intend to provide a complete representation of the constitutional discipline possibly involved, our aim is just to highlight few points in support of a reading that provides for a constitutional dimension of the issue investigated. As well known, articles 29, 30 and 31 of the Constitution trace directly the fundamental coordinates for the role of the family. They must be interpreted in the light of Articles 2 and 3, which are of a hierarchically superior character compared to the three mentioned just before, and integrated, from the standpoint of the principles relating to economic relations, with Articles 36 and 37.

The first provision refers to the discipline of the couple's relationship as equal, based on the moral and legal equality of spouses (art. 29, paragraph 2 of the Constitution), and as expression of an affective relationship.

In identifying such relationship, the Constituent indicates a paradigmatic model (which is not the only

⁴⁷ F. TOMASONE, *La legislazione sociale per la famiglia in Italia*, in P. DONATI (ed.), *La famiglia in Italia. Sfide sociali e innovazioni nei servizi*, vol. I, 2012, Carocci Editore, Roma, cited, p. 31 *et seq.*

⁴⁸ A role model in this regard could be accounted for by the 2013 *Working Family Tax Credit Act* and the 2003 *Child Tax Credit Act*, with coverage up to a top rate for the actually incurred and documented expenses for the care of children and family dependent, up to a predetermined maximum limit.

one)⁴⁹, considering marriage as the most appropriate familiar pattern for achieving the purposes set forth in art. 29, paragraph 1, of the Constitution.

The second article deals with the family in general, in a sense which includes also the dimension of the children birth and education, therefore of the relationship between parents and children. Here the legislature expresses a more accurate legal protection, by establishing a principle of responsibility in education for parents (art. 30, para 1 of the Constitution), and by including in the protection even those children "born out of wedlock", thus implicitly protecting families not based on marriage⁵⁰.

So it seems that a couple relationship (two people morally and legally equal that meet on the affective level) can legitimately be included within the provisions of art. 2 of the Constitution.

In this sense, the couple's relationship and, more generally, the family (regardless of the existence or persistence of a couple) would be one of the social groups (probably the most important) where human rights find development and a privileged protection; the family relationship, therefore, would be a particularly protected area of freedom for all the people who have long become (instead of the traditional subjects of law)⁵¹ the main addressees of the guarantees provided by the Constitution.

This interpretation was also offered by a recent decision of the Constitutional Court, which stated precisely that the term «social formation», in accordance with art. 2 of the Constitution, «*deve intendersi ogni forma di comunità, semplice o complessa, idonea a consentire favorire il libero sviluppo della persona nella vita di relazione, nel contesto di una valorizzazione del modello pluralistico*»⁵².

Such personalistic reading of the constitutional and legislative data, in particular of art. 2 of the Constitution that presupposes a privatistic vision of the couple relationship, clashes with the wording of Article 29, paragraph 1 of the Constitution, which refers to «the rights of the family» and apparently

⁴⁹ These points made, very clearly, by M. MANETTI, *Famiglia e Costituzione: le nuove sfide del pluralismo morale*, in *Rivista dell'associazione italiana dei costituzionalisti*, 2010, p. 11.

⁵⁰ See Legislative Decree of December 28, 2013 n. 154 published in G.U.R.I., January, 8, 2014, n. 5, containing the "*modifica della normativa vigente al fine di eliminare ogni residua discriminazione rimasta nel nostro ordinamento fra i figli nati nel e fuori dal matrimonio, così garantendo la completa eguaglianza giuridica degli stessi*", which could be translated into "amendment of the existing legislation in order to remove any residual discrimination remained in our legal system between children born in and out of wedlock, thus ensuring their full legal equality".

⁵¹ Such critical step, which covers all of Western states of constitutional law, has been masterfully described by S. RODOTÀ, *Dal soggetto alla persona*, Editoriale Scientifica, Napoli, 2007.

⁵² *Translator's note*: social formation «shall mean any form of community, simple or complex, suitable to allow and foster the free development of the person in social life, in the context of a setting off of the pluralistic model». It's the decision of the Italian Constitutional Court, April 15, 2010 n. 138, with which the questions of constitutionality, raised through orders by the Court of Venice and the Court of Appeal of Trento, in order to some rules that recognize certain rights only to spouses joined in marriage, excluding therefore the homosexuals who are not given the right to marriage under Italian law, were rejected. R. ROMBOLI, *Per la Corte costituzionale le coppie omosessuali sono formazioni sociali, ma non possono accedere al matrimonio*, in *Foro it.*, 2010, p. 1367; M. CROCE, *Diritti fondamentali programmatici, limiti all'interpretazione evolutiva e finalità procreativa del matrimonio: dalla Corte un deciso stop al matrimonio omosessuale*, www.forumcostituzionale.it; F. DAL CANTO, *La Corte costituzionale e il matrimonio omosessuale*, in *Foro it.*, 2010, p. 1369.; P. A. CAPOTOSTI, *Matrimonio tra persone dello stesso sesso: infondatezza versus inammissibilità nella sentenza n. 138 del 2010*, in *Quad. cost.*, 2010, pp. 361. For an interesting comparison with decision n. 359/2009 of the Portuguese Constitutional Court, see E. CRIVELLI, *Il matrimonio omosessuale e la ripartizione di competenze tra legislatore e organo di giustizia costituzionale: spunti da una recente decisione del Tribunale costituzionale portoghese*, in www.associazionedeicostituzionalisti.it.

recalls an organismic vision and subjects the institution of the family to a publicistic discipline.

In this direction, in affirming the commitment of the Republic to facilitate the formation of the family through economic measures and other provisions, art. 31 is a clarification of the provisions contained in art. 3, concerning the institutional duty to remove obstacles to the full development of the human person. This connection between constitutional principles underlies the Constitution awareness that the formation and maintenance of a family can be an obstacle to (or it can slow) the full exercise of certain rights that are part of the "full development of the person"⁵³.

What emerges, at this point, is a conflict between two different visions of the family, a conflict that is not an invention of the interpreter but comes directly from the inconsistencies of the text itself, dependent on the terms used in it, historically explicable by the confluence of different ethical and political conceptions (secular-liberal, socialist, Catholic) in the same text.

First of all, it can be argued that this approach is opposite to what seems to be the best way of understanding the principle of secularism, an implicit⁵⁴ principle that the Constitutional Court has considered as a supreme principle of our legal system⁵⁵.

Therefore, according to a recent reading of the principle of secularism⁵⁶ a "truly secular" State cannot impose the dictates of a particular moral, albeit largely dominant⁵⁷, on any citizen. Also, in the field of family law⁵⁸ a secular state cannot impose by law a particular moral model of family, even though the latter is largely spread.

In short, can be confirmed that not only is the family conceived by Constitution as a place that generates specific situations (which are, as such, governed by family law), but also it is a microcosm that interact with the external world i.e. with the working, economic and social environment, hence creating situations that may affect its functions. It is in this contest that the Republic assumes the task to intervene by adopting measures to promote conditions for the creation of the family and the fulfilment of the tasks deriving from its birth. A specific direction of this intervention emerges from Article 37,

⁵³ On the possibility that the family can be conceived as a new risk for the integration of the person in the social fabric, see F. TOMASONE, *La legislazione sociale per la famiglia in Italia*, in P. DONATI (ed.), *La famiglia in Italia. Sfide sociali e innovazioni nei servizi*, vol. I, 2012, Carocci Editore, Roma, cited, *passim*.

⁵⁴ On the implicit principles see R. GUASTINI, *Dalle fonti alle norme*, Giappichelli, Torino, 1990, p. 31 *et seq.*, 121 *et seq.*

⁵⁵ See the decision of the Constitutional Court April 12, 1989 n. 203, in *Giur. cost.*, 1989, pp. 898 *et seq.*

⁵⁶ On this interpretation of the principle of secularism see V. Villa, *ALCUNE OSSERVAZIONI SULLA NOZIONE DI "LAICITÀ"*, IN *QUADERNI LAICI. SUPPLEMENTO. LE DUE ITALIE*, 2010, pp. 183-193.

⁵⁷ The secular state does not make any of the possible conceptions of the good or the "good life" its own, but it creates the conditions and sets the rules on the basis of which all these ideas can develop and communicate with each other. In short, the secular state builds this "neutral" playground where individuals, agencies, associations, etc. can freely interact. Indeed, building this "empty space" is not itself a neutral choice, because it is a choice characterized in favour of the fundamental principles of freedom of conscience, autonomy and individual responsibility that are enshrined in our Constitution. See G. MARINI, *La giuridificazione della persona. Ideologie e tecniche dei diritti della personalità*, in *Riv. dir. civ.*, 2006, pp. 359 *et seq.*; G. RESTA, *Autonomia privata e diritti della personalità*, Esi, Napoli, 2005.

⁵⁸ This choice can therefore be described as "neutral" only in this specific situation, and exactly because none of the ethical concepts or world views that are available in that context is privileged; but it is not "inherently neutral", because it is founded on the values of freedom and autonomy of the person that are also guaranteed by our Constitution. On this point, see F. MILL COLORNI, *Multiculturalismo contro laicità*, in *Supplemento a Micromega. Per una riscossa laica*, 2007, pp. 56-68.

that, although expressed with a formula traditionally considered ambiguous, requires that the working conditions must allow working women to fulfil their essential role in the family, and it is to be reconnected to the same task of Article 31 on "carrying out the family tasks".

Finally, art. 36 follows the same logic as described above, since when dictating the parameters of "fair pay" it includes a factor entirely unrelated to the relationship and concerning a component related to a purely bilateral relationship (remuneration and employment contract, in fact), through the explicit reference to the family, to which the consideration of the working obligation must "ensure a free and dignified existence"⁵⁹.

The measures of family welfare, in this view, find their reason when favouring the realization of everyone's aspiration to form a family; to exercise the consequent rights and obligations in accordance with the responsibilities; to identify, therefore, the means to fulfil these rights and duties, and at the same time carry out the single individual's personality within the family, as a social formation (the most important one), and within the society in general, in accordance with article 3.

Those measures should be added to those that are more properly related to the social dimension of the family and derive from a specific legislation according to which the "family factor" becomes a transversal element that should guide the action of legislature towards a number of areas directly affecting the implementation of the same constitutional principles⁶⁰.

At this point, all this raises the national legislature's awareness about the constitutional importance of the "social factor family-conciliation" and its ability to affect transversely on a plurality of sectorial policies. At the same time, also it should rise the opportunity to conceive legislative actions that overcome the disarticulation, the fragmentation, and the lack of a strong union and collaboration between the various levels of institutional intervention. In other words, in the interests of legal policy, we need to build interventions focusing on the family and the effects of which fall in the field of tax

⁵⁹ F. TOMASONE, *La legislazione sociale per la famiglia in Italia*, cited, p. 32 *et seq.*

⁶⁰ On the indissoluble links between the social and legal status of the family and other areas of law, see D. BRADLEY, *A family law for Europe? Sovereignty, political, economy and legitimation*, in K. BOELE WOELKI (ed.), *Perspective for the unification and harmonisation of family law in Europe*, Intersentia, Oxford-New York, 2003, pp. 65-104. Among other things, the author identifies the barriers to the harmonization of family law, clarifying that, at the level of each legal system, the choices in this area are related to those of legislative policy in other areas. Bradley's analysis seems to reflect some typical positions of functionalism, that aim to understand the links between law and society. Functionalism, as a reaction to conceptualism and to the split of the legal reasoning from the context, has the merit of "lifting the veil of legal form" to seize the *policy* choices that the ordinances seek to achieve through different legal instruments. See also G.M. FLICK, *Globalizzazione delle regole e fondazione dei valori: l'esperienza europea*, in *Pol. dir.*, 2002, p. 212. Flick observes that, historically, the thesis on the autonomy of law and the need to «release the rule of law, in its alleged purity, from any reference to the criteria of value, to canons drawn from other moments of the historical experience, to the very way of being of men in society» leads us to consider those who identify legal science with the "politics of law" as dangerous *subversives of the system*. Law becomes a functional tool for directing the evolution of society and a determinant factor of change. This, however, results in the reduction of the contrast between application and creation of law. This is also a shared vision among many comparative lawyers. For all, see H. MUIR WATT, *La fonction subversive du droit comparé*, in *Rev. int. dr. comp.*, 2000, pp. 503 *et seq.*; G. FRANKENBERG, *Critical comparisons*, in *Harr. Int. L.J.*, 1985, pp. 445 *et seq.*; J. HUSA, *Farewell to functionalism or methodological tolerance*, in *RabelsZ*, 2003, pp. 419 *et seq.*

law⁶¹, of labour, service and social assistance, pensions, etc., and no more *vice versa*.

6. MODELS OF SOCIAL-FAMILY POLICY CARRIED OUT THROUGH CENTRALLY-COORDINATED LOCAL AUTONOMY.

The idea, at this point, is at first to propose a regulatory model that affects the system of sources governing this matter, as well as the levels (supranational, national and/or local) through which it is possible to intervene in function of subsidiarity; and, at last, to illustrate in detail the adoptable measures.

With regard to the first of the two aspects identified (source system), it should be remembered that the instruments of the ESF have been implemented and are implementable in accordance with the principle of subsidiarity, at a regional and local level.

Sometimes, this resulted in a marked rate of localism and legal particularism and in the consequent use of resources in a more or less virtuous, efficient and functional way. Thus, especially if compared to the needs of local communities. Such elements have clearly shown different levels of protection between north and south, in particular in Italy, also according to the capacity of individual local realities to create instruments and implement policies, governing or not the conciliation processes.

On other occasions, the measure taken have proved to be substantially useless, in a system characterized by a strong national and local *path-dependency* which affects the outcome of the intervention in itself: in this sense, the case of the Netherlands⁶² is emblematic.

As a matter of fact, in this system the decentralization policy of educational services in support of early childhood to the municipalities has not produced the desired results, because of the strength and stability in the market of the third sector, which in the Netherlands has a major weight on the economic and political fabric. Therefore, decentralization has caused that the third sector organizations by-passed local governments, activating a special relationship with the central government.

Of course, this trend is strongly connected to the component of the quite peculiar territorial dimension of the Netherlands, but the weakness of Commons, compared with a strong third sector able to

⁶¹ Also tax law has an important weight when women decide to enter or remain in the job market, considering also the distinction between individual and familiar taxation, which meant a different and higher tax pressure in front of a second earner in the same family. A concrete proposal on the point was put forward in Italy by A. ALESINA-A. ICHINO, *Tasse più leggere per le donne*, in "Il Sole 24 Ore", April 15, 2007.

⁶² R. PRANDINI, *Governance, Innovazione e Crisi nelle Città medie*, in P. DONATI (ed.), *La famiglia in Italia. Sfide sociali e innovazioni nei servizi*, vol. I, 2012, Carocci Editore, Roma, cited, p. 111, where the author refers to the Dutch experience and to other experiences in the EU area, also by quoting the studies carried out by V. FARGION, *Timing and the development of social care services in Europe*, in M. FERRERA-R RHODES (eds.), *Recasting European welfare States*, Cass, London, 2000.

address the policy in question, resulted in a marginal role – and only of bureaucratic character – of the public entities involved.

These examples lead us to reconsider the absolute value of the principle of subsidiarity and functional decentralization, traditionally anchored to the intent to be "more close" to the citizens and to the need to be more effective and efficient.

While maintaining the need not to abdicate the requirements foreseen by subsidiarity, the model we want to propose here aims at revising the function of political direction of the national legislature in this specific field. Such function, in Italy perhaps more than elsewhere, was partially sold upward to the European institutions on the one hand, together with the deriving funds and the budget constraints; and downward on the other hand, favouring the minor local entities in whose sphere of influence the measures have been implemented and, sometimes, even conceived and designed.

The regulatory action of political address, here hoped, does not necessarily have to result in an ordinary law, containing detailed rules, budget constraints and specific measures, forced and predetermined. The intervention from above, indeed, can take many more nuanced forms and methods, indicating a shortlist of possible instruments, which identify objectives and *rationes* of the policy intended to be implemented and which guide the choice of the operator in a gradually increasing measure, the more this is close to the system considered the best among those submitted.

The achievement of the objectives could be ensured or stimulated through rewarding measures for the various subjects-actors (public and private, institutional and para-institutional and/or third sector, employer and employee), who at various levels take behaviours of virtuous compliance towards the model.

The idea could, therefore, be to articulate the current draft of delegation towards the creation of a Consolidate text in the field of family welfare-workfare. On the one hand, the Consolidated text should, consolidate and reorganize the existing legislation in the sector in a systematic way, and above all indicate new conciliation measures involving as recipients both public institutions at various levels and the subjects of the working relationship (employer-employee), as well as the actors of the third sector (public and private) who offer services related to conciliation in the market.

Now, partly because of the need to sensitize institutions and operators, being aware that many of the resistance to the spread of the culture of conciliation are also due to the costs that such culture bears especially at the level of medium and small business, the method cannot be the provision of fixed and strict rules backed by sanctions from which to escape. As in other labor experiences, and not only Italian (Consolidate text on safety, criminal responsibility and social enterprises, undeclared work, etc.), the approach should be a balanced dosage of measures of regulation, deregulation and prohibition/reward, which help and encourage institutions, companies and trade unions to make use of such means. A complex of measures, that is, supporting those who wish to "approach" to the issue of

conciliation, prospecting concessions for those who make themselves available to bear the economic costs, to obtain benefits in terms of general interests that go beyond the mere profit of enterprise.

Thus, the preferable normative technique appears to be that, already experienced, of suggesting a virtuous model on increasing levels, each of which progressively implements multipliers (or various combination) of "conciliation measures", identifying benefits and measures for each of the levels prospected to reward those who adopt the instruments suggested⁶³.

Indeed, in the sociological research for models of corporate welfare, the enterprises that are more sensitive to the issue of corporate social responsibility showed the propensity to adopt a wide range of devices articulating work and family responsibilities⁶⁴.

Like the state welfare, the corporate one provides a number of areas of intervention:

1) insurance, health care and income support; 2) professional qualification; 3) work organization; 4) support to genders, generations and education.

All of the above are social policy objectives, which have a multilevel dimension of accomplishment. The problematic topics relate not so much to the level at which they are fixed but rather at what level (economic, organizational, cultural...) their costs arise.

In Italy the productive fabric of enterprises consists mainly of small and medium-sized businesses⁶⁵, and corporate welfare devices are activated almost entirely on a voluntary basis perhaps not always satisfactory, also for the lack or the inadequacy of a certain type of management culture. However, sensitivity to these issues is also still lacking in the trade unions and civil society and the third sector actors. It would, therefore, be useful to institutionalize some conciliation programs.

More particularly, a quite complete program, which could serve as a model to be proposed through an intervention such as that described above, would include:

a) Income support instruments: benefit plans (insurance policies for hospital charges and high diagnosis, for accidents at work and outside the working hours, the participation to the expenses of public transport, redemption of nursery and kindergarten fees⁶⁶, baby-sitting, domestic workers and caregivers,

⁶³ The methods to insert, propose and support devices of this kind - at the level of state legislation, in the exercise of the function of political address - can be operated through different paths: the use of money and economic incentives (tax rebates, bonuses, incentives) for virtuous companies or the most active actors of the third sector, which provide the above listed services on the market on a local basis; bargaining between the social partners; involvement of the third sector and families; original combinations of some or all of these routes.

⁶⁴ According to the most common interpretation the beneficial effect of the adoption of welfare packages affects the quality of work by reducing sickness justified absence, abating the stress levels in the staff, increasing the sense of belonging to the organization, ensuring greater employee identification in business objectives. The sense of belonging and identification results in strong attractive capabilities for the best professionalism and in keeping it within the company.

⁶⁵ On the size of Italian enterprises see pdf documents elaborated by ISTAT and available at <http://www.istat.it/it/archivio/106814>. The statistical study has been published on the 10.12.2013, but refers to 2011's data. For a map based on a regional criterion see <http://www.infodata.ilssole24ore.com/2014/11/26/la-mappa-delle-impresie-in-italia-scopri-la-vocazione-di-ciascuna-regione/>.

⁶⁶ The deterioration of the socio-economic conditions of families in Italy in 2013 also covers almost one-fifth of children who live in households below the poverty line. In this context, access to day-care is essential. The economic crisis, from

redemption of school and sports fees); integration of the maternity allowance (specific company agreements provide for the integration of 50% of the salary of women on parental leave until the age of 12 months of the child); supplementary pension; real estate loans; loans; subscriptions.

b) Flexible instruments concerning working conditions: part-time, to be renegotiated every year under the workload and family organization; bank of hours; abolition of badging procedures with wide in-and-out flexibility and attendance software; classic and customized teleworking; one day sickness.

c) Services of conciliation of life and working times: kindergartens; canteen; shuttle-bus and mobility plans; company doctor; time-saving services (company laundry, handling of tickets for cultural events, summer camp and recreational measures for children, care services for the house and for the person).

d) Parent program, which is a set of projects in support of the manager in the management of the motherhood of the employee and of the same employee during the absence or in the phase of the return to work, after the abstention.

e) Company auditing services: psychological counseling, career counseling, conciliation counseling, study permits.

In conclusion, we are proposing an elastic and mixed system where, at a legislative level, different measures can be singled out and introduced, and then combined and adopted spontaneously by the businesses, as long as they are functional to the entrepreneurs' goals and aims (for example the ones under a), b), c)), or as long as they are options approved at a collective bargaining level (as the ones indicated under letter d) and e)).

2008 onwards, has exacerbated the difficulties of families, aggravating the structural problems both in terms of income and employment opportunities and savings. The most recent data shows that it's the women from southern regions, living in families with lower incomes and education, who increase their participation in the labour market despite the worst conditions of the services they are offered. Moreover, the increase in the importance of childcare services in the context of the economic crisis was not enough to prevent the revenue of the municipalities from undergoing a drastic decrease because of the cuts and the reduction of regional funds distributed throughout the provinces. In most cases there is an on-going rationalization in the offer of nursery places, but unfortunately their number is lower than their demand. Given that each reality, for the purpose of access to the service, adopts peculiar selection criteria, the types of families who are "entitled" for those services change depending on the criteria employed. For example, in some Municipalities discomfited, unemployed and large families are privileged; elsewhere, families where both parents work are privileged instead. On this point, see D. DEL BOCA-C.PRONZATO-G. SORRENTI, *Criteri di accesso, tariffe, orari e assegnazione dei posti-nido*, Compagnia di San Paolo, Torino 2013.