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**DIFFERENT PATHS TO INTEGRATION OF
IMMIGRANTS IN COMPARATIVE
CONSTITUTIONAL LAW:
THE CASES OF CANADA AND ITALY**

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INTRODUCTION

Former Prime Minister David Cameron stated in 2011 that “Under the doctrine of state multiculturalism, we have encouraged different cultures to live separate lives, apart from each other and apart from the mainstream. We’ve failed to provide a vision of society to which they feel they want to belong. (...) I believe it is time to turn the page on the failed policies of the past. (...) Instead of encouraging people to live apart, we need a clear sense of shared national identity that is open to everyone.”¹

With this consideration, David Cameron noted how the society has failed young immigrants in encouraging their integration and providing them with the tools to shape a new identity in the host country. The speech, despite being delivered in the context of counterterrorist practices, and before the explosion of the migratory crisis which put western states at a test, still clearly summarizes how the presence of immigrants in a country has come to represent, in the current geopolitical scenario, both a risk and an opportunity. The possibility of bridging the demographic gap and the growing aging of a population, on the one hand, may help a State and support its economic and cultural growth; the “risks” of integrating immigrants into a new society, often with clashing, longstanding cultural traditions, represents on the other hand the downside of the migratory phenomenon. Nowadays, more than ever, States find themselves questioning their own identity in the light of the migratory phenomenon: despite, in Europe, the migratory crisis hit mainly Southern-European countries, showing the fragile equilibrium of the old continent, the force of the migratory flows was felt across the Atlantic, finding western states often unprepared to the various cultural, social and political challenges deriving from the

¹ Prime Minister David Cameron’s speech at Munich Security Conference, delivered on february 5, 2011

welcoming of newcomers, and of their effective integration into the host societies. The recent introduction of travel bans and entry restrictions since the beginning of the Trump Presidency in the US² is best representative of the mistrust governments display towards immigrants, their background and motives behind their choice to migrate. These provisions mirror clearly the dilemma of contemporary societies, which find themselves facing the challenge of re-shaping and re-creating a common sense of belonging in the growing heterogeneity of their social tissue.

The following work, in the light of the recent developments of the legal academic debate on migration, aims to investigate the problematic issues concerning the responsibilities of host states in the welcoming and integration of immigrants, through an analysis of the protection of the latter within the Constitutions of two States which, for different reasons, are at the forefront of immigration policies: Canada and Italy.

The decision to compare the two States stemmed from the interesting considerations concerning the building of an Italian model of integration, which is developing in the form of assimilationism in its intentions, and multiculturalism in its effects. In this context, the present work attempts to analyze two different models of integration, the Canadian multicultural tradition and the Italian still undefined, and perhaps unshaped, model. These two patterns, characterized by two different approaches to migration and to diversity, will be analyzed in the light of the legislation in force and of their ability to adapt to the ever changing needs of their growing societies by providing protection, assistance and welcoming to immigrants. For this purpose, this dissertation focused on three main criteria for “measuring” immigrant integration in the two case studies: citizenship legislation, the protection of civil and

² The Travel Ban was introduced in Sept. 24, 2017 in the framework of security and anti-terrorist measures, as a review of Homeland Security of the vetting of immigrants, and implied travel restrictions and limitations in the issuing of visas for Chad, North Korea, Venezuela, Iran, Libya, Somalia, Syria and Yemen.

political rights in the form of the right to vote and the enforcement of social rights in the form of health care.

The decision to focus on three utterances of the phenomenon of integration was based on the relevancy of these three tools in integration policies: the aspect of belonging, being inevitably tied to the modalities of access to the most relevant dimension of membership in a society, citizenship; the factor of political participation, through a measure of the width of its most relevant expression, the right to freely choose political representatives through vote; and the granting of equal opportunities in the framework of social policies, representative of the host society's openness towards foreigners and their basic needs. These three dimensions, which will be analyzed in their nature of criteria of inclusiveness, openness and integration, will highlight throughout this research how the formal tools of integration may not always mirror the effective integration of the migrant, or the respect of his rights, In the light of this preliminary considerations, it is necessary to question the degree of effectiveness of contemporary integration policies, and what is the role of Constitutional Courts in overcoming the shortcomings of national legislation through the enlargement of Constitutionally granted rights to immigrants.

CHAPTER 1

Integration Policies – A Legal Perspective

1.1 Integration Policies: Definition and Background

The contemporary international community is facing a time of growing migratory flows that are influencing the geopolitical balance of both countries of origin and host countries. This phenomenon is expected to rise in scale, and is manipulating the political, social and economic discourse in both national and international forums: national governments are more and more pressured to introduce effective integration measures within their policy program, in order to create a welcoming environment and provide minorities with the basic tools to become a part of the state's society.

In the light of the contemporary migratory crisis and of the growing demand for more effective and fair integration policies within the States, this dissertation will analyze and compare both international and national instruments concerning minorities, investigating their different level of protection in order to understand what political and social measures work best in facing the migratory phenomenon, and if successful measures can be adapted and adjusted to fit different contexts. The importance of good integration policies resides in the need to prevent diverse societies to become different communities, growing further apart in their interests, responsibilities and sense of belonging: this implies that the concept of integration itself goes beyond the recognition of minoritarian cultures and identities, being instead fundamentally tied to the provision of effective tools of participatory governance of the State.

For the purpose of an effective and complete comparison, this research will study two different cases representing different models of integration. The choice of the case studies is based on the interesting

dissonance between the models, each including its own integration policies and norms, and each resulting in extremely different social patterns: Canadian multiculturalism and the Italian path towards the creation of an integration model.

Multiculturalism be defined as a successful outcome of State integration policies. Multiculturalism, as will be defined more in depth in chapter 2, implies the existence in a State of a strong cultural and identifying influence due to the presence within its territory of ethnic groups or religious minorities. A multicultural state remains such as long as members of cultural and ethnic diversities recognize themselves both in their “original” identity and as members of the host culture. In this view, the concept of multiculturalism cannot be separated from a strong background of protection of minorities and of legal instruments in defense of minority rights: the more the national identity falls back, the more space there will be for integration of cultural, ethnic and religious differences in the public sphere. In order to analyze the concept of multiculturalism, we must clarify that a multicultural society is necessarily a democratic one: a definition of democracy which is particularly relevant for this analysis, the one supported by Przeworski and Wallerstein³, held that a democratic regime is one that stems from a compromise agreement for the peaceful resolution of conflict between politically significant social actors and other institutional actors⁴. Various authors have linked the concept of multiculturalism to democracy, believing that the former imposes a rethinking of the normative assumptions at the basis of liberal democracy: the growing importance of multicultural conflicts, and subsequently of recognition, has in fact led to the reshaping of normative categories typical of the liberal tradition. Rawls⁵’ vision that democracy should be based on equality of the rights to freedom, social justice and protection of individual rights sparked a debate on collective rights which changed

³ Przeworski A., Wallerstein M. (1982), *The structure of class conflict in democratic capitalist societies*, p. 215-238

⁴ Morlino L. (2012). *Changes for Democracy. Actors, Structures, Processes*, p. 28

⁵ Rawls, J. (1993), *Political Liberalism*

the scholars' perception of multiculturalism: Sandel⁶, Taylor⁷ and MacIntyre⁸ all put the liberal individualistic premises up for discussion, holding that the collective political identity should be at the basis of social practices and policies. In the view of communitarian, post-structuralist and neo-republican academics, rights of the liberal tradition prevent the expression of cultural identities, thus being incompatible with multiculturalism. According to this strand of opinion, when confronted with the claims of acknowledgment and recognition of fundamental rights, liberal-democratic States can only respond with political practices representing specific and individualistic visions of justice or of rights⁹. The changing needs of a multicultural society, requiring an inclusive approach which would enhance social and cultural difference, and not try to absorb it, has thus been considered not fitting for the necessities of a multicultural state; Chapter 2, which will analyze the concept of multiculturalism in light of the Canadian model, will explore these needs further.

Assimilation, on the other hand, being the opposite polity to multiculturalism, is based on the political equilibrium between surrendering ethnic, cultural and religious identifications in the public sphere in favor of a "citizenship contract" implying cultural unification under common values and traditions; in this model, for example, scholastic institutions are given the important task of building a shared national identity. The model of assimilation provides a view of integration and equality before the law which is individual and not communitarian: minority rights are often unrecognized, making citizenship more accessible yet somewhat less inclusive. Assimilation considers integration to be successful when original ethnic and cultural traits of the migrant are cancelled and replaced with the traditional sociocultural traits of the host society.

⁶ Sandel M. (1996), *Democracy's Discontent*

⁷ Taylor c. (1989), *Cross Purposes, The Liberal-Communitarian Debate*, p. 159-182

⁸ MacIntyre A. (1988), *Dopo la virtù*

⁹ Kymlicka w. (1995), *Multicultural Citizenship*

The Italian case, which will be analyzed in chapter 3, represents the ongoing struggle of the Italian government in finding successful tools of integration, and the need of coming to terms with long-term migration. Italy has long believed that growing migration was a temporary phenomenon: this belief, combined with the urgency of new measures to cope with the situation of a changing society and an ongoing political instability, led to the adoption of a “non-model” which was never object of a national debate. This resulted in the creation of integration policies by a variety of unusual actors such as the judiciary, police forces, schools or local organizations, often acting beyond their duties and in the name of national emergencies. It was only recently that a national debate sparked on the possibility to transition from a *jus sanguinis* to a *jus soli* model, thus allowing all individuals born within Italian borders to access citizenship, a fundamental feature which is at the basis of the integration discourse.

The above-mentioned models will be studied in the light of contemporary geopolitical events and of the most recent doctrinal and juridical debates, with the purpose of providing an overlook of integration policies and their effectiveness in different context and societies, then moving on in analyzing if one of the studied models could be adjustable to the Italian case.

1.1.1 Contemporary migratory flows

Current political considerations, in the light of the migrant and refugee crisis of the past few years, are extremely attentive of migratory flows and of their geopolitical influence in the different areas of interest: what the international community is now facing is an almost uncontrolled flow of people leaving poor countries to try to build themselves a new life in richer, freer countries. It is a flow originating from countries with difficult political, institutional and economic conditions; such conditions often make survival impossible.

The political instability of northern African regimes, and subsequently the fall of said regimes marked the start of a growing flow of migrants. Political turmoil in Iraq, Iran, Egypt and Libya, as well as unstable Syrian politics made the Mediterranean the new frontier of migration: open doors for a multitude of desperate people, Mediterranean countries were the first to realize that mass immigration is not a problem to be underestimated. Their already weakened economies, still recovering from the 2009 economic crisis, saw their welfare structures fall and their social models collapse.

Last but certainly not least, the cultural weight of a difficult integration in “transit” countries is to be considered, as well: countries of Eastern and Southern Europe are in fact still slowly and in some cases reluctantly adapting to their new multicultural and multiethnic societies.

The great migratory crisis is expected to last for over two decades; this of course implies a whole new range of economic, financial and social issues: control at the borders, disease-prevention, the need for a new legal framework providing new job regulations, the necessity of distinguishing migrants from refugees and asylum seekers. The new threat of terrorism is just an additional problem in the struggle to find a common response, allowing the weaker and most affected countries to manage this crisis.

Two great strategies have emerged from international and regional forums to tackle this humanitarian crisis: the first concerns helping the migrant’s home countries through international aid and institutional support to local economies. The second strategy entails granting a decent welcome for those who flee from their homes, a chance for integration and coexistence even with different traditions and cultures. This would mean allowing the international community to experience differences as opportunities and not as problems, while ensuring their citizens’ safety.

The EU pursued the first strategic line for a long time, but resources and efforts put in this program paradoxically helped corruption and small, armed groups to come to power. A revision of this kind of

policy is certainly desirable, and is becoming more and more pressing considering both the European efforts in the field of integration and cooperation and the uncertainty of regional and local stability.

The second strategy, that of welcoming and integration, is closely related to inclusion and acceptance policies: the creation of a common legal framework on the migrant status and the coordination of actions concerning health, welfare, jobs and housing are the basis of a tolerable, non-intrusive cohabitation with ethnically and culturally different citizens.

Migratory flows, known just one century ago as regional phenomena, only concerning a small group of people, have now taken on new socio-economic and geopolitical dimensions: these very dimensions have allowed migration to become the focus of modern political discourse, affecting developed and influential countries and their policy-making, ultimately leading the way to a new, globalized and multicultural world.

1.1.2 A Measure of Integration

Before moving on in analyzing integration policies, the following paragraph will clarify what we mean by integration, and in what way integration national policies can be examined to “measure” a State’s level of integration. In order to do so, a definition of integration itself should be clarified.

Among the different frameworks to explain the interactions between migratory flows and public policies, the concept of integration became increasingly important. In fact, the phenomenon of growing migration and the need to evaluate the level of inclusiveness of migrants into different societies has led to a complex doctrinal debate about the definition of the term. Integration is a complex and long-term phenomenon which includes a social, economic, political and cultural dimension: for this reason, it is a two-way process concerning not only migrants but also the citizens of the host country. Differently

from migration, in fact, integration does not entail the mobility of a single individual, but must take into account a plurality of actors and dynamics of inclusiveness within the host society. It is precisely for this multidimensionality that Rossi¹⁰ considered integration as a difficult concept to frame, having to ponder both ethical and political considerations. Gallino¹¹ on the other hand, defined integration as “a process in which migrants become equal holders of rights and opportunities, according to the willingness of the majority of individuals making up the State’s community to coordinate regularly and effectively their actions with those of other individuals, at different levels of the social structure and registering a low conflict rate”. Gallino’s definition, as it is clear, does not take into account the bi-directional aspect of integration, as Rossi does: the scholar believes integration is based on the host society’s willingness to accept diversities, and migrants have no role in this process. The ambivalence, in Gallino’s definition, lies instead in the relationship between integration and discrimination: if some sort of integration is necessary, there is some sort of sentiment of discrimination within the society. On this point, Tabboni¹² as well stated that the pluralistic feature of contemporary societies implies that no one is completely foreigner, and no one is completely integrated: in this light, there lies an intrinsic ambivalence of integration and discrimination in the relationship between different societies –or groups of within the same societies-. Cesareo e Blangiardo¹³ also consider integration to be a bidirectional phenomenon, believing that the migrant needs to start a process of inclusion in the host society as much as the national citizen needs to integrate him/her in the society. This approach also entails the recognition of a recurring multidimensional feature in integration policies, always involving the economic, social and cultural life of the receiving society, which may happen at different speeds and through different tools.

¹⁰ Rossi G. (2011). *Quali Modelli di integrazione possibile per una società interculturale*, in *Generare luoghi di integrazione. Modelli di Buone pratiche in Italia e all'estero*

¹¹ Gallino L. (2006). *Dizionario di Sociologia*.

¹² Tabboni S. (1990). *Vicinanza e lontananza: modelli e figure dello straniero come categoria sociologica*, p.124

¹³ Cesareo V., Blangiardo C. (2009). *Indici di integrazione. Un'indagine empirica sulla realtà migratoria italiana*.

Albeit scholars may disagree on the terminological definition of integration as a phenomenon, the general doctrine agrees on the existence of two major cultural strands regulating integration, concerning the role attributed to the dominant culture and to the social model of the phenomenon: multiculturalism and assimilation, which will both be analyzed further on in this study.

In order to properly analyze integration measures, and fully understand who they are addressed to, the concepts of migration and minorities also need to be clarified.

Albeit there is no legally acknowledged definition of migrant in international law, one could be deduced through the use international instruments make of the term: the 2015 UN International Migration report, for example, defines an international migrant as someone “who is living in a country other than his or her country of birth”. Adrian Edwards¹⁴, in an article for the United Nations High Commissioner for Refugees, defines migrants as those who “choose to move not because of a direct threat of persecution or death, but mainly to improve their lives by finding work, or in some cases for education, family reunion, or other reasons. Unlike refugees who cannot safely return home, migrants face no such impediment to return. If they choose to return home, they will continue to receive the protection of their government¹⁵”. What seems to define a migrant, in an analysis of international instruments, is the lack of an obligation or a compelling force to leave their homes: a report of the working group of intergovernmental experts on the human rights of migrants also confirms this thesis, stating that “The term ‘migrant’ in article 1.1. (a) should be understood as covering all cases where the

¹⁴ Edwards, A. (2015). *Refugee or migrant?* Available at <http://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html> (Accessed on Aug. 16, 2017)

¹⁵ Cit. Ibid

decision to migrate is taken freely by the individual concerned, for reasons of ‘personal convenience’ and without intervention of an external compelling factor¹⁶”.

The concept of ethnic minority, as well, has no uniform definition: its explanation is made even more complex due to the difficult quantification of the term “minority”¹⁷ in the sense of a fewer number of individuals compared to the entirety of the population, and of several other considerations of geographical distribution of a minority group, which could as well represent a majority at the regional level. The aspect of the quantification of the term also appears to be losing its importance in the light of the phenomenon of shifting power mechanisms: a numerical majority may as well be put in a minority-like or non-dominant position, being practically subjected to a numerical minority in a position of power (as happened for example in South Africa with the apartheid regime).

A definition offered by Capotorti¹⁸ describes a minority as “a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language¹⁹”. Since then, the term minority has been used in the UN human rights system to refer to a linguistic, religious, national or ethnic group, despite the definition being now considered quite outdated in the light of the emergence of new concepts of belonging and membership, less tied to citizenship and to the immigrants’ attempts to acquire it²⁰; various UN commissions were called on commenting on the topic of finding a more comprehensive definition for the term, to cope with the

¹⁶ Commission on Human Rights, 54 Session of the Intergovernmental Working Group of Experts on the Human Rights of Migrants. (1998). *Measures to improve the situation and ensure the human rights and dignity of all migrant workers*.

¹⁷ Also because a State minority could be a majority at the regional level.

¹⁸ Capotorti F. (1991), *Etude des droits des personnes appartenant aux minorités ethniques, religieuses et linguistiques*

¹⁹ Cit. Ibid

²⁰ Xanthaki A. (2016), *Against integration, for human rights*, p. 818

need to acknowledge the existence of a broader scenario of diversities such as disabilities or sexual orientation. Albeit an official and legally recognized definition of the term minority, due to the constant evolution of the concept, has not been agreed upon yet, all consulted bodies concurred on the fact that the existence of a minority is a question of fact, and any definition of the term must take into account both objective and subjective factors: the existence of a shared ethnicity, or the presence of a common language or religion can be considered objective facts; on the other hand, the manifestation of a joint feeling of identification within a precise community or minority should not be underestimated, and for the purpose of this study will be considered as a fundamental feature for the belonging to an ethnic minority.

For the purposes of this study, the categories of migrant and member of an ethnic minorities will both be analyzed for the purpose of measuring their level of integration in the host societies; the case of refugees, who still belong to a minority but enjoy a different standard of protection in international law, will be merged to the above-mentioned categories in favor of an analysis of national integration and anti-discrimination measures.

The phenomenon of integration in contemporary societies has become increasingly complex, due to the importance migrants grew to play in host societies: this role includes now not only an economic dimension, but a relevant cultural and social dimension, too. An interesting political and social discourse is also developing around the concept of political integration, which historically has never been taken into account, but is now becoming crucial in the achievement of what is defined a successful integration policy. Political integration allows migrants to actively feel part of the host society, giving them a legal right to be heard and represented, positively influencing their integration efforts instead of leaving them isolated to create a parallel sub-society of their own. The four

dimensions –economic, social, cultural and political- of integration emerge as the basis of any attempt to measure integration, albeit at different levels and with nuanced contents.

Cesareo and Blangiardo²¹ outlined three criteria for judging integration policies and their outcomes, based on the concept of equal rights and dignity and shared values: mutual respect between nationals and non nationals; the principle of equal rights before the law based on the fundamental principle of equal dignity of human beings; and shared democratic values. According to the scholars, these criteria are the basis of a “good integration”, being representative of a *continuum* along which integration may expand from assimilation to the creation of a “melting pot”.

Other scholars considered the sense of belonging of the non-national and their ties to their motherland as important indicators of integration: Sciortino²² distinguishes between juridical acquisition of citizenship, and membership or belonging meaning the bidirectional relationship of mutual recognition between nationals and non-nationals, which was already analyzed earlier in this paragraph. Kivisto²³, among others, considers the bond with the country of origin as an asset for the integration in a new society, showing that the great majority of foreigners who maintain a strong relationship with their motherland often tend to be far more integrated under the legal, socio-economic and educational point of view.

Entzinger and Biezeveld²⁴, who performed a quantitative analysis, theorized the existence of three broad domains of society: the socio-economic domain, the cultural domain and the legal-political domain. According to their theory, socio-economic integration relates to education, housing, health care and migrants’ accessibility to social security and social policy instruments; this measure is

²¹ Cesareo V., Blangiardo C. (2009). *Indici di integrazione. Un’indagine empirica sulla realtà migratoria italiana.*

²² Sciortino G. (2015), *È possibile misurare l’integrazione degli immigrati? Lo stato dell’arte*

²³ Kivisto, P. (2005). *Incorporating diversity: Rethinking assimilation in a multicultural age*

²⁴ Entzinger H. and Biezeveld R. (2003). *Benchmarking in Immigrant Integration.* (Report No. DG JAI-A-2/2002/006)

however often biased by the different levels of participation of the states in welfare systems, and is therefore not always explanatory of integration within a society.

Cultural integration on the other hand deals with the level of inclusiveness and understanding of the host society: this feature has become increasingly important in contemporary societies, where migrants are expected to acknowledge and respect the values and rules of the society they are living in.

The dimension of political and legal integration concerns the granting of rights and obligations to migrants. Of course, this is the legal feature most influenced by state laws, being strongly tied to citizenship regimes: the countries who have a *jus sanguinis* tradition, for example, usually have to adjust national legislation in order to make naturalization of migrants possible.

Bouchard and Taylor²⁵, who contributed heavily to the debate on the normative and conceptual definition of integration, present a partially different approach towards integration, believing said debate should focus on cultural integration, collective identity, church and state relationship, and the handling of cultural harmonization requests²⁶. Bouchard and Taylor's position is grounded on the basic principle of moral equality of all individuals: on the basis of this value, each person has the same value and should be granted the same respect and protection as citizen.

In this light, a good model of cultural integration should be able to balance out the need to perpetuate the social bond among its citizens, but also respect the ethnic diversities of the State's people. In their view, the only way to secure this balance is proposing a pluralistic model of integration, placing a variable and adjustable emphasis on ethnocultural diversity as opposed to protection of national identity.

²⁵ Bouchard G., Taylor C. (2008). *Building the Future: A time for Reconciliation*

²⁶ Ibid

As for the aspect of collective identity, in Bouchard and Taylor's view this is the aspect more tied to citizenship regimes ultimately reflecting two different types of nations: an ethnic one, usually dominated by the culture of the largest part of the population, and a civic one based on the respect of legally codified universal values. This latter type is associated, in the view of the two scholars, with a multicultural model of integration; the former, on the other hand, is considered more common in assimilationist models. Again, the two reject the polarity between these two types on nations, believing that a truly integrated nation should include both aspects of the dominant culture and commonly shared values.

Bouchard and Taylor's model of Church-State relation, which is not taken into account by most integration studies, implies nor a strict church-state separation or a theocratic model. The scholars support the creation of a flexible model of secularism where the separation between religion and state does exist, but also allows religious beliefs and practices not to be limited to the private sphere.

The two scholars describe two different frameworks for handling cultural harmonization requests: a legal path, consisting in top down governmental regulations and codification, setting up specific guidelines and requirements; and a *laissez-faire* position based on the shared responsibility of citizens and members of minorities, who basically set out the framework for integration policies themselves. Again, Bouchard and Taylor propose a middle way entailing a case by case approach based on the search for a compromise satisfying both parties and fostering dialogue between the two.

As we can see from this brief analysis of Bouchard and Taylor's theory, the scholars believe a good integration model resides somewhere between multiculturalism and assimilation, and is balanced in meeting the needs of both national citizens and members of a minority. In fact, when considering integration measures, the receptiveness of host societies must be considered as well: this feature has to do with welcoming, non-discrimination and inclusiveness. A successful integration policy requires

state institution to work actively to provide accessible schools, sports facilities, health care insurance as well as encourage national actors to provide migrants with fair opportunities to integrate into the society.

1.1.3 Three indicators: Citizenship, Voting Rights and Right to Health

The different points of view examined in the research for a comprehensive measure of integration in socio-political studies clearly show that a unified measure of migrant's integration cannot exist or be used to analyze extremely different contexts. Scholars, in trying to provide a unified measure of the phenomenon, have taken into account various factors expanding from citizens acceptance to the level of cooperation of state institutions; what the doctrine agrees on is that, due to the different states' migration histories, their various socio-economic background and geopolitical position, and considering the different levels of protection provided by the various policies, as well as the different background of host countries, any study of integration measures should also take into account a differing standard of successful integration. In the light of the academic debate on the indicators of integration, this analysis will take into account the different views of scholars though an emphasis on the most contemporary issues of host countries in our century, focusing on the level of inclusiveness of three important features concerning migration and integration: citizenship, the protection of civil and political rights, and mainly the right of non-citizens to vote, and the protection of social rights, through a focus on the ability of migrants to access health care programs.

Citizenship will be considered in this analysis in the light of its changing definition and borders: the relevance of how citizenship is conceptualized and approached to by scholars, politicians and lawmakers has become increasingly evident in the debate on the rights of migrants. If, in the modern

world, a citizen was an individual residing in a particular territory in virtue of its rights of membership and belonging to that territory, the political and legal theory of the last decade shows a tendency of scholars to support the idea that citizenship can extend beyond the borders of the State. Citizenship is coming to represent a de-territorialized concept²⁷, and therefore citizenship rights should not rely strictly on the birth or descent requirement anymore: contemporary authors like Varsanyi²⁸, Baubock²⁹ and Bauder³⁰ all hold that citizenship legislation is destined to be revised and amended on grounds of presence in a State, announcing a new strand of citizenship based on *jus domicili* instead of *jus sanguinis* or *jus soli*. The emergence of a *jus domicili* citizenship, based on residency and integration in a State and a society, is changing the law-makers approach to the issue of citizenship legislation, representing a step forward towards the concepts of global, post-national or transnational citizenship. The two other indicators, the protection of civil and political rights, namely the voting rights, and the social right to access appropriate health care, will be analyzed through the lens of a changing concept of citizenship: traditionally granted only to citizens, the growing importance of these rights in the human rights scenario gave them the leverage to be discussed in national debates of discrimination and prioritization of nationals, often with interesting results. In this light, the right to vote will be analyzed in its connotation of concept *ab origine* reserved to citizens, yet now expanding in favor of an all encompassing integration policy in the light of the introduction of the tool of European citizenship in Italy and its consequence on the active and passive electorate of immigrants. The issue of political participation of immigrants in Canada, that will be further analyzed in Chapt. 2, represents an unusual flaw in the multicultural story, perhaps suggesting that multiculturalism does not provide for perfect inclusion after all. As for health care, the analysis of this dissertation of the right to health care and basic cures will focus on the possibility for legal and illegal immigrants to access these rights

²⁷ Bosniak L. (2006), *The Citizen and the Alien. Dilemmas of Contemporary Membership*

²⁸ Varsanyi, M. (2006). *Interrogating "urban citizenship" vis-à-vis undocumented migration*. p. 245

²⁹ Baubock, R. 2005. *Expansive citizenship—voting beyond territory and membership*, pp. 683-686.

³⁰ Bauder, H. (2012). *Jus domicile: in pursuit of a citizenship of equality and social justice*, pp 184–196

notwithstanding their citizenship status; the choice of this criterion as a measure of integration stems from its nature of fundamental right, established by several international treaties and acknowledged by international law as part of the core values of human dignity. The interesting findings of the research will highlight the different behaviors and attitudes of national legislators and high courts, showing a tendency of the Italian Constitutional Court towards a strenuous protection of this right, as opposed to a restrictive approach adopted by the Canadian Federal Court.

1.2 Different levels of protection: an overview of legal instruments

For the purpose of analyzing integration policies and the different levels of protection granted by various legal instruments, a brief excursus on the hierarchy of sources of international law may be necessary.

International law is, in its definition, the result of the customary actions of the states that are part of the international community, therefore, customary law is considered the primary source of international law. Customary International law is not a written source of law, as it is solely based on a settled practice of the States. A customary law is formed when two conditions exist: *diurnitas*, i.e. a constant and uniform behaviour adopted by the majority of States concerning a specific matter; and *opinio juris sive necessitatis*, i.e. the belief of the international community that said uniform behaviour is compulsory and tied to a legal obligation. Although Customary Law is the oldest source of International Law, and the only one which generates rules that are legally binding on all States with no exceptions, it has not created a large number of norms.

Given that customary laws are not written, treaty norms are considered to be the secondary source of International Law³¹. Norms and obligations provided by International Treaties or Conventions are only legally binding on those States which are parties to that specific Treaty; contrary to Customary rules, Treaty Norms are numerous and constitute the most relevant part of International Law. For this reason, many international treaties are considered as authoritative as Customary laws: for example, the Vienna Convention of the Law of Treaties of 1969³², has been considered in its main provisions as codifying Customary rules, despite it having been signed by only half of the world's States. In this sense, Treaty Law is also serving as *opinio juris* supporting a customary law.

Nonetheless, any International Treaty or Convention is subject to Customary Law: the principle of *pacta sunt servanda*, which makes honoring pacts or treaties legally binding on all states of the international community, is recognized under Customary Law. In this light, International Treaties may be considered as sources of obligation under law.

Below treaty law, Treaty provisions can be considered a tertiary source of law; their compulsoriness derives from the international agreements they are included in, and is only valid for those States who are parties to the agreement. This category of sources is extremely important in contemporary lawmaking, as it includes most of the acts and provisions of International Organizations and State unions, as for example United Nations acts and resolutions and European Union directives.

Art. 38 of the International Court of Justice Statute³³ considers “General Principles of Law recognized by civilized Nations” as an additional source of law. According to the interpretation normally attributed to art. 38, and considering that said principles are mentioned after customary laws and treaty laws, case

³¹Conforti B. (2013). *Diritto Internazionale*

³² Vienna Convention on the law of treaties (with annex) Concluded at Vienna on 23 May 1969. No. 18232, vol. 1155, I-18232

³³ United Nations, *Statute of the International Court of Justice*, 18 April 1946, available at: <http://www.refworld.org/docid/3deb4b9c0.html> [accessed 20 August 2017]

law generally deems them to be valid when no customary or treaty rules can be applied to a specific case. The reference to general principles constitutes some sort of *analogia juris*, meant to bridge the gap of customary and treaty law; in this light, the resort to this source is only valid if no other international obligations exist in the specific case.

Despite a formal, legally acknowledged hierarchy of international sources of law does not exist -i.e. there is no hierarchy between customary and treaty law-, it is informally recognized that some rules of international law are fundamental in State relations, and they have the status of *jus cogens*. There are very few rules which belong to this category, and among them are the prohibition of torture, slavery and genocide. Departure from *jus cogens*, contrary to derogation of customary international law, is not permitted; therefore, a treaty which is conflicting with *jus cogens* rules loses its validity.

As European Union provisions and norms will be analyzed in the following paragraphs together with national laws, especially those of the three countries under analysis, which will be considered in the light of the integration policies they refer to.

1.3 Integration in International Law: Legal Instruments

The normative and legal framework which is at the basis of integration policies entails both binding international law and non-binding practices. The protection of religious minorities was in fact one of the first subjects of human rights treaties, and was the focus of post-Great War Peace Treaties: the extinction of three big empires (Russian, Austro-Ungarian and Ottoman), together with the birth of new Nation-States, made the issue of ethnic minorities particularly pressing.

The foundation of legal instruments concerning the protection of migrants and minorities are the *jus cogens* principles of the responsibility of states to respect basic human rights by prohibiting inhumane

treatment. These provisions, in spite of their general nature, are the most effective in protecting both migrants, refugees and members of minorities, due to their *jus cogens* status. It is precisely from these general principles that more specific and accurate norms on the matter stem, and it is from these rules that treaties on the topic derive their obligatoriness.

Other than *jus cogens*, non-nationals enjoy all the unalienable rights recognized under international law; however, specific authoritative instruments for the purpose of this study are human rights conventions:

- The Universal Declaration of Human Rights³⁴ (Paris, 1948) which, despite not being a legally binding instrument -in its quality of a UN General Assembly act- is now considered part of customary law. The Universal Declaration entails various articles which may serve as the basis for an integration program, protecting fundamental integration rights such as: Equality (art. 1); non-discrimination (art.2); prohibition of inhuman treatment (art. 5); equal protection before the law (art. 7); freedom of movement (art. 14); right to a nationality (art. 15); freedom of thought, conscience and religion (art. 18); right to social security (art. 22); right to an adequate standard of living (art.25).
- Convention relating to the status of stateless persons³⁵ (1954), defining a stateless person as someone who “is not considered as a national by any State under the operation of its law”. The Convention does not create new forms of protection for stateless persons, but rather reaffirms the validity of previous international instruments for the specific category.

³⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 20 August 2017]

³⁵ UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: <http://www.refworld.org/docid/3ae6b3840.html> [accessed 20 August 2017]

- International Convention on the Elimination of all Forms of Racial Discrimination³⁶ (1965), encouraging states to take action in preventing any kind of discrimination within their borders through the adoption of measures such as condemning racist organizations and propaganda (art. 4); granting equal rights to minorities (art. 6); adopting measures to combat prejudice through culture and education (art. 7).

- The International Covenant on Civil and Political Rights³⁷ (1966), a milestone in the acknowledgement of the rights of minorities and of endangered categories. The covenant, together with the International Covenant on Economic, Social and Cultural Rights, translated the principles of the 1948 Declaration into legally binding rules: it defines basic rights such as the right not to be subjected to torture or inhuman treatment; the right to life; right to liberty and security. Art. 27 of this Covenant also recognizes protection to religious, ethnic and linguistic minorities, establishing an obligation for states to undertake all necessary measures to protect said minorities.

- The International Covenant on Economic, Social and Cultural Rights³⁸ (1966). This covenant, other than codifying some of the articles in the above mentioned Universal Declaration, also entails: the right to work (art. 6); right to fair working conditions (art. 7); right to access social

³⁶ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at:

<http://www.refworld.org/docid/3ae6b3940.html> [accessed 20 August 2017]

³⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 20 August 2017]

³⁸ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 20 August 2017]

assistance (art. 10); right to an education (art.13). Art. 2 of the Covenant specifically refers to non-nationals, stating that “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals³⁹”.

These rights have recently taken on a new and greater importance: as many societies face the need to adjust to the inclusive policies needed for the integration of migrants, they often lack to keep these basic rights in mind.

- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁴⁰ (1990), which reaffirms the need to protect the rights not only of the migrant workers, by legally recognizing their existence and granting them equal rights, but also of their families. This instrument does not introduce new frameworks for protection, but rather codifies laws referring to the special category of migrant workers with the aim of increasing their protection. However, the number of signatory States in this Convention is surprisingly small, and no major host country has ratified it, greatly undermining the Convention’s effectiveness.

Other than codifying the rights of both legal and irregular (or undocumented) migrant workers, the Convention also encourages States to develop fair, humane and fair conditions for migration⁴¹. Art. 68 also promotes the collaboration among States parties for the elimination of clandestine migration and the employment of irregular migrants.

³⁹International Covenant on Economic, Social and Cultural Rights, 1966, art. 2

⁴⁰ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, available at: <http://www.refworld.org/docid/3ae6b3980.html> [accessed 20 August 2017]

⁴¹Ibid art. 64

- The Convention on the Protection and Promotion of the Diversity of Cultural Expressions⁴² (2005), with the goal of promoting the diversity of ethnic and cultural expression and encouraging dialogue among different cultures. The guiding principles of the Convention are respect for human rights, the principle of sovereignty, respect of all cultures, international solidarity.

The Convention is also legally binding on states to undertake the necessary measures within national law systems to protect and respect diversities of cultural expressions, taking on a series of actions at the domestic level.

Each of the above-mentioned instruments contains clauses setting up report mechanisms through which States are bound to track down their progress in ensuring the standards of protection established by the convention. The most important of these Treaty Monitoring Bodies (TMB) are the Human Rights Committee for the International Covenant on Civil and Political Rights; the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination.

Alongside such treaties, Bilateral Agreements address the issue of protecting minorities as well: for example, the Gruber-De Gasperi Pact (1946) was aimed at protection German-speaking people in South Tyrol, and the 1955 Declaration of Bonn and Copenhagen on the protection of Danish and German minorities was signed in order to grant specific rights to said minorities in both countries. Human Rights courts as well as International Tribunals also contribute in protecting non-nationals in their decisions, applying International Conventions rules and interpreting the law in favor of migrants, displaced persons and refugees.

⁴² UN Educational, Scientific and Cultural Organisation (UNESCO), *Preliminary Draft Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, 33 C/23; Annex V, available at: <http://www.refworld.org/docid/435cbdac4.html> [accessed 20 August 2017]

An interesting strand of case-law concerning discrimination was provided by several international judicial bodies in relation to the rights of Roma people and the discriminations against this cultural minority. In the cases *Kalamiotis v. Greece*⁴³ and *Katsaris v. Greece*⁴⁴, the UNHRC judged that Greece had violated art. 2, 7 and 26 of the International Covenant on Civil and Political Rights with respect to the claims made by the applicant that he was unrightfully detained and subject to cruel and inhuman treatment, and that legal procedures against him in front of national courts were vitiated by discrimination. The UN Committee on the Elimination of Racial Discrimination found Serbia and Montenegro guilty of the same violations with respect to art. 6 of the International Convention on the Elimination of all forms of Racial discrimination in the case *Durmic v. Serbia and Montenegro*⁴⁵, for failing to provide effective remedies to Roma nationals filing criminal complaints against discrimination in national courts.

The UN Committee on the Elimination of Discrimination Against Women stated a landmark principle in 2006 in the case *A.S. v. Hungary*⁴⁶, holding a State responsible for the first time for failing to provide a women with full information or consent for reproductive health procedures: Hungarian doctors were in fact guilty of having performed a sterilization following a C-section on a Roma patient without her understanding or consent. The CEDAW found Hungary guilty of art. 10, 12 and 16 of the Convention, all concerning right to family planning and appropriate health care.

The European Council has also engaged in the judicial debate concerning Roma rights, mainly through case-law concerning provided by the *European Committee on Social Rights* (ECSR), the Council of Europe body in charge of monitoring the compliance of member states with the *European Social*

⁴³ *Kalamiotis v. Greece* (2006), Application no. 1486/2006

⁴⁴ *Katsaris v. Greece* (2007), Application no. 1558/2007

⁴⁵ *Durmic v. Serbia and Montenegro* (2006), Application no. 29/2003

⁴⁶ *A.S. v. Hungary* (2004), Application no. 4/2004

Charter. The Committee's judicial functions can be activated both by NGOs and by Contracting Parties, and they produce legally binding decisions and conclusions. ECSR case-law concerns complaints against Member States failing to provide the adequate level of protection of social rights within their territory; yet, social issues often came into contact with a tendency of Member States to discriminate migrants on grounds of their ethnicity or cultural belonging.

An extensive line of cases concerns the discrimination of Roma people: *European Roma Rights Committee (ERCC) v. Greece*⁴⁷ and *ERCC v. Italy*⁴⁸ for example, concern housing rights. In the cases at hand the Committee held that Contracting Parties were not implementing respectively art. 16 (right of families to the appropriate social, economic and legal protection) and 31 (right to housing) of the Charter in conjunction with art. E (non-discrimination clause), in failing to grant Roma people right to housing, with national legislation discriminating the minority on grounds of ethnic belonging. In the similar cases *ERRC v. Portugal*⁴⁹ and *ERRC v. France*⁵⁰ the Committee also noted a violation of art. 30 of the Charter (right to protect against poverty and social exclusion) in conjunction with art. E. The cases *ERRC v. Bulgaria*⁵¹ *ERRC v. Bulgaria*⁵² and concerns cases of violation of Art. 11 (right to protection of health) and art. 13 (right to social and medical assistance) in conjunction with art. E, contesting the States' exclusion of Roma from health insurance programs.

The important role of European Courts in the protection of minorities, and the relevant discrimination case-law produced by both the European Court of Justice and the European Court of Human Rights will be both further discussed in the following paragraphs.

⁴⁷ *ERCC v. Greece (2003)*, Collective Complaint 15/2003

⁴⁸ *ERCC v. Italy (2004)*, Collective Complaint 27/2004

⁴⁹ *ERRC v. Portugal (2010)*, Collective Complaint 61/2010

⁵⁰ *ERRC v. France (2008)*, Collective Complaint 51/2008

⁵¹ *ERRC v. Bulgaria (2008)*, Collective Complaint 48/2008

⁵² *ERRC v. Bulgaria (2007)*, Collective Complaint 46/2007

1.3.1 European Union Provisions

The European Union offers protection to non-European citizens as well. The Union has, in virtue of its own scope, a great tradition of integration and welcoming of foreigners, and is thus becoming an important policy domain within the European Union. The concepts of free movement and shared citizenship in itself had the aim of granting freedom of movement within the community, blurring the lines between national and international citizenship, residence and work opportunities.

Albeit the impact of migratory flows is mostly felt at the national level, its management is shared between Member States and the Union; however, the different decisional levels often make the division of competences difficult and blurred. In particular, some areas of competence concerning migration present important specifications:

Art. 79 of the Treaty on the Functioning of the European Union⁵³ states that The Union may adopt measures concerning the entry and stay within its borders, as well as codify rules on the release of visas and residence titles by member States.

Paragraph 4 of the article also reads that the European Union Parliament and Council may promote integration on non-EU nationals residing in Member States territory, aiming to the adoption of EU measures ultimately leading to the creation of a common immigration policy ensuring fair treatment of third country nationals⁵⁴. Paragraph 4 specifies that integration policies fall under the category of complementary competence of the Union, which is based on the method of open coordination: the Union may introduce financial incentives and measures (see the creation of the European Found for the

⁵³ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/4b17a07e2.html> [accessed 26 August 2017]

⁵⁴ Blanke H.J., Mangiameli S. (2013). *The Treaty on European Union (TEU), A Commentary*.

integration of Third Country Nationals⁵⁵), yet excluding any chance of complete harmonization of national policies⁵⁶.

Paragraph 5 then moves on in clarifying that Member States still hold the power to control the volume of the inflow of economic migrants in their borders. If we consider the contemporary crisis, the denied competence on the crucial aspect of migrant inflows represents an extremely important reserve of competence allowing states to prevent the entrance of economic migrants into their borders.

According to art. 79, the Union also has competence in signing international agreements with third parties, in order to prevent illegal migration and is also competent in matter of free movement of non-EU nationals within its borders.

In the light of art. 79, it remains to be determined to what extent EU competences are restricted in matters of integration and migration. Most doctrinal works consider this article to be an exception from the Union's competence to establish common framework and policies; however, this restriction to EU competences should be interpreted carefully. On the issue of migrant workers for example, the restriction only applies to the volumes of admissions, technically leaving the EU free to establish other aspects of economic migration (i.e. grounds for admission, admission process). Moreover, this limitation of EU competence only applies to third country nationals who come directly from third countries, therefore non-EU citizens who legally resided in another member state are not covered by this restriction.⁵⁷

This article, together with art. 80, which states that the policies of the EU in this matter should be governed by the principle of shared responsibility and solidarity, form the legal basis for the protection of the rights of non-nationals within the EU.

⁵⁵ Council Decision n. 2007/435/CE

⁵⁶ Benvenuti P. (2008). *Flussi Migratori e Fruizione dei Diritti Fondamentali*

⁵⁷ Peers S. (2011). *EU Justice and Home Affairs Law*

Besides from Treaty law, the principle of equality and non-discrimination was promoted within the EU framework by the 2000/43 Directive and the 2000/78 Directive, which however expressly exclude the principle of discrimination based on nationality, reaffirming the competence of Member States in establishing their own admission policy: in the case of *Kamberaj vs. Istituto per l'Edilizia Sociale della Provincia Autonoma di Bolzano*⁵⁸, the ECJ stated that the applicant's claim of a differential treatment on the basis of his nationality did not fall within the area of protection of Directive 2000/43, and declared the claim to be inadmissible. Another big step towards a unified integration policy was made in 2003 through a European Commission declaration proposing an holistic approach towards integration; said approach would be based on six areas of intervention: participation in the job market, inclusion in the educational system, housing programs, access to security and welfare, promotion of the social and cultural environment and respect for diversities. This system set out a framework for integration based on policies of stabilization and legalization of the presence of foreigners within the EU. In 2004, in the light of the promotion of the 2005-2010 Agenda for Integration, the Council for Justice and Home Affairs adopted the 11 Common Basic Principles for Immigrant Integration Policy in the European Union⁵⁹. The Common Basic Principles introduced a new outline where integration is still strongly linked to migrant rights, yet ties said rights to the reaching of a minimum standard of civic integration.

Irregular migration was addressed by the EU in 2005 through a vast array of policy instruments and initiatives, starting with the so-called "Return Directive", which provided a framework of rules concerning return, removal, use of coercive measures, temporary custody and re-entry⁶⁰ of undocumented non-nationals. The Directive gave EU institutions greater power in controlling the implementation of immigration policies in Member States and was followed by other directives such as

⁵⁸ *Kamberaj vs. Istituto per l'Edilizia Sociale della Provincia Autonoma di Bolzano (IPES) and others*, Case C-571/10, EU:C:2012:233

⁵⁹ Available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/82745.pdf

⁶⁰ Directive 2008/115/Ec Of The European Parliament And Of The Council, 2008

the Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

The European Union had recognized already in 2006 that its Mediterranean Member States were becoming major immigration destinations; in this light, the bland legislation made by Council Resolutions, encouraging the introduction of joint actions to fight migration had proved to be insufficient. The Commission stated that national regulations about integration were extremely divergent, and proposals for adopting a directive failed. Another big step towards the harmonization of integration policies was made by the 2011 Directive on a single procedure for the issuing of a single permit to third-country nationals to reside and work in an EU member state and on a common set of rights of third-country national workers. The Directive, as it is worth recalling, poses Member States a mandatory result and deadline, leaving them free to chose the best way to implement said policy.

The 2011 Directive is the first European Union instrument regulating the rights of work immigrants in the EU from entry to residence, and applies both to non-EU nationals who wish to be employed in an EU country and to those who wish to reside in an EU Member States for other reasons, but have the right to be employed. As it is clear, the directive does not touch the most controversial category of immigrants, the irregular or undocumented who already reside in an EU Member State.

The peculiar situation of the European Union on the topic of migration and integration is certainly due to the extraordinary freedom of movement granted within its borders: the concept of European citizenship, as well as the creation of the Schengen Area, have made the Union an unprecedented space of globalization, with a great potential for integration. The Schengen Area, initially created in 1985, has legally abolished internal borders in favor of a single external border within which police services and

judicial authorities are extremely coordinated. Schengen cooperation was finally introduced into the European Union legal framework through the Treaty of Amsterdam (1997). One of the most difficult tasks in introducing the Schengen framework into the EU legal provisions was to establish the key provisions and measures of that mechanism that formed an *acquis*, a legal system that would form the foundation of any further cooperation on the matter.

The Directives that make up this *acquis* are 1999/435/EC: Council Decision of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis* and the 1999/436/EC: Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis*. The Schengen *acquis* establishes that Member States should be able to reintroduce border controls, should there be any threat to national security; the measure, which should be considered as a last resort, and may only be called upon for a period of 30 days, was largely used in the last year by Member States as a means of stopping the mass influx of migrants from both third countries and Schengen countries who are unable to deal with the flow of clandestine arrivals.

At the heart of the Schengen area, an information mechanism was created in order to share national information with EU Member States and ensure an effective border control; this system, The Schengen Information System (SIS), is now at the basis of every border police operation within the Schengen Area.

1.3.2 European Courts

The activity of both the European Court of Human Rights -stemming from the 1950 European Convention on Human Rights, to which the 28 Member States of the EU are parties⁶¹- and the European Court of Justice represented a huge leap towards the fights against the discrimination and the establishment of a comprehensive set of rules concerning integration of diversities. The two Courts, however, have different scopes: if the ECJ case law is based on the exhaustive list of prohibited discriminative behaviors (on grounds of art. 13 of the TFEU which states that EU institutions shall take appropriate measures to fight racial, religious or any other kind of discrimination), the applicability of the principle of non discrimination within the ECHR is limited, being grounded on the extremely general art. 14 which simply states that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination⁶²”. This very weakness is the reason why the Courts’ work is extremely important in setting up a specific framework of interpretation of the non discrimination principle through case law.

One of the main issues concerning cases of discrimination is the acknowledgement of the existence of a differential treatment, which often stems from direct discrimination. In *Thlimmenos case*⁶³, the ECHR stated for the first time that a conduct can be discriminatory if two people are treated in the same way when their situations differ significantly: in the case in question, the Court established that the applicant, a Greek national who found himself excluded from a job as he was charged with criminal

⁶¹ Since the entry into force of the Lisbon Treaty in 2009, the EU has a duty to accede to the ECHR. The need for an impending accession stems from the lack of a fundamental rights catalogue within the EU Treaty Series: the ECHR in fact, grants a broader protection of human rights than EU Treaties, and has proved to be more effective in safeguarding fundamental human rights. This is one of the main reasons why many cases have been brought before the European Court of Human Rights instead of the European Court of Justice.

⁶² Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at:

<http://www.refworld.org/docid/3ae6b3b04.html> [accessed 4 September 2017]

⁶³ *Thlimmenos vs. Greece (2000)*, Application no. 34369/97

offences after having refused to enlist in the Greek military due to his religious beliefs (the applicant was a Jehovah's Witness) was a victim of discrimination by the part of the Greek government, who had failed to treat differently people whose situations differed greatly. In particular, the Court stated that since the applicant had already served a prison sentence for his refusal to wear military uniform, and provided that his refusal stemmed from his religious beliefs, his exclusion from a job on this ground was not legitimate. The Court's approach to cases concerning religious matters has also often been linked to the issue of discrimination to integration: in the case *SAS v. France*⁶⁴, the Court addressed the issue of "living together", stating that the choice of Islamic women to cover their faces prevented them for correctly engaging in social interaction, which is crucial in a democratic society. The judgment thus legitimated France's blanket ban by stating that it did fall under the permitted derogations to art. 9, in terms of the legitimate aim to protect the rights and freedom of others.

The ECHR case-law on discriminations based on language shows a tendency to the protection of language education rights, especially in the case of minority children: in *Chapman v. the UK*⁶⁵ the Court held that an international consensus was emerging among the Council of Europe Member States that national governments held the responsibility of recognizing and protecting the special needs of minorities and their identity and lifestyle⁶⁶. This case led to the formulation of the "special consideration standard", implying that viewing non-discrimination only in terms of negative protection by the States does not comply with current human rights standards, and that States have positive responsibilities in ensuring the development of racial and minority groups.

⁶⁴ *SAS v. France (2014)*, Application no. 43835/11

⁶⁵ *Chapman v. the UK (2001)*, Application no. 27238/95

⁶⁶ In the case at hand, however, the Court held that the consensus was not still strong enough to guide the judges in that specific situation.

The ECHR has also engaged in a discussion about the concept of integration, namely in cases of removal of aliens: in the case *Uner v. The Netherlands*⁶⁷, the Court held that integration should be considered by national courts in cases concerning the expulsion of immigrants, highlighting the importance of the integration phenomenon in the life of an individual, and also implying for the first time that a “measure” of integration can be applied by courts⁶⁸, further discussed in *Boultif v. Switzerland*⁶⁹ and *Slivenko v. Latvia*⁷⁰. The Court held in particular that the applicants’ development of a network of social, economic and personal ties in the host country, as well as their place of permanent residency –also in the host country- both should be considered as undeniable ties to the country of immigration, and that their removal from the latter would result in an interference with their private life.

It is worth noting, however, that both Courts allow justification to discrimination, when a differential treatment pursues a legitimate purpose and is reasonable and proportionate. For example, religious discrimination has been deemed “not acceptable” in the Hoffman case⁷¹, when a mother was denied her parental rights allegedly on grounds of her membership of the Jehovah’s Witnesses.

In the same way, discriminations based on race are also strictly scrutinized: race is the ground of discrimination receiving the greatest protection under EU law: in the case of *Centrum voor gelijkheid van kansen en voor racismebestrijding vs. Feryn NV*⁷², the ECJ ruled on the basis of the interpretation of Council Directive 2000/43/EC on the principle of equal treatment, stating that the directive prohibits direct and indirect discrimination based on racial or ethnic origin. The applicant, The Belgian Centre for Equal Opportunities and Opposition to Racism, claimed that the company Feryn, in stating that it

⁶⁷ *Uner v. the Netherlands* (2006), Application no. 46410/99

⁶⁸ Xanthaki A. (2016), *Against integration, for human rights*, p. 820

⁶⁹ *Boultif v. Switzerland* (2001), Application No 54273/00

⁷⁰ *Slivenko v. Latvia* (2003), Application No. 48321/99

⁷¹ *Hoffman vs. Austria* (1994), Application no. 12875/87

⁷² *Centrum voor gelijkheid van kansen en voor racismebestrijding vs. Feryn V* (2008), C-54/07

could not employ Moroccan citizens, as they were not welcome in their clients' homes, was discriminatory despite its generality. The company claimed that since the statement was not directed to any particular individual, there was no discrimination. The court, in a landmark ruling against racial discrimination, stated that the lack of a subject to the statement did not imply a lack of direct discrimination: by accepting that discrimination can happen even in the lack of a specific victim, the ECJ opened up to a greater scrutiny and scope in the fight against racial discrimination.

The ECHR, on the other hand, has contributed to expand its protection against racial discrimination through various rulings, albeit being very strict in the seriousness of the charge, thus requiring a large amount of proofs in support of the claim. In deciding on the case of *35 East African Asians vs. the United Kingdom*⁷³, where the applicants, all of Asian origin, were denied entry and stay in the UK despite being citizens of British dependencies, the Court stated for the first time that discrimination on the base of race could amount to inhuman and degrading treatment under art. 3 of the Convention, and that the applicants had indeed been treated as “second class citizens”, but refused to call for further action since they had later been accepted into UK territory.

Discrimination on grounds of nationality has been treated differently by the ECJ and the ECHR: the Convention's protection is broader in scope than the protection provided by EU law, largely based on the Directive on the Free Movement of Persons⁷⁴, which only refers to EU citizens and their family. The European Court of Human Rights on the other hand distinguished, in its rulings, different situations: in the case of *Gaygusuz vs. Austria*⁷⁵, the Court stated that only “very weighty reasons “ can justify discrimination on the grounds of nationality, ruling that the denial of an unemployment pension

⁷³ *35 East African Asians vs. the United Kingdom (1973)*, 3 E.H.R.R.

⁷⁴ Directive 2004/38/CE

⁷⁵ *Gaygusuz vs. Austria (1996)* 39/1995/545/631, Council of Europe: European Court of Human Rights

to a Turkish national legally residing and working in Austria was discriminatory of the applicant's nationality, since he satisfied all legal conditions to access the pension and had contributed to the insurance fund. In a similar case, *Koua Poirrez vs. France*⁷⁶, the Court reiterated this opinion and applied an even stricter scrutiny in the reasons justifying discrimination on the grounds of nationality, stating that the applicant, an Ivory Coast national residing in France who had been denied benefits tied to his condition of disability on the grounds of his Ivorian nationality, had a right to access those benefits irrespectively of his contribution to the social security program.

When dealing with cases of access to national borders, the Court showed greater flexibility, since the Convention does not have the power to preclude States from imposing restrictions and controls at the border: in the case of *Moustaquim vs. Belgium*⁷⁷, the Court found that the deportation of the applicant (a Moroccan national who had lived in Belgium since age 1) following its conviction for criminal charges did not amount to discrimination on the grounds of nationality.

The call for further border control, in the light of both the migration crisis and of the increasing phenomenon of terrorism, have brought Member States to question the EU immigration policies, reopening the debate about free movement within its borders, substituting the Schengen concept with anti-migrant barriers. Member States have abused of the internal security clause for suspending Schengen measures, and by doing so they have tightened entry into their borders, by calling upon the customary principle of State discretion in the admission of non-nationals, which will be examined in the following paragraph.

⁷⁶ *Koua Poirrez vs. France* (2003) App no 40892/98, ECHR 2003-X, 40 EHRR 2, IHRL 3203

⁷⁷ *Moustaquim vs. Belgium* (1996) 35/1995/541/627, Council of Europe: European Court of Human Rights

1.3.3 Integration in State Constitutions

According to customary international law, States are free to admit foreigners into their territory under the principle of territorial sovereignty: this fundamental principle of international law allows States to choose their own policy in the field of temporary or permanent migration. Even in the case of asylum seekers, which represent a different and especially protected category under international law, States enjoy great discretion in deciding to accept asylum claims or not.

Part of the legal doctrine has gone as far as supporting the principle of States' ability to remove foreigners from their territory; however, most legal experts believe that mass expulsion of non-nationals is prohibited by a customary norm, later translated in art. 4 of Protocol n.4 of the European Convention on Human Rights. It must be certainly noted that freedom to regulate the entry or expulsion of strangers is not as absolute as it was in the past, now having to deal with human rights norms and treaties which protect them, as we already noted in paragraph 1.3. Nonetheless, the topic of border control should not be translated into part of an integration policy, being tied to important geopolitical considerations that often disregard the State's will: if the migrant and refugee crisis shed light on the need of a more comprehensive entrance policy within the international community, the power to choose how and at what level third country nationals should be integrated into the society still lies with national governments. Therefore, for members of minorities, national laws and procedures represent the main source of protection for the exercise of their rights. These provisions may vary significantly in their importance, going from constitutional provisions to ordinary law, thus granting different levels of protection.

Independently from the level of protection and the importance given by the State to integration policies, most constitutional texts contain a clause protecting non-nationals from discrimination: in Ukraine, Non-discrimination of third country nationals is granted in articles from 24 to 26, which refer to the

prohibition of discriminations on grounds of race, religion, ethnicity or language, and grant and equal treatment between nationals and non-nationals; in the US, Title VI of the 1964 Civil Rights Act prohibits discrimination on the base of race, color or national origin; chapter 2, section 19 of the Constitution of Finland grants equal rights to citizens and foreigners;

Some constitutions refer explicitly to the treatment of migrants, albeit the reference is usually generally formulated: art. 92 of the Ukrainian Constitution, for example, states that the status of third country nationals and of stateless persons shall be determined exclusively by the laws of Ukraine. Besides this general reference within the constitutional text, only art. 55 and 59 of the Constitution expressly refer to foreigners and stateless persons, granting them respectively the right to challenge acts, decisions and omissions of governmental authorities in court, and ensuring that they have access to legal assistance, the application of which was reaffirmed by a Constitutional Court Ruling of November 25, 1997. Any other aspect concerning a foreigner's stay in Ukraine is governed by primary legislation (i.e. parliamentary acts), the most important ones being the Law on the Legal Status of Foreign Nationals and Stateless Persons⁷⁸ and the Law on Immigration⁷⁹.

The Chapter I, Section 20 of the National Constitution of Argentina states that non-citizens enjoy the same rights as Argentinians, and are entitled to own, buy and sell assets as well as manage industries and businesses; the detail of integration policies, however, is set out in the 2004 Migration Law.

The Constitution of Finland offers a very high level of protection of migrants, also entailing some references to integration policies: Chapter II, Section 19 states that basic subsistence shall be guaranteed to everyone, as well as adequate housing, health and security services. Despite its generality, this provision forms the basis of the Finnish welfare-based integration policy: due to the

⁷⁸ No. 3929-XII of 4 February 1994

⁷⁹ No. 2491-III of 7 June 2001

high unemployment rates in Finland, migrants are often accused on relying too much on welfare, since the State is committed to grant to “everyone” a decent style of life.

Point 1, art. 15 of the Portuguese Constitution states that foreigners and stateless persons not only enjoy the same rights as Portuguese citizens, but are also subject to the same duties, with the exception of political rights and the rights that the Constitution “reserves exclusively to Portuguese citizens”. The Portuguese constitution also refers to foreigners’ political rights: point 4 of the article states the right for foreigners to stand and vote for local elections.

Besides the few exceptions mentioned above, integration policies are established in the framework of ordinary legislation, and the great majority of tools and measures in favour of the integration of migrants are set out by parliamentary acts or government decrees. In the Netherlands, for example, the agenda for integration is built around the 2008 Law on Integration, establishing an integration program based on language skills and a “civic integration” course and exam, with the purpose of preparing non-citizens to life in the Netherlands.

Denmark’s legislation on migration is made up of two main acts: the Aliens (or Consolidation) Act and the Integration Act, setting out the actual process of integration; the Act’s purpose is to give newcomers the possibility to contribute on equal footing with Danish citizens to the building of a good society: the concept of integration is here intended in the sense of assimilation and cultural transformation, stemming directly from the immigrant’s will to become a part of the society.

In the case of federal states, integration measures may vary significantly in their level of coherence: in Belgium, for example, laws on integration are not comprehensive at the national level, and the competence to choose integration policies lies with the regions. The Flemish community adopted a Civic Integration Decree in 2003 with the purpose of providing new facilities for the integration of

migrants, also entailing an integration program including language courses and orientation courses for future professional activities. In 2004, a Minister for Integration was appointed for the first time in history in Flanders with the responsibility to cope with the diversity in the Flemish society. Wallonia does not have a comprehensive integration policies targeted specifically for migrants, but implemented a program aiming at all disadvantaged groups; this program is based on the Regional Integration Centres -created with the 4th July 1996 Decree- which provide for an active assistance in the integration of newcomers into the society, from housing to coordination with administrative actors. The region of Brussels, on the other hand, developed a mixed approach giving competence to the two communities - the French-speaking and the Dutch-speaking- on the matter of integration.

Some legal systems, like South Africa, Singapore, Malaysia and Japan, do not entail any legislation on integration; in the case of Japan, in fact, the phenomenon of migration and the subsequent need for an integration policy is new to policy and law makers. In this light, local governments have been given the responsibility to deal with the development of social policies of integration, in the spirit of *tabunka kyosei*, i.e. “multicultural community building”. It was only in 2009 that a governmental action was implemented, with the adoption of the Immediate Support Measures for Foreign Residents in Japan; the measures focus on education, employment, housing and crime prevention. The Malaysian legal order, too, does not provide for integration policies or laws on the integration of migrants, which is only based on their ability to access the labor market after their participation in a two-week training program on language and customs.

From an overlook of different state integration measures worldwide, it appears clear that different factors and political consideration influence the choice of integration policies: if some states, namely those who are most affected by the phenomenon of migration, as Portugal, go as far as mentioning migrants rights in their constitution, others don't consider integration at all; these are usually the

countries which are least touched by migratory flows, and therefore do not feel a pressing need to cope with the integration of migrants. However, it is clear how the norm in integration policies is having an extremely general mention in the constitutional text about protection of diversities and non-discrimination, with ordinary law regulating the specific aspects of the integration policy, which is often implemented through actors such as associations or state agencies and institutions, practically contributing to the enforcement of integration measures.

The following chapters will analyze integration measures and tools more in depth in Canada and Italy, providing an overlook over their extremely different policies on migration and welcoming of diversities.

CHAPTER 2

Canadian Multiculturalism: a Constitutional Law analysis

2.1 Multiculturalism and the definitional debate in Canada

The definition of the concept of multiculturalism has been topic of debate in the socio-political arena; in general terms, multiculturalism may be defined as the differentiation of a society according to its cultural borders. Multicultural policies imply an intervention by national politics in order to favour coexistence of different cultures without damaging their identity, yet important questions arise from the concept of a multicultural society: how much space should be granted to expressions of identity, and in what measure can conflicting values be neutralized in favour of equal rights and representation?

A study published by UNESCO has defined multiculturalism as “a democratic policy response for coping with cultural and social diversity in society”⁸⁰; in fact, starkly aware of the experience of the Jews genocide, the founders of the United Nations became extremely mindful of the need to address the protection of ethnic minorities within the Charter. In order to answer the difficult questions linked to the concept of a multicultural society, the UN set up a number of instruments with the purpose to enforce the right of non-discrimination and the protection of cultural and ethnic rights. Half a century later, the concept of multiculturalism has come to represent a solution against the ineffectiveness of current politics in the face of the growing of intercultural relations: if it is still true that the term implies the coexistence of different minorities and ethnicities within the same society, different scholars have now given multiculturalism different declinations, linking the concept to extremely diverse social environments and situations, often questioning the positive connotation given to the term and its positive implications in the modern society.

⁸⁰ Inglis C.(1996), *Multiculturalism: New Policy Responses to Diversity*

The Canadian philosopher Charles Taylor has analyzed the topic of identity politics, and concluded that the modern concept of identity is to be considered under the light of politics, as its acknowledgement inevitably calls for recognition: since recognition of a shared individual humanity has historically been insufficient, modern identity politics came to develop around demands for the recognition of group identities, in their connotation of recognition of an equal identity of historically marginalised and discriminated groups. Taylor's consideration sheds light on the aspect of multiculturalism this work will analyze more in depth, that is the demand for legal recognition of equal rights for racially, culturally and religiously diverse sections of the contemporary society, and the controversies concerning its establishment in modern liberal democracies.

In fact, if multiculturalism as a value -in its connotation of a sentiment of tolerance and respect of cultural diversity- should by now be enshrined in any modern State, the contemporary debates in the United States and Europe for the recognition of diversities have proven otherwise: in a 2010 statement, German chancellor Angela Merkel described the attempts to build a multicultural society in Germany as an utter failure; the concept in itself however, representing quite a recent development of social history, is undergoing a constant process of change within the political arena, and so is its definition. Modood focuses on this aspect, stating that multiculturalism works differently within different groups, and the peculiar features of each group imply that integration cannot fit a single model; in this framework, the word "culturalism" refers to forms of group identities that are likely to distinguish and separate those groups from a larger portion of the society⁸¹.

Dewing defined multiculturalism from a social, ideological and political point of view: as a sociological fact, he believes multiculturalism refers to the presence within the same society of people of different racial and ethnic backgrounds; from an ideological perspective, multiculturalism is best

⁸¹ Modood, *Multiculturalism and Integration: struggling with confusion*, p. 5

represented in the coherent policy instruments and ideals surrounding the concept of diversity in Canada; at a political level, Dewing defines the concept of multiculturalism as a set of formal initiatives at different levels within the administration of the State⁸². This definition clearly shows that multiculturalism as it was originally conceived, as some kind of embellishment to a liberal and pluralistic State with an otherwise clear and homogeneous society, cannot be applied to contemporary States and their fast-developing societies: cultural diversity cannot be confined to the private sphere, where it would not intrude or challenge the social order. In fact, one of the main issues of current multiculturalism lays in the difficulty of recognizing both equal dignity and respect to each human being and the peculiar identity of the different ethnic groups. In this scenario, the process of globalization intervened in accentuating the complexity of a multiethnic society by changing the relationships among individuals, peoples, States and by emphasizing the need of uncovering new forms of civil and social coexistence. Other than this, multiculturalism has now come to represent an essential feature, if not a genetic one, of federal States, where the multiethnic composition of the society is particularly evident, and as a consequence, so is the propension of governments to adopt multicultural policies. In federal societies like Canada, United States and Australia, the inclination to multiculturalism is almost natural, considering the necessity to protect the identity of the different components of the federation, to respect differences while fostering the interactions among the various groups.

Will Kymlicka, the Canadian philosopher who is considered to be the father of the nation's multicultural policies, considers the term "multicultural" to be an inclusive one, covering many different forms of cultural pluralism⁸³. In distinguishing between multination states and polyethnic states, he outlines two different models of multicultural societies, and advises against

⁸² Dewing M. (2009), *Canadian Multiculturalism*, p. 1

⁸³ Kymlicka W. (2000), *Multicultural Citizenship*, p. 10

oversimplifications when dealing with them: if in multination states like New Zealand, Belgium or Canada itself, diversity stems from “previously self-governing, territorially concentrated cultures into a larger state”⁸⁴, usually implying a will to maintain distinct societies through the demand for different forms of autonomy, in polyethnic states like Germany and Ireland diversity arises from immigration. In analyzing the case of Canada, when defining multiculturalism, we must take into account that diversity is considered under the demographic, normative and programmatic-political aspects, and that these aspects all contribute in creating a policy response to the coexistence of different cultures, a response which will be analyzed in the course of the following paragraphs.

2.2 Federalism and Multiculturalism in Canada

Federalism is conceived in comparative public law as a form of government opposed to the unitary form. In the contemporary world, where nation-states are facing the challenges of world migration, federal states attempt at addressing these issues through multi-cultural and multi-nation citizenship⁸⁵.

In Canada, George-Étienne Cartier is the central figure in the building of the national political identity, and as such is believed to be one of the fathers of federalism. He wanted Canada to be built on political allegiance and loyalty to the country⁸⁶, promoting a form of united State respectful of diversities, making it clear that French Canadians would not have to waive their culture and identity in favor of a shared one. In this phase, an important role was played by the Judicial Committee of the Privy Council, then Canada’s highest court of appeal, which strongly protected the limited identities of the emerging

⁸⁴ Kymlicka W. (2000), *Multicultural Citizenship*, p.6

⁸⁵ Montes R.N., (2006), *Understanding Federalism*, p. 157

⁸⁶ Albert R., Cameron D.R. (2018), *Canada in the world: comparative perspectives on the Canadian Constitution*, p. 61

federation. Ajzenstat⁸⁷ and Ducharme and Constant⁸⁸, in fact, suggest that what drove the fathers of the confederation towards decentralization was the desire to protect individual liberties; however, federalism is more the consequence of the Canadian territorial reality than of a precise choice of government.

Over time, and at least until the Patriation of the Constitution Act in 1982, Canadians would continue to refer to the Canadian model through the notion of dualism. In 1982, Canada patriated⁸⁹ its Constitution, transferring its highest authority from the British Parliament to Federal and Provincial legislatures; in a famous statement, former Prime Minister Pierre Trudeau declared that it was unacceptable to “travel cap in hand to a foreign government” in order to change Canada’s founding document, starting a battle which would end with the patriation of Canada’s statutory document, but would inevitably undermine the federal government’s relation with Quebec.

Canadian governments had in fact been attempting to obtain a Canadian-made constitution since the early 1920s, since Canada remained formally one of the colonies of the British Empire until the period between the two World Wars. Even after Canada exited the cocoon of the British Empire, the British North America Act of 1867 -the law of the London Parliament establishing the creation of Canada- remained a British Parliament law, which could only be amended by the London government. Prime Minister Pierre Trudeau started negotiations in 1980 for the drafting of a patriation act, ultimately promulgating a Charter of Rights and Freedoms which was rejected by the province of Quebec, insisting on the introduction into the statutory text of a clear reference to the principle of duality of the Canadian society⁹⁰. The issue of federal-provincial relations was brought before the Supreme Court of

⁸⁷ Ajzenstat J. (2007), *The Canadian Founding: John Locke and Parliament*

⁸⁸ Ducharme M. and Constant J.F. (2009), *Liberalism and Hegemony: Debating the Canadian Liberal Revolution*

⁸⁹ The term was coined during the battle for the creation of a Canadian-made Constitution in 1980s

⁹⁰ Palmowski J. (2008), *A Dictionary of Contemporary World History*

Canada, which in the *Patriation Reference*⁹¹ was called upon to decide whether the federal government had the power to seek approval for the Constitutional Amendments (and namely the amendment introducing a Canadian-born Constitution) even in the lack of the provinces' approval⁹². The refusal of the central government to accord Quebec a special status among other provinces into the new Canadian-born Constitution fuelled separatism in the federal framework⁹³, determining a turn in Canada's commitment to federalism⁹⁴: the resolution forwarded to Westminster on the Canada Act, in fact, reflected the consent of the federal government and only nine of the ten provinces⁹⁵.

What emerged from the 1982 Constitution was a federal contract representing the union of communities, with a focus on the societal cultures shaping the citizens' world views rather than emphasizing the salience of the territorial community⁹⁶. Despite the 1982 Act maintained the provinces as the original constituent power of the country, the introduction of a Constitution Act with an entrenched Bill of Rights was of course portending the birth of a national civic identity transcending provincial borders. Contemporary immigration states have to integrate the various cultures of the different peoples within one constitutional framework, and they often do so by providing integration policies based on common values: in Canada, multiculturalism, diversity and cultural complexity were pursued and accepted as endogenous features of the State. In this sense, the recognition of minority groups and the acknowledgement of their culture and distinctiveness in Canada represents a breach from the traditional model of the nation state, built on the concept of shared values and identity, displaying an original and advanced pluralism that is both multicultural, as a result of an extremely

⁹¹ *Reference re Resolution to Amend the Constitution* (1981), 1 SCR 753

⁹² Oliver P., Macklem P., Des Rosiers N. (2017), *The Oxford Handbook of the Canadian Constitution*, p. 653

⁹³ Tierney S. (2013), *Le formalisme constitutionnel strict: la toxine britannique, l'antidote canadien?*, pp. 291-313

⁹⁴ Albert R., Cameron D.R. (2018), *Canada in the world: comparative perspectives on the Canadian Constitution*, p. 34

⁹⁵ Despite the Supreme Court had judged that the federal government was entitled to seek approval even without the consent of all ten provinces, judges advised that such an important amendment required a substantial degree of consent (*Patriation Reference*, 905). However, after the Patriation, the Court rejected Quebec's argument that the province held a veto over the Constitutional amendment (*Re Objection by Que. To Resolution to Amend the Constitution, 1982*, 2 SCR 793, 806)

⁹⁶ Barry B. (2001), *Culture and Equality: An egalitarian Critique of Multiculturalism*

open immigration policy, and multinational due to the large French community concentrated in the province of Quebec.

2.3 Multiculturalism in Canada: Developmental phases

Canada's multiculturalism is the result of its history of a traditionally multiethnic and multicultural society, characterized since its birth by the coexistence of ethnic communities not only deeply diverse among them, but also extremely firm in maintaining each its own identity even within a unified Nation. The lands of North America, due to their strategic geographical position, have long represented the ideal target for colonization; this made Canada the destination of countless immigrants who, throughout the years, overlapped and maybe prevailed over the indigenous populations. The Nation, made up of three main peoples, the Aboriginal, the French and the British⁹⁷, has grown and developed without assimilating foreigners, yet fighting for the safeguarding of ethnic diversity, self-government and self-determination.

The plurality of different ethnicities has undoubtedly characterized the history of Canada. The passage from an already critical "dual"⁹⁸ social model to a "plural" one could not intervene without its hardships: the aggravation of the pressure of coexistence and cohabitation, the arising of clashes between cultures with a firm intention to maintain their original ethnic diversities ultimately led to the maturity of federal multiculturalism, which developed in three different phases that Dewing defined as

⁹⁷ The Aboriginal people, which include Indians, Métis and Inuits, now amounts to 4.9% of the Canadian population; the French and British populations, in 1600 amounting respectively to 30% and 60% of the Canadian population, have now gone down to 13.55% and 18.34%. Besides from the Canadian-born -currently the 32.32% of the population-, more than 200 different ethnic origins were reported by the Census, making Canada one of the most ethnically diverse countries in the world. Data available at <http://www.bac-lac.gc.ca/eng/census/Pages/census.aspx#databases> (accessed Jan. 13, 2018)

⁹⁸ It is in fact undeniable that the country maintained, at least until the 19th century, a bicultural connotation due to the strong presence of the French and British colonizing powers.

such: the incipient stage (pre-1971), the formative period (1971-1981) and the institutionalization period (from 1982 onwards)⁹⁹.

2.3.1. The Emerging of the Canadian National Identity

The years leading up to 1971 can be seen as a period of slow but growing advance towards the acknowledgement of diversity in the Canadian society, whose nation-building was being modeled on the British social order. Historically, in fact, Canadians were considered *de facto* British subjects until the entry into force of the *Canadian Citizenship Act* (1947), implying an evident influence of British-type social structure in all English speaking Canada. The Canadian Citizenship Act, which came into effect under Prime Minister King, allowed residents of Canada to obtain citizenship irrespective of their country of origin¹⁰⁰. The Act marked the birth of the Canadian citizenship in the legal sense, establishing Canadian citizens as a distinct category, rather than classifying both individuals born in Canada and naturalized immigrants as British subjects. Other than the expression of a developing feeling of national identity, the Canadian Citizenship Act operated as a tool to ease racial and ethnic pressures, strengthening the awareness of national unity among an extremely diverse population.

The immigrant flood which followed the Second World War supplemented the older generation of Europeans colonizers: multiculturalism had already taken on specific features, mainly the acknowledgement of a “right to difference”. Expressing this peculiarity was the formula “ethnic mosaic”, a typically Canadian model which excludes any attempt of assimilation, thus differentiating itself from the US model. The Canadian ethnic mosaic attempts to interact with different groups through the respect of their differences, with the main goal of succeeding in integrating minorities into the dominant society by way of recognition of cultural and collective rights.

⁹⁹ Dewing M. (2009). *Canadian Multiculturalism*, pag. 2

¹⁰⁰ Knowles V. (2000). *Forging our legacy: Canadian Citizenship and Immigration, 1900-1977*, pag. 65

In the second half of the 20th century, the political debate over multicultural policies, previously limited to the Neodemocratic party, was soon absorbed by the entire political arena. A conclusive role was played by Prime Minister Pierre Trudeau (1968-1979 and 1980-1984) and the Liberal Party, who understood that in order to ease the clashes between French-speaking and English-speaking population, both had to be legally equal to Canadian-born citizens, yet without failing to protect other smaller but equally relevant ethnic communities. The first legal tool in protection of diversity, *The Canadian Bill of Rights – Déclaration Canadienne des Droits*, entered into force in 1960; through this Declaration, the Federal Parliament stated in Part I, paragraph 1. the prohibition of any of discrimination based on race, origin, religion and sex¹⁰¹. In 1963, Prime Minister Pearson set up the *Royal Commission on Bilingualism and Biculturalism* to study bilingualism and the relationship between the French and English speaking society; this focus on the bilingualism and cultural dualism sparked a sharp political and social debate over the bicultural nature of the Canadian society, and led to the drafting of a report from the Commission entitled “*The Cultural Contribution of the Other Ethnic Groups*” in 1969, and a recommendation from the Commission to the Parliament for the passing of the *Official Languages Act*¹⁰².

The events of the early 1960s led the way for the abandonment of cultural dualism and its assimilationist features, mainly due to the pressures of the Aboriginal peoples and the growing Québécois nationalism which culminated in the Quiet revolution of 1960.

2.3.2. The Multicultural Policy

¹⁰¹ The relevance of the Declaration, however, remained mainly formal: its effectiveness was limited by the impossibility for the Parliament to make the Declaration a part of the Constitution, which was to be amended only by the British Parliament. Despite not being binding for the regional legislator, the instrument was nevertheless binding at the federal level.

¹⁰² The Act, constituting of 39 sections, was the Federal Statute that made English and French the Official Languages in Canada, requiring institutions to provide services in both English and French.

The publication of the Six Volumes Report of the Royal Commission on Bilingualism and Biculturalism of 1969 started what is defined by analysts as the Formative Period of Canadian multiculturalism (1971-1982), recommending the integration of all ethnic groups into the Canadian society, granting them not only full citizenship but also equal rights and participation into the State's institutional structure.

The endorsement by the Commission of multicultural values paved the way for the establishment in 1971 of the Multiculturalism policy, developed in four different stages: 1) supporting the cultural development of ethnic groups; 2) helping members of ethnic and cultural groups to take part in the Canadian society, encouraging their participation in national institutions; 3) promoting and fostering constructive exchanges among all cultural groups; 4) assist foreigners in learning at least one of the two official languages. The introduction of an official Multicultural policy by Trudeau's second government made Canada the first country to implement a government-led multiethnic model, and the first State to introduce a Multicultural Directorate within the Department of Secretary of State in 1972 to manage and enforce all multicultural policies and programs. The creation of the Multicultural Directorate led to the birth, in 1973, of the first Ministry of Multiculturalism.

The adoption of an official multiculturalism policy was at least partly motivated by political worries such as the need to broaden the Liberal party's appeal to the ethnic communities in Quebec and ease the opposition to bilingualism; nonetheless, multiculturalism became more a symbolic acknowledgement of ethnic and cultural welcoming rather than a mere governmental policy¹⁰³, making the country the nest of multiculturalism and preparing the State's legal order to a multicultural turn¹⁰⁴.

2.3.3 The Institutionalization Stage

¹⁰³ Li P. S. (1999). *The Multiculturalism Debate*, p. 152

¹⁰⁴ Dorais J-L., Foster L., & Stockley D. (1994). *Multiculturalism and Integration*, p.387

During the 1980s, the multicultural policy had lured many foreigners into the Canadian territory, noticeably changing the composition of the Canadian society. The immigration wave led the government into a new phase of institutional changes in order to favour the adaptation of national institutions to the incidence of a growing number of immigrant groups; part of this phase was the introduction of an anti-discrimination legislation drafted to break social, ethnic and cultural barriers among the different minority and majority groups into the Canadian society¹⁰⁵.

A step in this direction was the adoption of a *Canadian Charter of Rights and Freedoms* in 1982¹⁰⁶, stating in section 27 that the “Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians¹⁰⁷”. The adoption of this Charter placed the Canadian multicultural heritage and model under the broader and stronger protection of the Constitution¹⁰⁸, now empowering federal courts to take multicultural policies and the multiethnic necessities of the Canadian society into account at the highest legal level; Section 27 of the Canadian Charter of Rights and Freedom, as absorbed into the Constitution, makes the Canadian Act the sole Constitutional document in the world recognizing multiculturalism as a founding value of its community.

The Charter functioned as an important interpretative tool for both the federal and regional courts in balancing individual and collective -and therefore multicultural- rights: in its broader interpretation, Section 27 of the Charter requires the government to assist ethnic minorities different from the French and English in preserving the peculiar features of their language and culture. The clause, as conceived

¹⁰⁵ Dewing M. (2009). *Canadian Multiculturalism*, p. 4

¹⁰⁶ 1982 was also the year in which the British Parliament enacted the Canada Act, Canada’s primary constitutional document, empowering Canada and its Government and Parliament of all necessary powers to rule over its people. The Canada Act encompassed both the Constitution and the Charter.

¹⁰⁷ Cit. *Canadian Charter of Rights and Freedoms* (1982), Part I, Section 27. Available at <http://laws-lois.justice.gc.ca/eng/Const/page-15.html> (accessed Jan. 14, 2018)

¹⁰⁸ The 1960 Canadian Bill of Rights, as has been noted, was not absorbed into the Constitution and hence was not binding for the federal legislator.

by its framers, encompasses a subtle equilibrium between parliamentary supremacy and judicial review¹⁰⁹, hence authorizing the judicial power to give advisory opinions on the possible violations of the Charter, yet still specifically detailing rights of the individual. However, in the silence of the Charter, the jurisprudential debate hence focused on the supposed obligation, for the government, to implement affirmative measures, and thus to intervene actively in the promotion and protection of collective ethnic rights. Many commentators such as Magnet¹¹⁰ and Kallen¹¹¹ consider Section 27 to be substantive in containing an individual and a collective right: they both argue that since Canadian courts distinguish between individual and collective rights -where collective rights are granted because of membership in a group, and are limited and peculiar for that group, and individual rights are exercised equally notwithstanding membership in a particular group-, multiculturalism must account for both kinds of rights in the case of ethnic minorities. Another position, sustained by Tarnopolsky¹¹² and Gall¹¹³ claims that Section 27 does not contain any rights at all, yet can be used by the judge to enhance the Charter's rights and favour an extensive interpretation of its provisions. In an analysis of case law on this jurisprudential debate, the emerging interpretation is that Section 27 is not a substantive provision, and that its importance lies in the broad margins of interpretation it allows to the judge.

The leading case on Section 27 is *R. v. Videoflicks, Ltd*¹¹⁴, which represented the first jurisprudential case of protection against religious discrimination since the entry into force of the Charter -and thus the introduction of the official Multicultural Policy. The appellants, a group of Orthodox Jews, retail

¹⁰⁹ Meyenhoff, T. (1994). *Multiculturalism and Language Rights in Canada: Problems and Prospects for Equality and Unity*, p. 914

¹¹⁰ Magnet J. E. (1987), *Interpreting Multiculturalism*

¹¹¹ Kallen E. (1987), *Multiculturalism, Minorities, and Motherhood: A Social Scientific Critique of Section 27*

¹¹² Tarnopolsky W. S. (1982), *The Equality Rights*

¹¹³ Gall G. L. (1987), *Multiculturalism and the Fundamental Freedoms: Section 27 and Section 2*

¹¹⁴ *R. v. Videoflicks, Ltd* (1984), 5 O.A.C. 1 (CA)

businesses owners, were convicted for offering goods and services for sale on a Sunday, violating section 2 of the Ontario Retail Businesses Holidays Act, establishing a day of rest in Ontario during Sundays and other specified holidays; the applicants claimed that the statute violated their freedom of religion, as it had the effect of imposing on them Sundays instead of Saturday (the Jewish Sabbath) as their rest day. The Ontario Court of Appeal recognized the violation, stating that the statute did in fact violate the religious group's freedom of religion, being unjustifiable as a reasonable limitation. In its explanation, the Court assessed the relevance of Section 27, concluding that the clause stemmed from the historical precept that Canada is a pluralistic society and must, as such, favour and accommodate the different religious practices of its minorities.

Despite the Supreme Court ruled differently in the case *Edwards Books and Art Ltd v. R.*¹¹⁵, noting that the statute did impose economic burdens on religious groups observing Saturday as their rest day, yet considering this limit on the freedom of religion reasonable; in reaching its decision, the Court acknowledged Section 27 as a relevant supplement to the interpretation of freedom of religion rights. A significant consequence of the broader margin of interpretation allowed to courts by the Charter was that any individual right was weighted against the rights of the community, in such a way that for example, in the significant case of freedom of expression, a balance is struck between freedom of speech and press and prohibition of hate propaganda and racial expressions. The Charter also broadens the protection of members of the Canadian society against discrimination, guaranteeing in Section 15, comma 1 that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."¹¹⁶

What the Charter lacked, however, was a recognition of linguistic equality for ethnic minorities, mainly

¹¹⁵ *Edwards Books and Art Ltd v. R.*, (1986) 2 S.C.R. 713

¹¹⁶ Cit. *Canadian Charter of Rights and Freedoms* (1982), Part I, Section 15(1). Available at <http://laws-lois.justice.gc.ca/eng/Const/page-15.html> (accessed Jan. 14, 2018)

implying that ethnic groups other than French and English should adopt one of the official languages. The absence, in the document, of an official recognition of linguistic pluralism, appears in fact to be inconsistent with the egalitarian definition that Canada's model of multiculturalism suggests.

2.4 Canadian Multiculturalism Act

The culminating phase of the Canadian multicultural model was the adoption of the *Canadian Multiculturalism Act*¹¹⁷ in 1988; the multicultural policy had developed from the celebration of differences in the 1970s, to the managing of social and ethnic diversity in the 1980s, to implement a constructive engagement of multiculturalism in all its aspects in the 90s¹¹⁸.

The new legislation recognized multiculturalism as a structural feature of the Canadian society, fully acknowledging its weight in the decision-making of the highest governmental levels, and its importance in the Federal government agenda. The Act expressly stated the right of individuals to identify with the cultural group and heritage of their choice, yet holding full and equal participation in all aspects of the Canadian social life. To this purpose, the legislator also acknowledged that barriers precluding the involvement and equal representation of minority groups in Canada's institutions still existed, and recognized the need to favour their participation in Canada's highest institutions; art. 3, comma 2 of the Act established that all government agencies, departments and corporations are expected to put forward multicultural policies and take part in all governmental programs and procedures favouring the full participation of minorities within the institutional structure of the country. All provincial governments, following the enactment of the 1988 Canadian Multiculturalism Act, have introduced some form of multicultural policy; six of the ten provinces have gone further, adopting a multiculturalism legislation.

¹¹⁷ Available at <http://laws-lois.justice.gc.ca/eng/acts/C-18.7/page-1.html> (accessed Jan. 15 2018)

¹¹⁸ Kirova A. (2015), *Critical and Emerging Discourses in Multicultural Education Literature: an (Updated) Review*, p. 240

Despite representing a pillar of multicultural politics worldwide, this Act, the first legal document entirely concerning multiculturalism, and granting its recognition and protection by the State, did not introduce substantial additions to the checklist of ethnic and cultural rights in Canada, mostly reiterating the constitutional provisions relating to minority rights already granted by the Charter. This is partially why the race to multicultural policies gradually ended towards the end of the 20th century, progressively turning to a more “maintenance” approach, with the establishment in 2008 of a Ministry of Citizenship, Immigration and Multiculturalism within the Department of Citizenship and Immigration.

2.5 Canadian Citizenship Legislation: The dilemmas of immigration

Citizenship is a relation based primarily on the ownership of particular rights and is generally defined as the relationship between an individual and a State, yet the centre of the discussion is not national belonging anymore: in a multicultural society like the Canadian one, where national belonging is understood in its broader meaning and where each citizen is part of a different community, citizenship legislation appears to be of the greatest importance. Canadian citizenship law is multifunctional in recognizing the status of citizenship and defining the qualifications which are necessary to obtaining it or renouncing to it, and most importantly in attaching to the status of citizens a variety of rights, duties and responsibilities which are peculiar to the members of the Canadian society. Legislation on citizenship in Canada, besides establishing the terms of membership to a community, provides for a unique mechanism through which a society retains its identity¹¹⁹; as usual in the Canadian tradition, in fact, the goals of establishing criteria for membership in the Canadian society and protecting the multicultural heritage of the country were not incompatible in the intentions of Canadian constitution

¹¹⁹ Galloway J. (1999), *The Dilemmas of Canadian Citizenship Law*, Georgetown Immigration Law Journal vol. 13, no. 2 p. 202

and law makers. In the light of the multicultural turn of the Canadian society, the content of citizenship law, as stated by Toniatti¹²⁰, may not be reduced to a mere identification with the consolidated rights of the individual¹²¹, but must be weighted on a collective dimension, too. This dimension, which has taken on the definition of “multicultural citizenship”, coined by Kymlicka, represents a secondment from the classical definition of citizenship as an inclusive tool, ultimately embodying a means of fragmentation of the social tissue: the real membership lies in the cultural group of reference, which serves as a link between the individual and the State. This theory, in its crumbling of the legal order through the recognition of alternative -and perhaps incompatible- normative systems, goes as far as implying a non-traditional imposition on national legal systems and their citizenship legislation: in suggesting that citizenship is now multicultural, and as such, inevitably impartial, a citizenship law must be “neutral”, i.e. it must not assume the point of view of any of the cultural components of the society. Keeping this in mind, a multicultural citizenship law should not express any value orientation, leaving space to freedom in its form of autonomy in the choice of belonging in a particular group; it is precisely the highlighting of the ethnic mosaic, and its ability to introduce migrants and minorities in a model of “differentiated citizenship¹²²” that separated the Canadian experience from that of other states¹²³.

2.5.1 1947 Canadian Citizenship Act and 1977 Citizenship Act

The Canadian Citizenship Act of 1946, which came into force in January 1947, repealed the *Canadian Naturalization Act* of 1914 and the *Canadian Nationals Act* of 1921, and represents the primary source of citizenship law. The citizenship legislation, in its 1946 version, glosses over various relevant

¹²⁰ Toniatti R. (2012), *Pluralismo e autodeterminazione delle identità negli ordinamenti culturalmente composti: osservazioni in tema di cittadinanza culturale*. p. 5-29

¹²¹ Baraggia A. (2017), *La cittadinanza “composita” in alcune esperienze europee. Spunti di riflessione per il caso italiano*, p. 10

¹²² Term coined by Kymlicka and Wayne

¹²³ Di Maio C. (2017), *Profili di integrazione politica dello straniero. Una riflessione comparata tra Europa e Canada*, p. 7

citizenship issues such as the retention of multiple nationalities, or in the identification of rights and responsibilities attached to the status of citizen¹²⁴; the most significant omission, however, is the absence of the definition of citizenship itself.

On February 1977, a new Citizenship Act came into force, representing an important step forward for the non-British population of Canada; the new Act removed the previous distinction between British subjects and “aliens”, eliminating all special treatment of British nationals in the granting of citizenship, also partially mending the faults of the previous legislation by clearly stating that Canadian citizens by birth and choice are equal before the law and hold the same rights and responsibilities.

The change of pace which inspired Canadian law-makers in drafting a new and more efficient legislation on citizenship stemmed from two major global developments. The economic growth and changes in industrial production, bringing to an increase in south-of-the-world migration ultimately resulting in a change in the federal government’s immigration policy, now focused on a “race blind” rather than “national preference” approach¹²⁵; this change, legally absorbed into 1976 Immigration Act, was functional to facilitating access to citizenship as codified by the new Citizenship Act. The new provisions concerning equal treatment and anti-discrimination, and namely the removal of all favorable treatments reserved to British nationals in the process of access to citizenship, are on the other hand an explicit response to the change of power relations in the world as a consequence of decolonization and the human rights revolution.

The Act was clearly aimed at making Canadian citizenship attractive for newcomers, and was particularly successful in this purpose, representing “one of the crown jewels in a series of separate but

¹²⁴ Both these issues are dealt with in federal statutes or in the Constitution.

¹²⁵ Winter E. (2013), *Descent, Territory and Common Values: Redefining Citizenship in Canada*, p. 100

inter-related policies to which Canada owes much of its international reputation¹²⁶ of a welcoming country; Neyers considers this legislation as the translation of the multicultural approach into law, through the redesigning of Canadian citizenship to make belonging to multiple cultural groups within the same society possible.

Citizenship law, as set out by the Citizenship Act, establishes three ways to obtain Canadian citizenship¹²⁷:

1. A person who is born in Canada, who gains automatically Canadian citizenship (Paragraph 3, sec. 1 lett. A), save in the case of children of foreign diplomats. This provision maintains the English common law tradition of *jus soli*;
2. A person who is born to a Canadian citizen outside Canadian territory (Paragraph 3, sec. 1 lett. B), save the case of children of citizens who have also gained citizenship through this provision, who will lose the status¹²⁸ unless they reclaim their citizenship before the age of 28 through registering as citizens. These provisions do not apply to adopted children, who are to register as migrants if they wish to reclaim citizenship. This provision takes from *jus sanguinis* civil law systems, typical of the civil law tradition;
3. By naturalization (Paragraph 5, sec. 1):

“The Minister shall grant citizenship to any person who:

- a) makes application for citizenship;
- (b) is a permanent resident
- (c) is 18 years of age or more but less than 55 years of age at the date of his or her application, has an adequate knowledge of one of the official languages of Canada;

¹²⁶ Cit. Winter E. (2013), *Descent, Territory and Common Values: Redefining Citizenship in Canada*, p. 100

¹²⁷ Paragraph 5, section 4 also provides for extraordinary procedures to obtain citizenship, such as for example the granting of citizenship as a reward for exceptional services to Canada.

¹²⁸ Unless they reclaim their citizenship before the age of 28 through registering as citizens and residing in Canada for at least one year.

(d) has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; (...)"

The Citizenship Regulations, however, expand these legislative requirements, stating for example that knowledge of Canada of the applicants is to be tested through questions regarding the election process, the social and cultural history of Canada, as well as his physical and political geography.

The Citizenship Act and Citizenship Regulations both account for loss and renunciation of citizenship, stating in Section 10 that should the Federal Cabinet find that a person has obtained citizenship "by false representation, or fraud or by knowingly concealing circumstances", that person ceases to be a citizen. Canadian courts have largely resorted to this provision in the 1990s against individuals who have concealed allegation of war crimes when applying for citizenship or permanent residency: in these cases, many judges found that, despite finding such individuals guilty of the offenses would require proof beyond reasonable doubt, stripping them of citizenship only required proof on the balance of probabilities.

The new Act repaired some of the flaws of the original Canadian Citizenship Act, mainly by making rights and responsibilities of citizens explicit, thus clarifying the privileges and burdens tied to Canadian citizenship, guaranteeing them political rights, including the right to vote and the right to run for office; the Act also fixed the multiple citizenship problem by securing the Canadians' right to hold dual citizenship. Despite closing many of the Canadian Citizenship Act's loopholes, a controversy rose on the legality of the provisions of the Act following the entrenchment in 1982 of the Canadian Charter of Rights and Freedoms as one of the elements of the Canadian Constitution. In fact, despite both citizenship and residence within the Canadian territory are recognized as statuses by the Charter, which guarantees rights and assigns responsibilities to both categories, they are not defined therein. The

dispute over the meaning and interpretation of the residence clause has led to several appeals to Canadian courts, with judges reaching extremely different conclusions: if some have used a physical presence test, others have taken a more nuanced approach. In the case *Re Papadogiorgakis*¹²⁹ for example, the judge held that if a person was established in Canada, he or she would not cease to be considered a resident if he or she were to leave for a limited period or time or temporary reasons. In *Re Pourghasemi*¹³⁰, on the other hand, the competent judge argued that it is not possible to consider an individual a Canadian resident if he or she is not physically present in Canada, and thus fully into contact with the Canadian society.

Similarly, in the case of the definition of citizen, the lack of a definition of the term poses the question of the possibility to amend or revise the status of citizen, considering the acquired constitutional value of the Charter; in the silence of the Constitution on a clear designation of “citizenship”, the issue was left open to interpretation by the doctrine, which was divided on three different opinions: that the framers of the Charter implied a definition of citizenship (which was found in the Citizenship Act), and that a constitutional amendment would be necessary to alter this definition¹³¹; the second option, supported by the constitutionalist Hogg, entails a flexible definition of citizen, with the responsibility to delineate its main features demanded to the legislature¹³²; the third option, and the most reasonable according to most, is that the term citizen is indeed a flexible one, but its interpretation is demanded to the judiciary, as the only body which is not accountable to the people.

2.5.2 The renewed text – relevant amendments to the citizenship legislation

¹²⁹ *Re Papadogiorgakis*, [1978] 2 FCR 208, 1978 CanLII 2001 (FC), <<http://canlii.ca/t/ggl2>>, retrieved on 2018-01-23

¹³⁰ *Re Pourghasemi*, (1993), 62 FTR 122

¹³¹ This option is not particularly persuasive, as it would entail an intention, by the framers’ part, to put in place a static definition of citizenship instead of a flexible one, much more suitable for a multicultural State.

¹³² This option does not convince either, as it implies the possibility for the legislative to define subjects and matters within the Constitution.

The 1977 citizenship legislation, despite representing a step forward from the 1947 Canadian Citizenship Act, was still far from perfect, as Garcia points out. This is why, due to the relevant flaw of the missing definition, and pushed by the need and will to develop citizenship rights together with the evolution of the society, the dispositions of the Citizenship Act were frequently for screening for the parliamentary assembly, being revised in 2009 and 2015 and lastly in June 2017. The 2009 amendments, included in Bill C-37, were mainly instrumental in solving the problem of *lost Canadians*¹³³, while the latest, most relevant changes to the previous citizenship legislation are included in the reform of set of amendments already introduced in 2015, called the *Strengthening Canadian Citizenship Act* (SCCA). The SCCA made it more difficult to obtain citizenship, with the purpose to strengthen Canada's borders in order to help the State deal with the modern issue of terrorism, introducing clauses forbidding applicants to take up arms against Canada in a foreign army or to join international terrorist organizations.

The Act provided for tougher residence requirements for the acquisition of citizenship, namely from three out of four years to four out of six years; this provision was challenged in several cases. In the case *Deldelian v. Canada*¹³⁴, the applicant appealed against a Citizenship Judge decision to deny his application on the grounds that he did not meet the residency requirement, just made stricter by the SCCA; the federal judge granted this appeal, sending the citizenship application back for review, stating that the doubts raised by the Citizenship Judge concerned the issue of the meaning of "residence" within the Citizenship Act, which had already been interpreted in different ways by judges in the past. Other than the numerous cases of revocation on grounds of false representations or fraud –

¹³³ Term referring to people who were never granted citizenship or ceased to be citizens due to old and outdated legislation, notwithstanding their substantial connection to Canada.

¹³⁴ *Deldelian v. Canada (Citizenship and Immigration)*, 2014 FC 854 (CanLII), <<http://canlii.ca/t/gdrlz>>, retrieved on 2018-01-23

mostly concerning false testimony regarding the residency requirements, see *Canada v. Houchaine*¹³⁵ or *Canada v. Savic*¹³⁶ - the SCCA also introduced new grounds for the revocation of the status of citizen, namely implementing a stricter scrutiny of the applicants' criminal records in the light of anti-terrorism and national security measures.

The amendment initiated a manhunt against convicted terrorists residing in Canada, alleged perpetrators of crimes against humanity and guilty of war crimes, resulting in a relevant number of open cases of citizenship revocation, most of them still pending; the closed cases delineate a clear tendency of the courts to revoke citizenship. In the case *Canada v. Rubuga*¹³⁷ for example, the Minister of Citizenship and Immigration required from Mr. Rubuga a declaration of false representation or fraud concerning the facts described in his citizenship application. The defendant had in fact claimed refugee status and subsequently applied for and was granted access to citizenship in 2004, concealing his membership in the Rwandan armed forces and his subsequent participation in 1994 Rwandan genocide, as both would have implied the defendant's ineligibility for both the refugee and the citizen status. In the case at hand, the Federal Court held that the defendant acquired citizenship by fraud and his Citizenship was to be revoked.

The amendments concerning Section 5 of the SCCA have been criticized by The British Columbia Civil Liberties Association and the Canadian Association of Refugee Lawyers (CARL), which claimed that the amendments created an un-equal system favoring Canadian-born individuals over naturalized Canadians, mainly in the provisions concerning the intent to reside in Canada. The two associations

¹³⁵ *Canada (Citizenship and Immigration) v. Houchaine*, 2014 FC 342 (CanLII), <<http://canlii.ca/t/g6hpd>>, retrieved on 2018-01-23

¹³⁶ *Canada (Citizenship and Immigration) v. Savic*, [2015] 3 FCR 209, 2014 FC 523 (CanLII), <<http://canlii.ca/t/g7cd1>>, retrieved on 2018-01-23

¹³⁷ *Canada (Citizenship and Immigration) v. Rubuga*, 2015 FC 1073 (CanLII), <<http://canlii.ca/t/gmlc8>>, retrieved on 2018-01-23

challenged the constitutionality of the law in the case *Azevedo v. Canada*¹³⁸, challenging the Governor General's power to grant royal assent on a law revoking citizenship, and asking for a judicial review of the royal assent on Bill C-24. The court dismissed the application by stating that not only the judiciary did not have the power to intervene in the legislative process, but also that the right to citizenship is not inalienable, thus enabling the parliament to pass legislation revoking citizenship.

Despite the issue of constitutionality on the Strengthening Canadian Citizenship Act was dismissed by the Federal Court, the severe backlash suffered following the passing of the SCCA led the Canadian legislative to draft a new amendment which was approved with the passing of Bill C-6: the June 2017 amendments concern three important issues:

- a) the previous text stated that applicants, in requesting Canadian citizenship, had to prove their intention to live in Canada continuously, once granted the status of citizen. The new norm, however, eliminates this obligation; this amendment adapts the provision to the possible necessities of trans-frontier work;
- b) before the reform, the competent Minister held the right to overlook some of the legal requirements (Section 5.1) of the citizenship law, in order to allow protected categories (see minors without Canadian parents) to obtain citizenship anyway. This right was abrogated in favour of a full right for the minor to appeal for citizenship without the need of the parents' or relatives' consent;
- c) according to the new law, foreigners should cumulate at least three years of non-subsequent previous residence, within a time-frame of five years, before being admitted to the issuing of citizenship; the previous legislation was more restrictive in fixing a threshold of 1.460 days within a time-frame of six years.

¹³⁸ *Azevedo v. Canada (Governor General)*, 2015 FC91 (CanLII), <<http://canlii.ca/t/gdrlz>>, retrieved on 2018-01-23

In the light of these important amendments, some conclusions may be drawn. Firstly, it should be precised that the Canadian model *per se* represents the sum of mixed citizenship procedures and legislation: it alternates pure *jus soli* solutions to more defined forms of citizenship by descent. For this reason, the Canadian citizenship model assumes a double connotation: if, on the one hand, the typically European request for specific prerequisites -as the acceptance of national values and the demonstration of fluency in one of the two official languages- remains intact, on the other hand citizenship represents the main tool for immigrants to access participation in the Canadian society. As already noted by De Lucas¹³⁹, in this kind of citizenship legislation, the acquisition of the status of citizen is not the apex of the process of integration, but “an emancipating tool, a remedy against inequalities”¹⁴⁰. The Canadian vision of citizenship, in fact, is growing farer and farer from the monistic tendency which is typical of European States, leaving space to a distinct and separate evaluation of the concept of nationality, since the original nationality of the subject is already preserved within a system of free ownership secured by the Canadian authorities.

2.6 Civil and Political Rights: the protection of fundamental rights of non-citizens in Canada

Non-citizens and migrants in general have changed and expanded the concept of citizenship, imposing on contemporary States the responsibility to take non-citizens into account in their policy and law-making, extending forms of political and social protection to them, and ultimately creating “citizens at

¹³⁹ De Lucas J. (2006), *La ciudadanía basada en la residencia y el ejercicio de los derechos políticos de los inmigrantes*

¹⁴⁰ Cit. Ibid p. 25

the grassroots level”¹⁴¹. In Canada, the number of undocumented immigrants is considerably lower than in the majority of other States, and yet migrants residing in Canada have benefited from the extension of legal and political rights to non-citizens less than in other nations, perhaps stalling Canada’s path in the direction of “post-national citizenship”, as described by Sassen¹⁴² and Soysal, who claims that citizenship is destined to be replaced by a new model of citizenship based on a universal notion of human rights¹⁴³. Despite many authors such as Schuster and Solomos¹⁴⁴ have pointed out the limits of the post-national citizenship thesis (also Glenn, 2000¹⁴⁵ and Castles and Davidson, 2001¹⁴⁶), migrants have now come to be politically and socially active in their host societies, and debates about migrant integration cannot disregard the political dimension anymore. Political participation and voting rights, in their connotation of most active dimensions of citizenship, generally imply granting of the right to vote for local elections even for non-citizens, and at least for naturalized citizens; however, the limited nature of residence permits and the rules of non-permanent stay do not grant the preservation of these rights. In Canada, where democracy and nationhood also imply social and cultural inclusion, the multicultural model proved to be ineffective in providing an all-encompassing standard of political participation. Canada’s “official multiculturalism policy”, as defined by Good¹⁴⁷, previously focused on cultural heritage preservation; contemporary version of the same policy, however, have shown how policy and law makers have adapted to the changing society by concentrating on the elimination of old barriers to the social participation of migrants, yet leaving the political dimension somehow behind.

¹⁴¹ Cit. Basok T. (2008), *Constructing Grassroots Citizenship for Non-Citizens*, p. 266

¹⁴² i.e. a denationalized citizenship, deprived of its State connotation. See *Handbook of Citizenship Studies* (2002), p.288

¹⁴³ Soysal Y.N. (1994), *Limits of Citizenship: Migrants and Postnational Membership in Europe*

¹⁴⁴ Schuster L., Solomos J. (2002), *Rights and Wrongs across European border: migrants, minorities and citizenship*, p. 51

¹⁴⁵ Glenn E. (2000), *Citizenship and Inequality: Historical and Global Perspectives*, p. 10

¹⁴⁶ Castles S., Alastair D. (2001), *Citizenship and Migration: Globalization and the Politics of Belonging*

¹⁴⁷ Good K. R. (2009) *Municipalities and multiculturalism: the politics of immigration in Toronto and Vancouver*

The main tool for the protection of minorities and the granting of political and civil rights to migrants in Canada is the Canadian Charter of Rights and Freedoms of 1982. The Charter, according to the dualist system operated by Canada, absorbs the international instruments of human rights protection into the Canadian legal system: international treaties, signed and ratified by the executive, still require incorporation into the national legal system through domestic law to be enforceable at the national level. This places the Canadian government in the position of confirming that Charter provisions are coherent with the international norms to which Canada has assented, and that are applied to all persons within the Canadian territory. The traditional judicial trend of a strict application of human rights provisions, which finds judges being reluctant in applying legal provisions that have not yet been absorbed into domestic law, is now taking a turn towards the acknowledging of human rights law notwithstanding its formal entrance into the national legal system.

The Charter's first engagement in terms of non-citizen rights was the *Singh*¹⁴⁸ ruling. The case of *Singh v. Canada*, which formally challenged rules of procedure on the determination of the refugee status, is relevant to this analysis in the light of the key holding that the Charter grants protection to every human being that is "physically present" on the Canadian territory. In reaching the historical decision the Court, by addressing the rights of non-citizens in its reasoning, brought the latter under the Charter's protection, notwithstanding their immigration status¹⁴⁹. The second leading case on non-citizens' rights, *Andrews v. Law Society of British Columbia*¹⁵⁰, went even further in broadening the applicability of the Charter. Mr. Andrews was a permanent resident of Canada and a British subject, and he was prevented from law practice on grounds that he did not hold Canadian citizenship; the case, far more relevant than *Singh*, which stemmed from the need to comply with international human rights standards, presented

¹⁴⁸ *Singh v. Canada (Minister of Employment and Immigration)*, 1985 1 SCR 177, (sub nom Re Singh and Minister of Employment and Immigration) 17 DLR (4th) 422

¹⁴⁹ Dauvergne C. (2013) *How the Charter Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence*, p. 671

¹⁵⁰ *Andrews v. Law Society of British Columbia* (1989), 1 SCR 143, 56 DLR (4th) 1

non-citizens as a protected category for the first time. In its ruling, the first concerning Section 15 of the Charter¹⁵¹, the Court implemented for the first time what was later referred to as a “substantive approach to equality”¹⁵²; this approach led the judges to rule that the grounds of protection provided within Section 15 extended to non-citizenship as well. In the paramount decision, the Supreme Court was partially inspired from US constitutional equality jurisprudence, yet developed an original approach: the judges agreed that equality rights must be granted to non-citizens, focusing on the vulnerability of the category. Justice Wilson held that immigrants are among “those groups in society to whose needs and wishes elected officials have no apparent interest in attending”¹⁵³; the Court’s reasoning was thus based on the belief that lacking political power, the interests of non-citizens are often overlooked, and this makes them an analogous category to those computed in Section 15 of the Charter.

The academic opinion of the late 19th century held that the role of citizenship as an important threshold for the granting of rights within the national legal order was being overshadowed by the strength of human rights, and the Courts’ tendency to extend traditionally “national” rights to immigrants. Sassen and Jacobson¹⁵⁴ both considered this development positively on the hype that followed the *Singh* and *Andrews* rulings: they considered the loss of relevance of the concept of citizenship in favour of human rights and their respect in terms of the success of immigrants in asserting their rights. Likewise, the two leading cases on equality, despite foreshadowing an evolution of the Canadian legislation on the path of political representation and granting of political rights, followed a different direction with the

¹⁵¹ i.e. the section of equality rights, granting protection against discrimination on grounds of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

¹⁵² The interpretation according to which grounds of discrimination analogous to Section 15 provisions would also be granted protection under the Charter. See Dauvergne 2013

¹⁵³ *Andrews*, supra note 83, citing John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980), John Stuart Mill, *Considerations on Representative Government* (Chicago: Henry Regnery, 1962).

¹⁵⁴ Jacobson D., Ruffer G. B. (2003), *Courts Across Borders: The Implications of Judicial Agency for Human Rights and Democracy*

subsequent jurisprudence and legislation. Since that time, citizenship and its privileges have undergone a rebirth in national legal orders: in Canada, for once, non-citizens do not hold the right to vote or run for office in Federal, provincial or even municipal elections, or perform certain jobs requiring a high-level security clearance requirement¹⁵⁵. In the case *Lavoie v. Canada*¹⁵⁶, the applicant challenged the *Public Service Employment Act* provisions establishing a preference for Canadian citizens for some categories of employment. The Court found that despite the equality rights infringement did exist, the limitation of non-citizens' rights was saved by Section 1 of the Charter –the “reasonable limitation clause”-, namely justifying the limitation through the existence of similar clauses in the *International Covenant on Civil and Political Rights*, whose art. 25 protects the right of citizens to access public-service employment.

2.6.1 Voting Rights of Immigrants

In the last decade, several law experts have supported the idea of allowing permanent residents to vote in municipal elections, stating that a reform of the voting system is long overdue and necessary in order to fully incorporate permanent residents into the Canadian society. The opinion that permanent residents should be granted voting rights in local elections is based on the claim that PRs are on the path to citizenship, having thus already expressed in that manner the intention to join the State in which they chose to reside, and having already been screened and tested on their language, knowledge and education¹⁵⁷. Another important argument in favor of the right of permanent residents to vote in municipal elections is that, as beneficiaries of the services offered by the city, they should have a saying in how the latter administers them. Attempts to amend legislation have largely fallen into

¹⁵⁵ <https://www.canada.ca/en/immigration-refugees-citizenship/services/new-immigrants/pr-card/understand-pr-status.html> (accessed on Jan. 24, 18)

¹⁵⁶ *Lavoie v. Canada*, [2002] 1 S.C.R. 769, 2002 SCC 23

¹⁵⁷ Lenard P. T. (2014), *Residence and the Right to Vote*, p. 122

nothing in various occasions: voter eligibility requirements, established by Provincial Governments across Canada, reflect constitutional provisions of supremacy of provinces over local institutions, as established by the Canadian federal system: as a result, Canadian provinces have adopted quite standardized municipal voting eligibility provisions, all requiring to be of age (18 years or older), to be a Canadian citizen, and a resident or an owner/renter in that municipality. The ratio of the non-resident, property-tax-payer provision is that investors whose interests are significantly affected in a specific municipality should have a say in the expression of those interests, and thus be allowed to vote in municipal elections; according to this line of thought, the growing number of permanent residents settling in major Canadian cities, however, should be granted this right for the same reason.

In 2006, the City of Toronto office announced that 246,924 names were being cancelled from the eligible voters list¹⁵⁸; following this announcement, a doctrinal debate started on the issue of the right of non-resident Canadian citizens' ability to vote in municipal elections. In June 2013, Toronto city council voted to ask the province to amend legislation concerning the right to vote; in 2016, Bill 181 "Municipal Elections Modernization Act" was discussed in Queen's Park Provincial Parliament. Member of Provincial Parliament Hatfield proposed, in the light of the other anticipated amendments to the Act, the introduction of a clause allowing permanent residents to vote in municipal elections. A drastic detachment from the traditional way to view politics in Canada, separating the concept of citizenship and right to vote in municipal elections would represent a way for newcomers to engage in local administrative decisions before they earn the right to become Canadian.

The possibility of broadening the applicability of voting rights gathered considerable support among academics¹⁵⁹, with scholars now identifying residency as the foundation of a new generation of

¹⁵⁸ Siemiatycki M. (2014), *Non.Citizen Voting Rights and Urban Citizenship in Toronto*, p. 81

¹⁵⁹ Siemiatycki M. (2014), *Non.Citizen Voting Rights and Urban Citizenship in Toronto*, p. 87

political rights, as already discussed in Chapt. 1, par. 1.2.2. Triadafilopoulos¹⁶⁰, on the other hand, argues that immigrant political participation would be best granted through naturalization, considering municipal voting rights a premature fast-track for non-citizens, especially considering the permissive access to Canadian citizenship. The proposed amendment however was rapidly dismissed, with most Canadian citizens and MPPs having proved highly irresponsible to the claims of non-citizens voting rights advocates, such as Munro¹⁶¹, notwithstanding their numerous convincing arguments: permanent residents, under the current Municipal Elections Act, are in fact prevented from expressing their political preferences despite paying taxes and owning property; in many cases, they have Canadian-born children in schools and using public city services; the argument of a non-citizens voting rights reform being introduced some two decades ago in the Netherlands and New Zealand¹⁶² with a huge success was also unconvincing to many.

2.7 Protection of migrants' social rights: health care

The Canadian Charter of Rights and Freedoms, the main tool for granting non-citizens' rights, does not contain any provision concerning economic and social rights, only providing for a catalogue of fundamental civil freedoms. The subsequent gap in the protection for social and economic rights is bridged by a partial protection granted by sources of law of a subordinated level. By not falling into the category protected by the Charter, those rights are addressed by non-constitutional laws, yet will still be given constitutional relevance due to their linkage with other rights expressly granted by the Canadian Charter.

¹⁶⁰ Triadafilopoulos, P. 2010. *Non-citizen voting in Toronto: a case of too little, too soon?* Mowat Centre for Policy Innovation, <http://mowatcentre.ca/opinions.php?opinionID=18>. (Accessed January 25, 2018)

¹⁶¹ Munro, D. (2008). *Integration through participation: non-citizen resident voting rights in an era of globalization*, p. 65

¹⁶² Which grants the right to vote to legal residents after one year

Health Care has traditionally been considered a citizens' privilege: its protection is not expressly conceded by the Charter, yet its protection is granted at the jurisdictional level though the right to equality embedded in art. 15.1 of the Charter; Canadian courts have given to this right different interpretations with respect with the right to health, which is perceived in Canada as a national value. In the context of today's increasing migration, the health care necessities of non-citizens have been addressed by several authors and politicians on the basis of the tendency of the initial health advantage perceived by immigrants to disappear over time. The theory supported by Macinko, Starfield & Shi¹⁶³ holds that granting migrants access to high-quality health care services, and namely primary care and preventive cures, reduces mortality among the category by enabling early treatment of any disease. According to the authors, as immigrants represent a vulnerable part of the population, the introduction of policies and interventions to favor the access of non-citizens to health care would raise the threshold of social inclusion in the country. The view that the universal right to health care applies to all residents in a given society, notwithstanding their citizenship status, was supported by several scholars: Chen¹⁶⁴ for example supported the position of Daniels and Ladin¹⁶⁵ in stating that since migrants represent cooperating members of the society, contributing to its economy, to ensure fairness in this cooperation they should be granted access to healthcare, insofar the equality principle broadened its scope in order to protect other rights. However, other migration countries appear to fare far better than Canada in complying with the standards of the *International Covenant on Economic, Social and Cultural Rights*¹⁶⁶, whose art. 12 states the right of everyone to the enjoyment of the highest standard of physical and mental health possible. The main argument against the Canadian system of immigrants' health care is that many of the people within the country holding temporary visas are being denied access to

¹⁶³ Macinko J., Starfield B., Shi L. (2003). *The contribution of primary care systems to health outcomes within Organization for Economic Cooperation and Development (OECD) countries, 1970–199*, pp. 831-865

¹⁶⁴ Chen B. Y. Y. (2017), *The Future of Precarious Status Migrants' Right to Healthcare in Canada*, p. 649

¹⁶⁵ Daniels N. & Ladin K. (2015), *Immigration and Access to Health Care*, p. 56

¹⁶⁶ 16 December 1966, 993 UNTS 3, art 12(1)

healthcare or considered unfit for public health care coverage in light of their temporarized presence in the country. Generally speaking, in fact, migrants who hold the status of permanent residence enjoy the same rights as Canadian citizens in the field of healthcare, being able to access publicly founded health care programs. Among precarious status migrants', however, publicly founded health care is not accessible in most of the cases: workers are often disqualified from health care plans unless they can provide a work authorization lasting longer than six months; immigrant students are excluded from any form of health care in several provinces¹⁶⁷, and other provinces only grant some form of health care to students holding a permit more than twelve months long; undocumented migrants and non-citizens on visas are not eligible for health care at all, save for primary care though largely ineffective community health centers¹⁶⁸.

Migrants have often challenged their impossibility to access public health coverage, mainly on grounds of violation of equality rights under the Charter, yet mostly to no avail: to date, the only successful case in broadening non-citizens' rights entitlement to health care was *Canadian Doctors for Refugee Care v. Canada (Attorney general)*¹⁶⁹. This cases concerned a request for judicial review of the federal government's decision to provide for a reduced, and in some cases inaccessible, health care coverage. The applicants, in asking the Court to value the legality of the amendments to the 2012 Interim Federal Health Program (IFHP); despite considering the amendments to be within the powers of the executive, and finding no denial of procedural fairness in the case, the Court agreed that the affected individuals (i.e. the refugees) were being subjected to a "cruel and unusual" treatment, particularly in the case brought to Canada by their parents. The Court also stated that the amended legislation violates the equality provision in establishing a differential treatment between different categories of refugees. The

¹⁶⁷ Ontario, New Brunswick, Prince Edward Island

¹⁶⁸ Chen B. Y. Y. (2015), *Extending Health Care Entitlement to Lawful Non-Transient International Migrants: Untapped Potential of the Universality Principle in the Canada Health Act*, p. 111-117 UBC L Rev 79

¹⁶⁹ *Canadian Doctors for Refugee Care v. Canada (Attorney general)*, 2014 FC 651 (CanLII), <<http://canlii.ca/t/g81sg>>, retrieved on 2018-01-25

Court's reasoning however, did not imply a broadening of health care to all immigrants under Section 15. In the similar case *Clarken et al. v. Ontario Health Insurance Plan*¹⁷⁰, the Court dismissed the applicants' claim that the stripping of their health insurance as a result of the above mentioned amendments to the IFHP represented a violation of Section 15 of the Charter; the Court's reasoning was based on the fact that the condition of inequality was not immutable, as it could be mended by the acquisition of permanent residency. The same reasoning was at the basis of the Court's dismissal of the case *Irshad (Litigation guardian of) v. Ontario (Ministry of Health)*¹⁷¹ and *Toussaint v. Canada (Attorney General)*¹⁷², where the Court was called upon to rule on the case on an undocumented migrant woman's inability to access public health care.

The Canadian judiciary and policymakers, in all, proved to be largely irresponsible and unsympathetic of the situation of precarious status migrants': the government's consideration of migrants as a temporary or irregular category has ultimately legitimized the federal level to cut back the social rights of non-citizens, legalizing rights violations and protecting those violations from judicial scrutiny, often leading to the application of double standards of interpretation of Section 15 of the Canadian Charter of Rights and Freedoms. In this light, Canadian Courts should be the leading promoters of a dialogue of the Charter with the legislative, supporting the claims of non-citizens to broaden health care protection to all residents in the country, notwithstanding their legal status.

¹⁷⁰ *Clarken et al. v. Ontario Health Insurance Plan* (1998), 109 OAC 363 [Clarken]

¹⁷¹ *Irshad (Litigation guardian of) v. Ontario (Ministry of Health)* (2001), 55 OR (3d) 43 (CA)

¹⁷² *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, [2013] 1 FCR 374

CHAPTER 3

Integration in Italy – A “Work In Progress” Model

3.1 An Intercultural Italy

“Integration must be a mutual exchange of human experience at the psychological level, a cultural exchange producing a broader and more mature perspective; the introduction of the immigrant in the new social structure as a vital part of the latter, contributing to the enrichment of the society”¹⁷³. It is in these terms that Alberoni and Baglioni described integration in one of the first analysis of the immigration phenomenon in Italy: the choice of the authors’ words highlights how Italy always considered the process of integration to be an ambivalent one, described both in a unilateral way as the adaptation of the individual to the society, and through a bilateral point of view, as a cultural exchange. The choice of the term *introduction* rather than *assimilation* was used by the authors with the aim of refusing the latter concept, traditionally representing the process of migration as one of adaptation of the immigrants into the host society¹⁷⁴, and not a mutual development towards respect and recognition. Strozza believes that the definition of the Council of Europe of integration, during the 1990s, describing the process as a confrontation and exchange of values, of standards of life and behavioral models between the immigrants and the host society¹⁷⁵ led the Italian legislator, only then approaching to the phenomenon, to a more mature and open approach towards the phenomenon of integration and its consequences into the Italian society.

Italian legislators and policy-makers have always considered the phenomenon of immigration to be a temporary one, and the government did not address the issue if not after the first relevant immigration

¹⁷³ Alberoni F., Baglioni G. (1965), *L'integrazione dell'immigrato nella società industriale*, p. 26

¹⁷⁴ The International Union for the Scientific Study of Population of 1949 represented it in this sense.

¹⁷⁵ Natale M., Strozza S. (1997), *Gli immigrati stranieri in Italia. Quanti sono, chi sono, come vivono?*, p. 252

wave which followed the collapse of the communist regime; even then, the attitude of the State towards the event proved to be approximate and rough at best, legally addressing the issue only from the point of view of national order and security, never going further in securing any control or policy of welcoming. This approach resulted in a hybrid integration model which was assimilationist in its intentions and multicultural in its effects: the first Italian report on immigration, *Primo rapporto sull'integrazione degli immigrati in Italia*¹⁷⁶, published by a Commission within the Ministry for Social Solidarity, shows a tendency of the author towards the multicultural vision, yet this choice is clearly explained by the will to stress the limits of the opposite model, the assimilationist one. In this report, assimilation is presented as a “mutilation” of the migrants’ identity: this approach to assimilation is consistent with the academic view that Italy has always tried to implement some sort of assimilationist model without assimilation¹⁷⁷.

Aware of the dangers of the excessive attachment of foreigners to their cultural identity, which might bring to social isolation and ethno-cultural closure, the Italian policy-maker adopted a branch of assimilation which appears somewhat forced in the Italian society, mainly driven by the strong cultural hegemony and cultural bond of the Italians with their traditions, but also pushed forward by xenophobic political forces, as Dal Lago¹⁷⁸ and Maneri¹⁷⁹ noted. The political party *Lega Nord*, which has strongly stirred the political debate about immigration, came to be the ambassador of a discipline of integration based on public order and fearful of the hybridization of the Italian society, ultimately

¹⁷⁶ Zincone G. (2000), *Primo rapporto sull'integrazione degli immigrati in Italia*

¹⁷⁷ Guolo R. (2009), *Modelli di integrazione culturale in Europa*, p. 5. Available at

https://www.italianieuropei.it/images/iniziativa/schoolfilosofia/materiali2010/IE_Modelli%20Di%20Integrazione%20Culturale%20In%20Europa_Guolo.pdf [accessed on Jan. 20, 2018]

¹⁷⁸ Dal Lago, Alessandro (1998). *Lo straniero e il nemico: materiali per l'etnografia contemporanea*

¹⁷⁹ Maneri, Marcello (1998). *Lo straniero consensuale. La devianza degli immigrati come circolarità di pratiche e discorsi*, pp. 230-247

accentuating the distance between immigrants and natives¹⁸⁰. Ideologically assimilationist, this discipline resulted in a *de facto* multicultural model: by encouraging the identity closure of the various minorities, this model imposes the separation of immigrant communities and Italian society, yet lacking the loyalty to the host country that is typical of multicultural States, in virtue of the unwelcoming perceived by migrants.

This model of integration has proved to be largely inefficient in imposing the respect of Italian laws and traditions on the newcomers: the absence of a facilitated path towards citizenship makes the Italian social standard unappealing to migrants, who are expected to give up their traditions, religion and identity in exchange of a still precarious membership in the Italian society. The emergence of this non-model, perhaps resulting from the political instability of the Italian governments (which in the 1990s were facing the tumultuous transition to the democracy of alternation), favored the cultivation of the immigrants' ethnic and even juridical separateness¹⁸¹. In the silence of the executive with respect to the phenomenon of immigration, improper actors have taken charge of integration policies. The institutional deputizing was operated by the judiciary, local institutions, charities, school and the police, which forcibly gave life to a model extremely rich in contradictions, based on a downward assimilation handing over to migrants a marginalization and stigmatization, self-producing a harsh debate about religious and ethnic differences.

Academics have also tried to bridge the institutional gap by attempting to categorize the Italian approach to immigration, thus facilitating the political and social discourse about which policies would suit it best. Riccardi has proposed a “latin” model of integration based on the ancient juridical feature

¹⁸⁰ Colombo M., Richardson J. (2013) *Continuity and change in populist anti-immigrant discourse: An analysis of the visual propaganda of the Lega Nord*, pp. 180-202

¹⁸¹ As demonstrated by the proliferation in Italy of Mosques based on shaaritic family law, which gave life to a *de facto* parallel law and jurisprudence stemming from the dissociation of the State from any cultural development of the immigrant society.

of adoption as intended by Roman law, through which one could easily become a citizen of the Roman empire. The former Italian Minister for Integration stated in 2012 that he believed the Italian integration model to be “the sum of millions of adoptions”¹⁸²: the Latin model presented by Riccardi presents a model of integration based on physical proximity, on the convergence and divergence –not clashing– of values. Trying to describe the Italian integration, Zincone coined the term “low-conflict interaction”, where the rights of immigrants are limited in order to favor the acceptance of the latter for the native population, which would be secured by the prominent position granted to them by the legislation¹⁸³. This assimilationism without assimilation, multiculturalism without multiculturalism, produced in Italy the original model which has been referred to as *interculturalism*¹⁸⁴.

3.1.2 The migratory crisis

The issue of extensive migration became a relevant national and European emergency only throughout 2012; after the collapse of the Gaddafi regime in Libya, and in the light of the evident impossibility of building an efficient central government in the country, thousands of migrants from different regions of Africa boarded ships off the coasts of Cyrenaica and Tripolitania towards Italy; during the following three years, new refugees from Syria and Iraq started flooding the Italian coasts. Since the start of the migrant and refugee crisis, the European Union has introduced a number of institutional and policy tools for curbing migration: the externalization of Member States’ borders results from these specific and restrictive measures and operates through bilateral agreements between MS and third countries, in the light of the creation of a system of partnership with countries of origins and of transit. The main purpose behind these agreements is the holding back of irregular migrants in exchange for financial aid

¹⁸² Cit. Andrea Riccardi, interviewed during the conference “L’Europa dell’integrazione. Modelli a confronto” (2012)

¹⁸³ Zincone G. (2001), *Secondo rapporto sull’immigrazione in Italia*

¹⁸⁴ Sale G. (2016), *L’immigrazione in Europa e i diversi modelli di integrazione*, p. 8

from the EU, often expanding border control to the points of departure of migrants; as Balibar noted, “borders are no longer at the border”¹⁸⁵, they are dispersed.

The geopolitical tension in the Mediterranean region and the historical ties between Italy and Libya led to the establishment of a shared approach to migration, starting from the 1998 with the *Joint Communiqué*, which represented the premise to a broader political agreement and culminating in 2008 with the *Trattato di Amicizia, Partenariato e Cooperazione (Treaty on friendship, Partnership and Cooperation)*¹⁸⁶ signed by Gaddafi and Berlusconi. Migration entered the Italian political agenda as a relevant issue for the first time, with the introduction of the first government initiatives, mainly imposing restrictions and manifesting concerns over the security of the borders¹⁸⁷. The treaty engaged both countries in the patrolling of their respective borders with the aim of reducing the flow of migrants to Europe, in an attempt of curbing what was considered by both countries as an invasion and an assault¹⁸⁸; push back operations were considered as legal operations within the scope of the treaty, despite clearly violating the principle of *non refoulement* entrenched in art. 33 of the Geneva Convention.

In 2009 alone, Italy returned 843 Somali, Eritrean and Nigerian national to Libya through push back operations, all with the silent collusion of the EU: the situation only changed after the case of *Hirsi Jamaa and Others v. Italy*¹⁸⁹ was brought before the Strasbourg Court. The case concerned a push back operation carried out by the Italian Revenue Police which intercepted three migrant boats from Libya in open sea and, after having transferred the migrants on Italian boats, proceeded to bring them back to Libya without informing the concerned individuals of their destination and without carrying out any

¹⁸⁵ Cit. Balibar E. (1998), *The Borders of Europe* p. 217-218

¹⁸⁶ Also known as the Treaty of Benghazi

¹⁸⁷ Zincone, G., Caponio T. (2004). *Immigrant and Immigration Policy-Making: The Case of Italy*, p. 9

¹⁸⁸ Former Minister of Foreign Affairs Pisanu referred to migration as “an assault to our coasts”

¹⁸⁹ *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012

identification process. The migrants were handed over to Libyan authorities and, following to these events, two of the migrants in question died. Twenty-four of those migrants (eleven of Somalian citizenship and thirteen of Eritrean citizenship¹⁹⁰) brought the case before the Strasbourg Court, claiming the Italian authorities had violated art. 4 of protocol 4 of the ECHR¹⁹¹ in conjunction with art. 3 of the Convention¹⁹²; the Court agreed with those violations, stating that since the applicants were under Italian jurisdiction, Italy had violated the principle of *non refoulement* by extraditing the migrants, exposing them to the risk of inhuman and degrading treatments (considering the political turmoil in Libya at the time of the events).

After the 2012 events, push back operations became noticeably fewer and more careful; exasperated by the continuous flow of migrants and by the ineffectiveness of bland EU actions, Italy urged the UN to take the lead on the migratory crisis, mainly by taking action against illicit trafficking. Over the course of 2017, Italy trained and financially supported Libyan Coast Guard officials, supplying them with boats and resources to cope with the phenomenon of human trafficking and illegal migration, also imposing a new code of conduct for NGOs operating search and release operations off the coasts of Libya. Despite the rate of interceptions of migrants boats by Libyan authorities dropped sensibly since May 2017 since the Coast Guard increased its activity, Italy has now become a definitive host country¹⁹³. After being considered, until 2015, as a “waiting room” for the countries of northern Europe, Italy Italy found itself coping with the largest migrant and refugee crisis of the last fifty years¹⁹⁴, with many of the European countries closing their borders. The inability of Italian policymakers and lawmakers to adapt to immigration and approach it as a structural –and not temporary- phenomenon fueled in the Italian public opinion a distrust towards immigrants, which are

¹⁹⁰ Two of the migrants however died in unknown circumstances before the Court decided on the case

¹⁹¹ “Collective expulsion of aliens is prohibited”

¹⁹² Prohibition of inhuman and degrading treatment

¹⁹³ Colombo A., Sciortino G. (2004), *Stranieri in Italia. Assimilati ed esclusi*.

¹⁹⁴ Guild E., Costello C., Garlick M and Moreno-Law V. (2015), *The 2015 Refugee Crisis in the European Union*, p. 4

not considered as an asset, like in the multicultural model, ultimately leading to a structural flaw in the integration system.

3.2 Immigration Legislation

The Italian legal order was essentially devoid of any legislation concerning immigration until the second half of the 1980s, thus lacking specific regulations controlling the entry of foreign individuals into the country and their stay and residency. Art. 10 comma 2 of the Italian Constitution, stating that the juridical condition of the foreigner is regulated by the Italian law in conformity with international treaties and conventional law, remained unutilized until the 1980s. Sciortino¹⁹⁵ noted that as a result, when migration started to be perceived as a relevant phenomenon for the Italian political agenda, a significant number of undocumented migrants had already settled in the Italian society, and the policymakers were left to adapt to the situation of precarious status migrants by this time present in the country and the need to regulate new arrivals.

3.2.1 Pre-1998 Legislation: Law 946/1986 and Law 39/1990

The first legislation regulating entry and stay of foreigners in the Italian territory was Statute no. 943 of 30 December 1986¹⁹⁶. The relevancy of this law lies in its area of application: previous legislation concerning the development of migration flows to Italy¹⁹⁷ only applied to immigrants coming from member states of the European Community, and did not address the treatment to extra-communitarian

¹⁹⁵ Sciortino G. (2009). *Fortune and Miseries of Italian Labor Migration Policy*, p. 11

¹⁹⁶ LEGGE 30 dicembre 1986, n. 943, Norme in materia di collocamento e di trattamento dei lavoratori extracomunitari immigrati e contro le immigrazioni clandestine. (*GU n.8 del 12-1-1987*)

¹⁹⁷ Formazione scolastica dei figli dei lavoratori migrant, DPR n.722 del 10.9.1982 (GU n.280 del 11.10.1982)

foreigners. Law 943, on the other hand, defines for the first time specific social policies of control of the migratory flows, also establishing the rights of non-communitarian immigrant workers¹⁹⁸. Law 943 delegated the implementing of an official integration policy to local administrations, namely to regions; the regulations delineate five main areas of intervention for the regional administrations: the creation of regional consultation bodies; the implementing of courses of professional requalification; favoring the integration of migrants through courses of Italian culture and language; promoting the national culture of migrants; favoring the preservation of the migrants' culture and language.

The groundbreaking legislation was founded on two main principles: the integration of the immigrant through the recognition of equality between Italian and foreign workers, entrenched in title IV of the law, which defines the issue of regularization of the precarious status migrants, also recognizing a control on new immigrations based on the curbing of illegal migration. The law established for the first time the right of regular migrants to family reunification in art. 4; the constitutionality of the provision was challenged in the case *Telma De Castro Carvalho v. Italian Ministry of Interior*¹⁹⁹. The applicant, a Brazilian national married to an Italian citizen, was denied right to family reunion for her son –who was born outside the marriage- since she did not work in Italy, but contributed to the family as a housekeeper. The Regional Tribunal of Friuli Venezia Giulia held that law 943 violated art. 29²⁰⁰ and 30²⁰¹ of the Italian Constitution, yet the issue of constitutionality was dismissed by the Constitutional Court, which judged that despite the work of a housekeeper was indispensable for the family, it did not amount to “work” under the prescriptions of the 943 act, which was addressed only to migrant workers, and thus it did not raise an issue of constitutionality²⁰².

¹⁹⁸ Favaro G., Tognetti Bordogna M. (1989), *Politiche Sociali ed Immigrati Stranieri*

¹⁹⁹ *Telma De Castro Carvalho contro Ministero degli Interni*, Ricorso n. 835/93

²⁰⁰ Which establishes the protection of the family as a “natural society founded on marriage”

²⁰¹ Equiparating illegitimate children to legal ones before the law

²⁰² Sentenza N. 28, Anno 1995

The main limit of the legislation, as showed by the above mentioned case, was the specific subjects of its purpose: the law was addressed to migrant workers, and thus left out various other categories of migrants (like students and refugees); furthermore, despite formally granting equal civil rights to migrants and establishing a fair access to health care, public housing and education, no actual financial resources were allocated to the regional administrations for this purpose²⁰³. The necessity to regulate access to migrants who arrived in Italy after the terms specified by the law, and the need to introduce a broader legislation concerning the entry of all categories of migrants, ultimately translating the honorable principles established in law 943 into an effective legislation, will be the main drivers of the successive lawmaking leading to new legislative developments²⁰⁴.

The inadequacy of the 1986 law led the lawmakers to the passing of a new Immigration Act, law no.39 of February 1990²⁰⁵, also known as the “Martelli law”. The new legislation stemmed from the social tension around the issue of public housing for migrants, whose presence caused aggressive reactions by the Italian neighbors; the situation peaked in southern Italy in 1989, when a black worker was murdered by a group of right-wing supporters, fueling a public debate on the need to provide migrants with better tools to survive in the Italian society. With law 39, migration went back to being considered an emergency issue, ultimately leading to the implementation of a legislation voted to the providing of a decent life for migrants. Law 39/1990 mended the previous legislation flaws’ by allocating financial resources to regions for the construction of reception centers, shelters created to provide migrants with a temporary accommodation before their moving on to more permanent adjustments. The act also set

²⁰³ Zincone G., Caponio T. (2005), *Immigrant and Immigration Policy-Making: The Case of Italy*, p. 3

²⁰⁴ Zincone G. (1998), *Illegality, enlightenment and ambiguity. A hot Italian recipe*, p.50

²⁰⁵ LEGGE 28 febbraio 1990, n. 39, Conversione in legge, con modificazioni, del decreto-legge 30 dicembre 1989, n. 416, recante norme urgenti in materia di asilo politico, di ingresso e soggiorno dei cittadini extracomunitari e di regolarizzazione dei cittadini extracomunitari ed apolidi già presenti nel territorio dello Stato. Disposizioni in materia di asilo. ([GU Serie Generale n.49 del 28-02-1990](#))

up a threshold for the number of extra-communitarian migrants allowed to enter Italy yearly²⁰⁶, and finally allowing asylum seekers into Italy, making it mandatory for Italian authorities to issue visas for individuals coming from emigration countries.

Following the collapse of the communist regimes, a new flow of migrants started pushing at the borders of Italy from the Eastern European Countries, and namely from Albania and former Yugoslavia. The new Italian immigration policies, now having to fulfill the EU provisions contained in the Schengen Agreement and Maastricht Treaty, were also designed to favor the immigration of eastern Europeans for humanitarian reasons. “The Dini decree of 1995”²⁰⁷ allowed the settlement of migrants more permanently, also introducing stricter measures against trafficking and smuggling and providing for broader health care and education²⁰⁸ benefits²⁰⁹. The decree, which failed to be transposed into law, was part of a broader attempt to reform integration policies in Italy, which was later achieved with the Law 40/1998.

3.2.2 Law 40/1998

In the second half of the 1990s the logic of the emergency was gradually abandoned in favor of a more general and systematic normative framework²¹⁰: the law (law 40/1998)²¹¹ represented the key

²⁰⁶ The provision still prioritized unemployed Italians and European workers, and unemployed non-European residents, with extra-communitarian non-residents only being allowed in as a third choice.

²⁰⁷ DECRETO-LEGGE 18 novembre 1995, n. 489 (Decaduto per mancata conversione) - Disposizioni urgenti in materia di politica dell'immigrazione e per la regolamentazione dell'ingresso e soggiorno nel territorio nazionale dei cittadini dei Paesi non appartenenti all'Unione europea. ([GU Serie Generale n.270 del 18-11-1995](#))

²⁰⁸ The Decree granted the right to enroll in public schools to the children of undocumented immigrants.

²⁰⁹ Colombo M. (2013), *Discourse and politics of migration in Italy: the production and reproduction of ethnic dominance and exclusion*, p. 162

²¹⁰ Calvanese E. (2011), *Media e immigrazione tra stereotipi e pregiudizi. La rappresentazione dello straniero nel racconto giornalistico*, p. 50

²¹¹ Legge 6 marzo 1998, n. 40 "Disciplina dell'immigrazione e norme sulla condizione dello straniero.", pubblicata nella *Gazzetta Ufficiale* n. 59 del 12 marzo 1998 - Supplemento Ordinario n. 40

regulation in this framework. Law 40/1998 was composed of seven titles, concerning respectively: the normative principles; the entry, stay and forced exit of migrants; the entry for work reasons; the migrants' family and minors; citizenship rights; EU citizens; final dispositions. The Law also contained an enabling act for the Italian executive for the drafting of a decree summarizing the existing law and regulations concerning migration. The enactment of the governmental decree led to the approval of the *Testo Unico (TU) sull'immigrazione* of 1998²¹², which has since been amended but is still in force, and its original text was analyzed by Zincone and Caponio²¹³ as consisting of four pillars.

The first pillar, the prevention and fight of illegal migration, was grounded on the establishment of temporary accommodation centers where illegal immigrants would be detained during their wait for the repatriation procedure; further measures against trafficking were implemented with the introduction of social and residency benefits for the victims willing to denounce their traffickers. The second pillar concerned the regulation and managing of inflows of migrants into the country migrants through the introduction of the system of *entry quotas*, established according to the demand of foreign manufacture²¹⁴, and the institute of *sponsorship*, based on a private work relationship of the migrant with the employer. The third pillar, the promotion of integration policies, operated through a more specific regulation for access to permanent residency (set at five years of stay), and the institution of a National Fund to finance integration policies enacted by the local administrations²¹⁵. For what concerns the fourth pillar, the treatment of undocumented migrants, the law 40/1998 acknowledged the migrants' social rights, dedicating the entire title V of the law to dispositions concerning health care, education, housing and participation to the public and social life of the country; the act stated the equality of

²¹² d.lgs. 25 luglio 1998 n. 86, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero

²¹³ Zincone G., Caponio T. (2005), *Immigrant and Immigration Policy-Making: The Case of Italy*, p. 4

²¹⁴ Cognini P. (2008), *La disciplina dell'ingresso e del soggiorno per lavoro*, p. 6

²¹⁵ Funds were assigned to Regional Councils who reallocated them to local authorities and organizations after having identified the priority areas.

Italians and regular migrants from the point of view of social rights, also introducing policies typical of the multicultural model²¹⁶. These dispositions were further enriched by the important innovation of the introduction in art. 44 of civil action against discriminations, and the creation of a new concept of crime. A corrective decree (decree no. 380/1998) later introduced an amnesty for 220.000 illegal migrants²¹⁷.

Despite the relevant innovations, the discipline of the foreigners' stay designed within the TU of 1998 did not emancipate the immigration policy from the traditional concept of the migrant, defined in a fitting description by Pepino as "a guest on perpetual probation"²¹⁸. The process of *precarization* of the regular migrant which characterized the years following the enactment of law 40/1998 was best described by Bucci²¹⁹, who noted that the status of regular migrant was easily lost to the difficult maintaining of the strict requisites for the renewal of permanent residency and to the cumbersome and lengthy administrative procedures.

The lack of a mechanism of regularization of illegal entry or stay represented in fact one of the most relevant limits of law 40/1998, thus preventing the access *ex post* to permanent requisites, following the acquisition of the required conditions; a mechanism of this sort would noticeably reduce the idea of irregularity, encouraging a more virtuous behaviour of the immigrants. The stressing of the binary logic characterizing the Italian immigration policies, divided between integration policies addressed to regular migrants and strictness in the treatment of irregular migrants²²⁰, was openly expressed by the report explaining the law: the legislators cleared their intention of marking a sharp distinction between the regular and irregular migrant, which ultimately resulted in an irregular situation. The normative

²¹⁶ The setting up of a National Integration fund and the financing of cultural mediators

²¹⁷ Blangiardo G. C., Tanturri M. L. (2004), *Il popolo dei regolarizzati*, p. 50

²¹⁸ Pepino L. (2015), *Prove di paura. Barbari, marginali, ribelli*, p. 14

²¹⁹ Bucci G. (2005), *Eguaglianza, immigrazione e libertà di circolazione nell'era della mondializzazione dell'economia*, p.

393

²²⁰ Pastore F. (1998), *Migrazioni Internazionali e ordinamento giuridico*, p. 1047

framework, by providing expulsion as the only tool to answer the –although clearly different- situations of irregularity, made the logistics of repatriation ultimately ineffective: the rush towards a solution to the problem of finding a quicker procedure for removal of illegal migrants from Italy would be one of the main drivers of the following legislative intervention.

3.2.3 Law 189/2002

The law of July 30, 2002²²¹, takes the name of the former *Alleanza Nazionale* leader Gianfranco Fini and Umberto Bossi, former leader of *Lega Nord*, in 2002 seating respectively as Vice-President of the Council of Ministers and Minister for the Institutional Reforms. The main goal of this law was the regularization and harmonization of the precedent legislation concerning migration, amending and repealing law 40/1998. The law set out two main branches of action: strengthening the link between residency and employment, mainly dissuading migrants from permanent settlement in the country (as they have been interpreted by Pugliese²²²), and curbing illegal immigration. The innovations introduced by the legislation consisted of a decisive segment concerning irregular migration, and the discipline of entry and stay: from the point of view of the former, the amendments introduced by law 189/2002 are characterized by a drastic hardening of the discipline of the entry of migrants, which inevitably brought to a raise in the number of irregular migrants.

The act considerably restricted access to residence permits, thus significantly reducing the grounds for legal access and stay in Italy; measures concerning the validity of the residence permit and the requisites to remain in Italy were amended, lowering the duration of the permit from twelve to six months for unemployed migrants. Residence permits granted through the institute of sponsorship were

²²¹ LEGGE 30 luglio 2002, n. 189, Modifica alla normativa in materia di immigrazione e di asilo (Gazzetta Ufficiale n. 199 del 26 agosto 2002 - Suppl. Ordinario n.173)

²²² Pugliese E. (2006), *L'Italia tra migrazioni internazionali e migrazioni interne*

also abolished following the introduction of a more rigid subordination to the access to legal employment, which has to be certified in the newly introduced “contract of residency”, through which the employer was required to provide for accommodation and travel expenses in the case of dismissal of the immigrant worker. These measures, based on an ideological-functionalist approach, introduced in theory to facilitate the individuation of illegal migrants and their removal from the country, proved in practice to be largely ineffective, ultimately raising the number of illegal migrants due to the high chances to find a migrant –even a previously regular one- in an illegal position. Section 33 of law 189/2002 showed a more solidarist approach evident in the intent to allow regularization for home helps and care providers, and the elimination of the provision excluding employed migrants from the amnesty, yet leaving the entire apparatus of social rights for both legal and illegal migrants intact. In 2003, the law was amended in the provision establishing a threshold for migrant entries established yearly by the executive, re-introducing the mechanism of inflows regulated by demand in the labor market.

The strengthening of the repatriation and expulsion procedures, namely the introduction of the rule of the immediate execution of expulsions through forced escorting to the borders (even with appeals of the subject pending, and without any possibility of defence) was the most relevant introduction to the immigration legislation, causing a public and judicial debate in which the constitution emerged, as noted by Joppke²²³, as the main grantor of the rights of migrants. Before addressing the issues of constitutionality raised before the Constitutional Court, it must be remembered that the Italian constitutional review procedure arises from national judges in a bottom-up process, with the judge holding a constitutional issue before the Court. After the enactment of law n.189, more than one thousand cases were referred to the Constitutional Court, claiming the unconstitutionality of the provision concerning the coerced expulsion. The rigidity of law 189/2002 concerning entry and

²²³ Joppke C. (2001), *The legal-domestic sources of immigrant rights. The US, Germany and the European Union*, p.354

granting of residence permits, as well as regulations facilitating the loss of the legal status, was harshly fought by national judges and by the Constitutional Court and led to a judgement of unconstitutionality by the with *sentences no.222²²⁴ and 223²²⁵ of 2004*, through which the Court held that forced expulsion violated art. 13²²⁶ and 24²²⁷ of the Italian Constitution. The Constitutional Court performed an important balancing between the statutory provisions of security and public order, and the right of migrants to legal defense. The Court's decisions in the two benchmark sentences are particularly relevant in the light of the protection granted by the Italian judiciary: The Constitutional Court extended the protection granted by the European Convention of Human Rights to migrants in the same issue, by stating the illegitimacy of arrest, while the ECHR had established time and time again the legitimacy of detention to prevent the immigrant from illegally entering the State's territory. The judgement required considerable adjustments to the law by lawmakers, and the issue of security and forced expulsion remained in the Italian political and social debate until the amendments made in 2008 to the immigration law.

3.2.4 Recent legislative developments: the Italian Integration Agreement

In the light of the discussion concerning immigration and security, the Berlusconi government of 2008-2011 re-introduced a restrictive immigration policy: the law no. 125 of July 24, 2008²²⁸ established the judicial expulsion for EU citizens and extra-EU citizens in case of conviction to more than two years of

²²⁴ Corte costituzionale - sentenza 8-15 luglio 2004, n. 222 Presidente Zagrebelsky - Relatore Mezzanotte

²²⁵ Corte Costituzionale - Sentenza 8-15 luglio 2004, n. 223 Presidente Zagrebelsky - Relatore Mezzanotte

²²⁶ Personal freedom is inviolable and any provision limiting it must be evaluated by a judge)

²²⁷ Right to defense

²²⁸ Legge 24 luglio 2008, n. 125, "Conversione in legge, con modificazioni, del decreto-legge 23 maggio 2008, n. 92, recante misure urgenti in materia di sicurezza pubblica" pubblicata nella *Gazzetta Ufficiale* n. 173 del 25 luglio 2008

confinement, other than for a number of other situations²²⁹. Legislative decree 92/2008 also introduced the important novelty of the aggravation of illegal immigration, “*aggravante di clandestinità*”: the decree, raising doubts of constitutionality already in the first phases of its enactment, was later annulled by the Constitutional Court with *sentence 249 of July 5, 2010*²³⁰. In its reasoning, the Court held that the decree violated the constitutional principles of reasonability and equality, other than the principle stating the respect of the fundamental rights implies the illegitimacy of criminal-law judgements aggravated by personal features of the subject to the judgement. Legislative decree no. 160 of October 3, 2008²³¹ amended the previous legislation on family reunification by significantly restricting the scope of application. Law no. 94 of 2009²³² introduced new measures of public security, the most important of which is the creation of the offence of illegal immigration and stay: the controversial bill, by making illegal entry or stay into the country a punishable offence was part of a broader “security package – Pacchetto sicurezza” which aimed at reinforcing the already strict regulatory framework. One interesting consideration about migrant illegality is that this status is produced by the host society itself: De Genova²³³ pointed out how Italy is *de facto* producing illegal migrants, creating new categories of deportable migrants as the legislation on the matter expands. The Constitutional Court, despite being often called upon to judge on the unconstitutionality of the offences of illegal entry or stay established by art. 10*bis* of law 94/2009, did not intervene with a judgement of unconstitutionality. The European Court of Justice, however, was called upon to judge on the compatibility of the new

²²⁹ Felony against the State, conviction for a penalty restrictive of the personal freedom, false attestations on personal identity

²³⁰ Sentenza 249/2010 (ECLI:IT:COST:2010:249), Giudizio Di Legittimità Costituzionale In Via Incidentale

²³¹ Decreto Legislativo 3 ottobre 2008, n. 160, "Modifiche ed integrazioni al decreto legislativo 8 gennaio 2007, n. 5, recante attuazione della direttiva 2003/86/CE relativa al diritto di ricongiungimento familiare" pubblicato nella *Gazzetta Ufficiale* n. 247 del 21 ottobre 2008

²³² Legge 15 luglio 2009, n. 94, "Disposizioni in materia di sicurezza pubblica" pubblicata nella *Gazzetta Ufficiale* n. 170 del 24 luglio 2009 - Supplemento ordinario n. 128

²³³ De Genova N. (2002), *Migrant 'illegality' and deportability in everyday life*, p. 438

offence of illegal entry and stay with EU provisions in the case *Sagor MD v. Italy*²³⁴. Art. 10 of law no.94 stated that any individual guilty of illegal entry or stay would be condemned to the payment of a fine, and in case of insolvency, to house arrest. The ECJ, stating that Member States of the EU are required to proceed to the expulsion of the illegal migrants, thus making the Italian provision of house arrest illegitimate.

In 2012, the Italian government introduced the institute of the *integration agreement*: through this tool, Italy measures the level of integration of immigrants and sets a specific threshold of successful integration in the Italian society. The integration agreement was part of the 2009 security package²³⁵, representing an initiative of the then Ministry of Interior Roberto Maroni; the provision, implemented for the first time in March 2010, only came into affect after the Presidential Decree 179/2011²³⁶. The agreement, also consisting of a “*Charter of the values of citizenship and integration*”²³⁷, requires immigrants wishing to apply for a residence permit to sign an integration agreement and thus committing to the achievement of specific integration goals.

The provisions list as requirements for successful integration the knowledge (level of A2 or above) of the Italian language and the familiarity with Italian culture and social life, the completion of school obligation for their children, the obligation to fulfil tax payments. The integration agreement also requires the acceptance and acknowledgement of the principles and values of the Italian society by declaring their agreement to the Charter of Values. In exchange for the immigrants’ acceptance of the Integration Agreement and the Charter of Values, the Italian State grants enjoyment of fundamental

²³⁴ First Chamber of the CJEU, decision no. C-430/11 of 06-12-2012

²³⁵ art. 1 paragraph 25 of law 94/2009, then absorbed into art.4 of the “Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero” (d. lgs 286/1998)

²³⁶ DECRETO DEL PRESIDENTE DELLA REPUBBLICA 14 settembre 2011, n. 179, Regolamento concernente la disciplina dell’accordo di integrazione tra lo straniero e lo Stato, a norma dell’articolo 4-bis, comma 2, del testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero, di cui al decreto legislativo 25 luglio 1998, n. 286. (11G0221) ([GU Serie Generale n.263 del 11-11-2011](#))

²³⁷ Already in force since 2007 through Decree of the Ministry of Interior of 23 April 2007

rights and equal dignity of all individuals without distinctions based on sex, race, language, religion, political opinions and personal or social conditions, preventing any manifestation of racism or discrimination²³⁸. The acceptance of the Agreement is a necessary condition for the release of the residence permit: once signed, the maintenance of the status of regular migrant rests on the degree of satisfaction of requisites of integration, on the ratio of a point-based system (hence the emergence of the term “point-based permit”, “*permesso a punti*”) where each applicant for the residence permit is given sixteen points. Points can be gained through the acquisition of education titles, the participation in volunteering initiatives, the choice of a family doctor or the renting or buying of an apartment; points can be lost for convictions for administrative or tax felonies. The loss of all credits (or points) results in the withdrawal of the residence permit and the removal of the immigrant from the national territory²³⁹, except for some protected categories which do not risk the loss of the residence permit (see asylum seekers or refugees or individuals having exercised the right to family reunion).

The agreement has a validity of two years, at the end of which the immigrant is subjected to a screening from public authorities (namely the Prefecture): if the final credits amount to more than thirty, and the agreement has already been renewed for one year, the agreement is considered to be extinct; if the final credits amount to zero, or if the immigrant has not fulfilled the school obligation of its children, the immigrant is expelled.

As Carrera²⁴⁰ pointed out, similar instruments have been more or less successfully implemented in both EU and non-EU countries such as France, Germany, UK and Switzerland, yet they all required a mandatory integration path for foreign citizens wishing to acquire a permanent residence permit, not an ordinary one like the Italian agreement requires. This important distinction implies some aspects of

²³⁸ Allegato A, art. 2, del Regolamento

²³⁹ Art. 4bis, comma 2, Testo Unico

²⁴⁰ Carrera S. (2006), *A Comparison of Integration Programmes in the EU. Trends and Weaknesses*, pp. 3-6

discrimination of the Italian Integration Agreement concerning mostly social rights (public housing, children care subsidies): since the Italian legislation only provides for summary indications concerning the objectives of the integration agreement, it leaves the specific discipline of the tools required to reach these objectives upon the executive. Cuttitta²⁴¹ observed that the very fact of the regulation of specificities of the agreement being left to an administrative act, hence out of the Parliament's control, raises strong doubts of constitutionality, violating the rule of law entrenched in art. 10 of the Italian Constitution²⁴²: the article establishes that the legislator is the only body with the power to intervene to change the status of foreign citizens, thus a pronouncement of the Constitutional Court on the issue results extremely necessary, especially considering the gravity of the consequences (revocation of the residence permit, expulsion, loss of integration credits).

As clarified above, the citizen petitioning for the release of the residence permit declares to adhere to the Charter of Values of Citizenship and Integration, and commits to the respect of its principles. This document, drafted by a scientific Committee composed of five academic members, opens with a preamble followed by 31 paragraphs, divided in six sections: dignity of the individual, rights and responsibilities; social rights, work and health; social rights, school, education and information; family, new generations; secularism and religious freedom; Italian international commitments. The Charter, according to the preamble of the Ministerial Decree, establishes the inspiring principles of the Italian society and legal order concerning the regulation of the migratory phenomenon. In the same way, in the framework of cultural and religious pluralism, the Minister of Interior commits to act in the respect of the Charter and of social cohesion and integration in its actions concerning the immigrant communities.

²⁴¹ Cuttitta P. (2013), *L'accordo di integrazione come caso di discriminazione istituzionale in Italia*, p. 261

²⁴² art. 10 of the Italian Constitution: "the juridical condition of the foreigner is established by the law in conformity with international norms and treaties"

An interesting feature of the Charter of values is that it consists of the enunciation of principles inspired by the Italian Constitution, and more in general by the Italian legal order. In other words, Constitutional principles are selected, interpreted and reformulated through statements which are liberally inspired by ordinary laws. One of the most relevant examples of this arbitrariness in the choice of inspiring principles is evident in paragraph 26 of the preamble (“Secularism and religious freedom”), which states that “items of clothing covering the face are not acceptable as they prevent the identification of the person and preclude interactions with other individuals”. The ambiguity of the chosen form “are not acceptable” implies that dressing in such a way that the face is covered is in any case prohibited by the Italian law, but art. 5 of law 152/1975 (amended by the law 533/1977) simply states that the use of protective helmets or any other tool preventing the identification of the individual without a valid justification is prohibited. This implies that covering one’s face with a valid justification, for example for religious reasons, is allowed: the legislator, by using the form of “acceptable” in the Charter, makes a clear reference to the religious and cultural traditions of the Islamic people, which is also evident in the choice of placing this provision under “secularism and religious freedom” and not “dignity of the person, rights and responsibilities”. This is consistent with Cuttitta’s²⁴³ view that the Charter openly defies the constitutional principle of the State’s secularism, by often referring to the “Christian tradition of Italy”²⁴⁴: a juridical interpretation of the Charter’s provisions would thus imply a violation of the Constitutional principles of freedom of religion and freedom of thought, through the imposition of the drafting committee’s opinions and peculiar interpretations of specific norms.

Before the introduction of the Integration Agreement, the possibility for migrants to obtain a residence permit was subordinated to the satisfaction of the main –and maybe only- condition of the holding of a work contract. Now another requirement is to be satisfied: the acceptance of the Charter of Values, a

²⁴³ Cuttitta P. (2013), p. 268. Op. cit. p. 87

²⁴⁴ See for example the preamble of the Charter: “Italy evolved in the prospect of Christianity”

document clearly reinterpreting both the Italian history and the juridical principles of the Italian legal order. The document, besides defying, as already noted, the Constitutional principles of the freedom of thought and religion, fails to grant the principle of non-discrimination (Italian citizens, in fact, are required neither to explicitly accept the principles of the Constitution nor to adhere to the whole Italian legal order).

The introduction of the tool of the point-based permit raises the already high number of precarious status migrants by substantially adding to their list of requirements for the holding of a residence permit (Santoro 2006²⁴⁵), making them now liable to lose their acquired residency status over the loss of integration credits. The document's discrimination and precarization of the migrant, in this light, reflects the Italian logic of a "differential inclusion"²⁴⁶ of the migrant in the social and legal tissue, operating on exclusion and not its opposite: in its latest legislative actions, in fact, the Italian executive leaned towards a form of "chosen", not "suffered" migration, within an integration model which can be described as "*civic integration*"²⁴⁷.

3.3 The role of regions in the process of integration

The issue of migration represents a particularly problematic aspect of the separation of competences between State and Regions. Despite the reform of Title V of the constitution²⁴⁸ attributed the regulation of matters concerning the juridical condition of the foreigner, the right to asylum and international protection and the discipline of immigration to the exclusive legislative competence of the State (art.

²⁴⁵ Santoro E. (2006), *La fine della biopolitica e il controllo delle migrazioni: il carcere strumento della dittatura democratica della classe soddisfatta* pp. 293-321

²⁴⁶ Mezzadra S., Neilson B. (2013), *Border as a method, or, the multiplication of labor*, p. 161

²⁴⁷ Gargiulo E. (2014), *Dall'inclusione programmata alla selezione degli immigrati: le visioni dell'integrazione nei documenti di programmazione del governo italiano*, p. 222

²⁴⁸ Legge costituzionale 18 ottobre 2001, n. 3 "Modifiche al titolo V della parte seconda della Costituzione", pubblicata nella *Gazzetta Ufficiale* n. 248 del 24 ottobre 2001

117, comma 2, lett. A) and B), Bonetti²⁴⁹ noted, in analyzing the jurisprudence and legislative practice that this separation was not satisfactory. Title V of the Constitution, by attributing the legislative competence exclusively to the national legislator, ignored the important influence of said legislation on areas of specific competence of the Regions, namely in the sanitary and social field.

Constitutional law 3/2001 mainly concerns the aspects relative to the control of migratory inflows, leaving the issue of social integration open. It should be noted that Regional Competences are residual with respect to the titles of competence relative to the different policies: since neither the Constitution nor the TU on immigration provide for a specific regulation, the discipline of the above mentioned aspects is left to Regions. Part of the doctrine (see Ruggieri and Salazar²⁵⁰, Passaglia²⁵¹, Bonetti²⁵²) in line with this branch of opinion, considers immigration as a “*metaissue*”, a diagonal issue concerning different levels of government and legislation: constitutional jurisprudence on the matter, in fact, clearly demonstrates the problematic individuation of the legislative discipline of social and civil rights and their criteria and methods of enjoyment by the foreigners.

The prevalent doctrine and constitutional jurisprudence considers the discipline of the juridical condition of the foreigner (lett. a), comma 2 of art. 117 of the Constitution) as inclusive of the regulation of entry, stay and expulsion of the foreigner; and the discipline of immigration (art. 117, comma 2, lett. b) as comprehensive of the regulation of entry quotas and immigration policies²⁵³. The Constitutional Court was the main driver of the tendency to attribute to regions the matters concerning

²⁴⁹ Bonetti P. (2003), *intervention during the works of the Study Commission for the revision of regional law on immigration*, Regione Campania

²⁵⁰ Ruggieri A., Salazar C. (2004), *Ombre e nebbia nel riparto delle competenze tra Stato e Regioni in materia di emigrazione-immigrazione dopo la riforma del titolo V*, p. 31

²⁵¹ Passaglia P. (2006), «*Immigrazione*» e «*condizione giuridica*» degli stranieri extracomunitari: la Corte costituzionale precisa i termini del riparto di competenza (...e torna sulla portata delle enunciazioni di principio contenute negli statuti), p. 352

²⁵² Bonetti P. (2002), *Ordine pubblico, sicurezza, polizia locale e immigrazione nel nuovo art. 117 della Costituzione*, p. 484

²⁵³ This is the opinion of the Constitutional Court as expressed in sentences nn. 50/2008 and 156/2006, where the court stated that public intervention cannot be limited to the control of entry and stay, but has to take into account social assistance, education, housing, which are all concurrent competences.

work, education, public housing and health care: in sentence n. *134/2010*, the Court clearly states that the possibility of regional legislative interventions have to be granted in the field of immigration and namely in the regulation of social rights of immigrants. This sentence is in fact coherent with the branch of academic opinion interpreting the competences of the State as established by art. 117 of the Constitution in a restrictive way (se Gallo²⁵⁴, Felicori²⁵⁵).

The implications of this interpretation, however, are far from being object of a uniform opinion: Corpaci²⁵⁶ pointed out that this ambiguity is entrenched in art. 118 of the Constitution, stating that the coordination of immigration policies is demanded to both State and Regions. In particular, the doctrine wondered about the positive interpretation of the norm, in its meaning of privileging regional and State action in public order, security and immigration, or in its negative connotation of excluding from this functions the regional and provincial level. The main interpretation holds that State and Regions should both be able to discipline immigration policies: in this light, the State will hold the competences of international relations, security and citizenship, and Regions will hold the administrative functions of social integration and immigrant policies management.

The provisions of the TU, in particular, regulate the areas of specific competence of the Regions at art.1, comma 4: the law establishes that Region can adopt detailed legislation in matters concerning education and health care, yet still leaving them unable to regulate the issue of social care and services, which fall both in the areas of general competence of the Regions. More in general, art. 3, comma 5 of the TU establishes that Regions and local administrations adopt provisions concerning the removal of obstacles to the full recognition of rights and interests of foreigners, namely obstacles preventing

²⁵⁴ Gallo C.E (2001). *Le fonti del diritto nel nuovo ordinamento regionale. Una prima lettura*, p. 91

²⁵⁵ Felicori G. (2001), *Il processo di semplificazione e federalismo amministrativo nelle politiche sociali*, p. 1002

²⁵⁶ Corpaci A (2001), *Revisione del titolo V della parte II della Costituzione e sistema amministrativo*, pp. 1305 ss

equality in the areas of housing, language, social integration and respect of fundamental human rights²⁵⁷.

3.4 Citizenship Legislation

The comparative analysis of the concept of citizenship in Italy is particularly interesting for the study of the legislation on the matter; the awaiting of an appropriate normative intervention reshaping the current legislation has resulted in a renewed interest in the issue of the national model of citizenship and its current needs in the light of the new migratory flows. The State-led perspective which governed the acknowledgement of citizenship is best represented in the national prerogative of establishing the necessary conditions for the recognition of the status of citizen, established freely by sovereign states²⁵⁸; the incidence of foreign citizens legally present in the State territory, and the transformation of State legal orders in the light of a greater inclusion of immigrant rights led to the reshaping of the concept of citizenship as comprehensive of the whole community residing within the State.

Furthermore, the redesigning of citizenship in EU Member States and the gradual introduction of the concept of *European citizenship* in the last decade of the XXth century, attributed a legal status to all citizens of Member States. EU citizens, after the entry into force of the Maastricht Treaty, have come to represent a peculiar and original legal position, whose discipline is demanded to European law. The introduction of this new dogmatic category favored and perhaps accelerated the process of erosion of the traditional concept of citizenship, which was already being reframed in the light of the expansion to foreigners the traditional rights historically linked to the *status civitatis*, i.e. of civil, social and politic

²⁵⁷ Ronchetti L. (2012), *Regioni e diritti di cittadinanza degli immigrati*

²⁵⁸ Sechi O. (1902), *voce Cittadinanza - Diritto italiano e legislazione comparata*, p.223

rights. In this light, the difference in treatment and discriminations on the basis of naturalistic or factual differences appears to be less justifiable, in favor of the recognition of a core of human rights, independently from the status of citizen.

The concept of citizenship, and consequently the legislation regulating it, is undergoing a process of lengthy and slow adaptation to the requests of a new class of “potential citizens”²⁵⁹, an extremely fitting definition for Italian immigrants in the current legal and political discourse about citizenship legislation.

The idea of citizenship is one of the key values of the Italian Constitutional text, for it is tied to the great majority of rights and tools of protection granted to Italian subjects. The 1948 Constitutional text however, appears somewhat inefficient in mirroring the changes in the Italian society: Caravita di Toritto correctly pointed out that it is clear, from the constitutional text, that its framers were inspired in citizenship legislation by “the national spirit of the last century”²⁶⁰. From a systematic point of view, the Italian Constitution appears to reject ethnic or cultural features of citizenship, in favor of the economic, social and cultural perspective of integration into the Italian society. The Constitution disciplines the institute of citizenship through art. 22, specifying that citizenship cannot be revoked for political reasons; besides this provision, the constitutional text does not determine any criteria of identification or requirement for the access of citizenship at the constitutional level. This decision of the Constitutional Assembly may be interpreted as the expression of the will to consider citizenship in its connotation of integration in the tissue of one society. The Constitutional Court, however, did not address the issue of citizenship acquisition or loss, in line with the principle of discretionality of the

²⁵⁹ V. Onida (2009, *Relazione introduttiva, Convegno dell'Associazione Italiana Costituzionalisti “Lo statuto costituzionale del non cittadino”*, p. 3 ss

²⁶⁰ Caravita di Toritto B. (2009), *I diritti politici dei non cittadini. Ripensare la cittadinanza: comunità e diritti politici*, p. 12

legislator and rejecting the existence of a subjective right to citizenship in sentence no. 490/1988²⁶¹ (“art. 3 of the constitution is addressed to Italian citizens, and to non-citizens only with reference to the protection of fundamental rights, and the acquisition of citizenship does not fall in this category”).

3.4.1 Legislation in force

The normative reference for citizenship legislation, in the silence of the Constitution, is the ordinary law n.91/1992²⁶². Law 91, despite repealing the previous legislation dating back to 1912, essentially maintained the structure of the precedent citizenship legislation, except for some innovative provisions that can be summarized in the hardening of the requisite of residence for the purpose of naturalization, and the facilitation of the acquisition of citizenship for Italian citizens abroad.

Art. 1 of law 91 states that an individual is an Italian citizen “by birth” when one of his/her parents are Italian citizens. This disposition is based on the previous 1912 legislation²⁶³, founded on the principle of *jus sanguinis a patre*, according to which citizenship was to be granted to any child whose *father* was an Italian citizen. The idea of the transmission of citizenship by “inheritance”, as opposed to its legal acquisition, shows a tendency of the legislator to enhance only some features of the concept of nationality, disregarding the characteristics typical of the cultural and social belonging to a nation: in this light, the ethnic and racial element on which the Italian citizenship legislation focuses, appears to be of secondary importance before the identification of the communitarian dimension at the basis of the *status civitatis*²⁶⁴.

²⁶¹ Corte Costituzionale, Sezione Unica, Ordinanza n. 490 del 27-04-1988.

²⁶² Legge 5 febbraio 1992, n. 91 (Nuove norme sulla cittadinanza), repealing the previous 1912 law.

²⁶³ Law no. 555 of 1912

²⁶⁴ Porena D. (2012), *C'è spazio anche in Italia per una concezione “culturalista” della cittadinanza? Brevi profili comparatistici e spunti di riflessione in vista di una revisione della legislazione nazionale*, p. 18

The 1992 legislator had three main concerns in the drafting of the citizenship law: reflecting the classic Italian strand of opinion considering immigration as a temporary phenomenon, the law drafted a system whose main concern was revitalizing and protecting the “Italian roots” of the thousands of people who had lost citizenship due to emigration. The second issue addressed by the law was the necessity to amend and repeal some aspects of the previous legislation, introducing the provisions contained in the 1975 family law reform, thus stating the equality between husband and wife and between men and women, abrogating the principle of *a patre* citizenship. With regards to marriage, the Court of Cassation stated in *sentence no. 4466*²⁶⁵ that women whose parents were Italian citizens maintained the Italian citizenship even in the case of marriage to a foreigner, eliminating the effects of law 555/1912 and correctly applying the Italian Constitution in its granting of full equality between men and women. The last concern of the drafters of the 1992 legislation was the elimination of any automatic acquisition or loss of citizenship, introducing specific provisions for the verification of requisites and evaluation of the individual circumstances.

The legislation establishes three paths to citizenship:

1. the criterion of citizenship by descent, which was left untouched in its nature of pillar of the Italian citizenship law, establishing that an Italian citizen is someone who is born from Italian parents, even if outside of the Italian territory;
2. the principle of territorial acquisition of *jus soli* as a residual measure, reserved mainly to children of stateless or unknown parents and to children who cannot acquire the citizenship of their parents due to their State’s legislation;

²⁶⁵ Sentence no. 4466 (2009) – Sezioni Unite- Corte di Cassazione

3. the model of citizenship by naturalization, which establishes a period of legal and permanent residency of ten years in order to claim the status of citizen.

Law 91 made the acquisition of the status of citizenship for non-EU citizens extremely difficult: the required number of years of regular residency was raised from five to ten years (art. 9, comma 1, lett. f); the requisites for acquisition of citizenship for foreigners born in Italian territory were narrowed by subordinating the concession to individuals who were continuously resident in Italy until adulthood, and only if they make explicit request within one year after becoming of age. The law also adopted new measures for the concession of citizenship based on a blood tie, facilitating the access to citizenship for individuals through ascendance in straight line (parents, grandparents), and the maintaining of citizenship for Italians who acquire a second citizenship. The acquisition of citizenship was also made more difficult due to the need to produce documentation of a stable income, to prove that the aspiring citizen is autonomous and able to contribute to the collective life of Italy under the form of taxation, ultimately representing a “duty of solidarity²⁶⁶”. In the *sentence no. 3306*²⁶⁷, the Court of Cassation stated that the provision is inadmissible in its interpretation of stable income, which the Administrative Tribunal of Rome interpreted in a restrictive way: the judges held that the position of a housewife who was denied access to citizenship on ground of not being able to produce an income was not legitimate, as the equal dignity of the work of a housewife has to be considered, and that the income of the whole family has to be taken into account.

From this legislative intervention it is clear that the prevalent perspective of citizenship in Italy is the *jure sanguinis* model, with some kind of disregard of the effective and longstanding bond with the Italian territory and society. This strand of opinion is evident in the process of acquisition of citizenship, clearly favoring Italian descendants and Italians by marriage. The opposite citizenship

²⁶⁶ T.A.R. Lazio - Roma: Sezione II Quater n. 12555/2007

²⁶⁷ Sezione III del 5 giugno 2012, n. 3306

criterion, the *jus soli*, remains now residual to children born in Italy by unknown or stateless persons, and to children born in Italy by foreign citizens who lose citizenship according to the law of the parents' State. The category of children was particularly protected by the Italian judiciary, who stated with *sentence no. 21779*²⁶⁸ the possibility for the parent of a child already resident in Italy to acquire a residence permit even in the case of precedents of clandestinity. The discipline of naturalization, introduced by art. 9 of the law 347/1992, adopted a quite original approach in the European scenario, creating a detailed hierarchy between different categories of foreigners, by establishing different residency requirements for each category²⁶⁹: three years for the foreigner with a straight, second degree blood line, and up to ten years for foreign citizens without any tie to Italy. As for citizenship by marriage, the Security Package of 2009 introduced a provision requiring the maintaining of the residency status for two years after the celebration of the marriage in order to access citizenship.

An interesting consideration about the current legislation is the need for the individual petitioning for the acquisition of citizenship to pledge allegiance to the Italian Republic; art. 10 of law 91/1992 states in fact that the decree conceding the status of citizenship is nullified if the subject to whom the decree refers to refuses to take oath of loyalty to the Republic and its Constitution. Art. 10 was brought before the Constitutional Court in its consequence to obstacle the acquisition of citizenship of the individuals who are somewhat impeded in taking the oath. In the case at hand, in *sentence no. 258*²⁷⁰ the Court declared art. 10 to be unconstitutional in the lack of an appropriate discipline of exoneration for people who are incapable of taking such oath. The Court, in its reasoning, held that the provision did not respect art. 2 and 3 of the Constitution, declaring the protection of fundamental rights and the removal of obstacles preventing equality among individuals: the impossibility of some individuals to undertake

²⁶⁸ Le Sezioni Unite civili della Corte di Cassazione, sentenza n. 21799 del 25 ottobre 2010

²⁶⁹ Rimoli F. (2005), *Universalizzazione dei diritti fondamentali e globalismo giuridico: qualche considerazione critica*

²⁷⁰ Sentenza no. 258 (2017)

an oath cannot represent an obstacle to the access to citizenship and to the applicant's social integration.

The Italian choice to base citizenship legislation on *jus sanguinis* shows an inversion of tendency with respect to other European states, where legislations originally founded on *jus sanguinis* were tempered by a progressive expansion of the *jus soli*. This trend, in European states, was instrumental to the introduction of integration policies: the *jus sanguinis* model was in fact considered by promoters of integration as incompatible with the correct and full introduction of the national community of immigrants into the state society²⁷¹. In the light of this restrictive legislative order, Baraggia²⁷² pointed out that the effects on the access to citizenship are paradoxical: it is interesting to note that Eurostat²⁷³ and Istat²⁷⁴ data show that Italy is the European state which conceded the largest amount of citizenship statuses in 2015 (178.000, representing the 21% of the citizenship statuses granted in the whole EU). Another relevant data is the average age of the new citizens: according to Istat, 39,8% of citizenships in 2015 were acquired by underage individuals; these numbers represent the automatic acquisitions of citizenship for underage children residing with a new Italian citizen, as stated by art. 14 of law 91/1992²⁷⁵. This significant data stresses the importance of what should be a residual category in Italian legislation, representing in concrete a large portion of the concessions of citizenship. The current legislation provides for a sort of “second-degree *jus sanguinis*”: in formulation of art. 14, law 91 allows “second-generation” individuals (children of a new citizen) to access citizenship, while precluding the acquisition of the status to children born in Italian territory to parents who are regularly and permanently resident in Italy, but haven't acquired the citizenship yet.

²⁷¹ Lippolis V. (2010), *Il significato della cittadinanza e le prospettive di riforma della legge n. 91 del 1992*, p. 151

²⁷² Baraggia A. (2017), *La cittadinanza “composita” in alcune esperienze europee. Spunti di riflessione per il caso italiano*, p. 22

²⁷³ EUROSTAT, *Statistiche sulle migrazioni internazionali e sulle popolazioni di origine straniera*, Marzo 2017

²⁷⁴ ISTAT, *Acquisizioni di cittadinanza*, dati 2014 e 2015

²⁷⁵ “Underage children of individuals who acquire or re-acquire Italian citizenship acquire the Italian citizenship themselves if they live with the new citizen (parent)”

3.4.2 Proposed amendments: proposal 2092 during the XVII parliamentary term

After the coming into force of law 91/1992, various attempts to reform the current legislation were made, but all of them stalled at the level parliamentary works and proposals: between march 2004 and may 2005 the First Commission of the Chamber of Deputies (the commission on constitutional affairs) examined various law proposals, all of parliamentary initiative. In 2005, the debate started at the parliamentary level on a unified text suggested by the Commission²⁷⁶, essentially proposing the facilitation of the process of acquisition for permanent residents and for children born on the Italian territory, but discussions on the proposal ended with the end of the legislature, and in other cases with the fall of the government in charge.

The last proposal, also unfinished, for the amendment of what is now considered as an anachronistic legislation considering the current anatomy of the Italian society and population, is the law proposal approved at the Chamber of Deputies and subsequently sent for screening at the Senate no. 2092²⁷⁷. The proposed amendment, currently on hold due to the imminent national elections, is controversial both with reference to the timing and to the content of the law: the doctrine held that the main purpose of the proposal was the necessity to bridge the gap between second-generation *jus sanguinis* citizens and children born in Italy and resident on the Italian territory who are not allowed to apply for citizenship if not after 18 years.

The heart of the proposal is the introduction of the model of “tempered *jus soli*”, allowing the access to citizenship by birth to children born within the Italian territory by foreign parents, if one of them is permanently resident in Italy. Other requisites for the acquisition of citizenship by birth are the demonstration from the parent of an income above the social assistance check, of an appropriate house

²⁷⁶ A.C. 204 ed abb.-A

²⁷⁷ Proposta di Legge no. 2092 Recante Modifiche alla legge 5 febbraio 1992, n. 91, e altre disposizioni in materia di cittadinanza.

and of the knowledge of the Italian language. Besides the tempered *jus soli*, the proposal also introduces the model of *jus culturae*, allowing underage foreigners to acquire the status of citizen if they are born on the Italian territory, if they entered the Italian territory within twelve years from their birth or if they attended with profit an education cycle of at least five years within the national territory.

Proposal 2092 introduces the opportunity to access citizenship for a large portion of young residents in Italy who, despite being born outside the national territory, have spent the decisive years of their education and definition of social belonging in Italy, by stating that the positive outcome of a course of studies demonstrates full integration in the social system, which is one of the criteria for the acquisition of citizenship²⁷⁸.

As for the acquisition of citizenship for naturalization, the draft law introduces a new model benefitting the foreigner who entered the Italian territory before coming of age, but after twelve years from his/her birth, who was legally resident in Italy for at least six years. In this case, the foreigner can claim citizenship under the condition of the attendance with success of a full cycle of studies in one of the institutes within the national educational system, or the achievement of a professional qualification in Italy.

In the light of the analysis of the Italian citizenship legislation, the proposed amendment, despite representing an inversion of the traditional Italian trend considering citizenship as a selective right, follows the general tendency of the most recent national legislations to consider citizenship in the light of social instances emerging from the recent migratory phenomena, involving western societies and the transformation of the institute of citizenship in a “composite” tool. The proposed innovations, in fact, are applied in the context of mechanisms that have already been tested abroad: the model of the tempered *jus soli* represents the introduction of a “middle way” between the various “pure” models.

²⁷⁸ Ceccanti S. (2017), *Cittadinanza: le due contraddizioni del collega Sbailò e una legge da approvare*, p. 1

The Italian reform, presenting a moderate version of a *jus soli* model itself, does not imply the indiscriminate granting of citizenship to every individual born on the national territory (solution that, it may be recalled, was adopted by one of the most powerful democracies of our time, the United States of America): the temperate tones of the proposal do indeed move towards a recognition of the status of citizen to those underage children born or raised in the national territory, that have grown to share Italian values and represent the Italian culture as a community. The academic debate around the proposal, perhaps introduced at the wrong political timing if we consider the elections of march 2018 and the delicate theme of the migratory emergency, cannot disregard considerations about the migratory policies and the models of integration, in the light of a complex citizenship built on the *jus sanguinis* tradition, now moderated by *jus soli* and *jus culturae* tools.

3.5 The Civil and Political Rights of Third Country Immigrants in Italy: the right to vote

Drafted when Italy was still a country of emigration, the Constitution addresses the specific rights of non-citizens only through art. 2, which omits the distinction between citizens and non-citizens by stating that the Italian Republic grants the inviolable rights to all individuals in its territory. Besides from the Constitutional data, however, the majority of the doctrine and the prevalent constitutional jurisprudence both showed the tendency of expanding constitutional protection to foreigners, promoting an extensive reading of the statutory dispositions attributing rights to Italian citizens²⁷⁹. The academic debate on the establishment of a specific criterion for the expansion of the rights granted to citizens was also reflected in the Constituent Assembly works: a proposal was drafted for the

²⁷⁹ Of this opinion, among the others, see Ballardore Pallieri P. (1970), *Diritto Costituzionale*, p. 396; Barile P. (1953), *Il soggetto privato nella Costituzione*, p.51; Finocchiaro F. (1958), *Uguaglianza giuridica e fattore religioso*, pp. 82 e ss.

introduction of a provision summarizing the rights granted to non-citizens. Some authors, in particular, apply the literal criteria and hold that only the rights that do not include the specific term “citizen” can be expanded to non-citizens, thus deducting *a contrario* the dispositions of extensive nature. Among these authors, some point out that all rights that are not expressly addressed to citizens are automatically extended to non-citizens and foreigners, and others like Pace²⁸⁰ and Mazziotti Di Celso²⁸¹ believe that the power to decide whether to grant those rights to other subjects is placed upon the legislative. The opposite strand of opinion adopts the substantial criterion, stating that the rights that can be extended to non-citizens can be recognized by the juridical positions that they protect. According to this last approach, supported by Barile²⁸² some rights are reserved to citizens in his quality of active members of the state collectivity, while others can be expanded necessarily to the non-citizens, for they concern the protection of the essential needs of the human condition, while a third category of rights can be attributed by the legislator to citizens or non-citizens.

The Constitutional Court intervened in this debate by amplifying the protection of rights granted by the Constitution, going as far as defining as “arbitrary” and “unreasonable” any disparity in the treatment based on citizenship, without taking into account other factors underlying the constitutional provision of a specific right. The judiciary came to this conclusion namely with respect to the right to health care, which will be examined more in depth in the next paragraph, and in force of reconstructions founded on the category of the fundamental rights of people and on the case-law of international courts. In a first phase, in fact, the Constitutional Court limited its opinion to the expansion to foreigners of the principle of equality, by admitting that the legislator is only limited by the rationality of its appreciation.

²⁸⁰ Pace A. (2003), *Problemativa delle libertà costituzionali. Parte Generale*, p. 319

²⁸¹ Mazziotti Di Celso M. (1964), *Sulla soggettività dello straniero nell'ordinamento italiano*, p. 462

²⁸² Barile P. (1999), *Diritti fondamentali e garanzie costituzionali: un'introduzione*

Other than the Constitution, the rights of foreign citizens are currently granted by different international instruments of protection of human rights, and in particular the European Convention on Human Rights, which prohibits discriminations to foreign citizens based on the belonging to a different nationality; this provision was absorbed by the Italian legal order through artt. 10 and 117 of the Constitution, establishing the principle of respect of international legal instruments. The Constitutional Court, in the benchmark *sentence no. 311/2009*²⁸³, expressly stated that the dispositions of the European Court of Human Rights relative to the discrimination of foreigners must be read in the light of art. 117, in their nature of international norms. A direct consequence of the Court's reasoning is that any action or inaction undertaken by the Italian executive or legislative power in the field of discrimination and protection of the foreigner against discrimination, must be considered as violating the Italian Constitution. Coherent with this vision, the Constitutional Court considered the fundamental civil and social rights to be addressed to all individuals within the Italian territory, without any discrimination grounded on citizenship or lack thereof.

The Court of Cassation has given uneven opinions on the issue of discrimination, describing it as “a sentiment of aversion grounded on race, ethnic origin or colour”²⁸⁴, a situation strictly tied to prejudice and to the exclusion of conditions of equality. Discriminatory behaviours were considered and interpreted differently by the Court, which stated in *sentence no.30525/2003*²⁸⁵ that the aggravating circumstance of racial discrimination is found in situations grounded on racial discriminations, notwithstanding the reasons behind the offence. In other cases the Court judges held that the discriminatory situation should also be read in the light of intentionally discriminating behaviours: in the *case no. 151590*²⁸⁶ the court stated that the insult of the defendant with reference to the applicant,

²⁸³ Sentenza 311/2009 (ECLI:IT:COST:2009:311), Giudizio di legittimità costituzionale in via incidentale

²⁸⁴ Cassazione penale, Sezione V, 28 dicembre 2009 (dep. 28/12/2009), n. 49694, Rv. 245828

²⁸⁵ Cassazione penale, Sezione V, 4 febbraio 2003 (dep. 15/07/2013), n. 30525, Del Dotto, Rv. 255558

²⁸⁶ Cassazione, Sezione V, 28 gennaio 2010 (dep. 25/03/2010), n. 11590, P.G. in proc. Singh, Rv. 246892

which contained a racial expression against Italians, could not be interpreted as racial discrimination, since Italians are not a category linked to a situation of inferiority in the common sense, judging that the behaviour did not give life to situations of discrimination. This restrictive approach was later overturned²⁸⁷ when the Court stated that the purpose of discriminating can be also found in actions that manifest prejudices with respect to the inferiority of a race, notwithstanding the consequence of the action leading to feelings of hate and other discriminatory behaviours.

As far as voting rights are concerned, Italy grants to the permanent residents coming from EU states and legally residing in the Italian territory to participate in administrative local elections, allowing them to choose their closest representatives under the principle of subsidiarity. The decision of the Italian legislator not to extend this right to non-EU citizens deserves to be inquired further, since the doctrinal debate which followed the introduction of the right to vote for EU citizens, discriminating the then extra-communitarian immigrants, is still largely unresolved. The discipline of the municipal and administrative electorate was introduced in Italy through legislative decree no. 197/1996²⁸⁸, absorbing into the Italian legal order the directive 94/80/CEE; the decree established provisions for the right for EU citizens to vote and be elected in local elections.

Art. 48 of the Constitution states that all citizens, men and women, who are of age, hold the right to vote; the term “citizen”, according to some scholars²⁸⁹, is not exclusive of the category of non-citizens, and passive and active electorate should, according to this strand of opinion, be fully granted to foreigners. A second part of the doctrine states that the right to vote, in virtue of the particular national

²⁸⁷ Cassazione penale, Sezione V, 15 maggio 2013

²⁸⁸ D.Lgs. 12 aprile 1996, n. 197, *Attuazione della direttiva 94/80/CE concernente le modalità di esercizio del diritto di voto e di eleggibilità alle elezioni comunali per i cittadini dell'Unione europea che risiedono in uno Stato membro di cui non hanno la cittadinanza.*

²⁸⁹ See Luciani M. (1992), *Cittadini e stranieri come titolari di diritti fondamentali. L'esperienza italiana*, p. 37; Cuniberti M. (1997), *La cittadinanza. Libertà dell'uomo e libertà del cittadino nella Costituzione italiana*, p. 429

interests that it carries, cannot be expanded to non-citizenship; this last opinion was strongly supported by Schmitt, who stated that political rights, by nature, are not granted to foreigners, for the granting of political rights to non-citizens would imply the lack of the possibility of distinction between friends and enemies²⁹⁰. Part of the Italian doctrine²⁹¹ showed a tendency towards the vision according to which political rights, by nature, can only be granted to citizens, thus excluding from any decision concerning national issues all the individuals who might be considered supporters of foreign interests.

The above mentioned theories clash, however, with the matter of fact introduction of the right of EU citizens to vote in administrative elections, and in the election of the European Parliament. If the opinion of the doctrine²⁹² stating that any distinction, at the constitutional level, between different elections (administrative or political) is unconstitutional, this implies that the Italian legal order has already conceded the full right to vote to foreigners, or at least to EU citizens. This consideration opens to different issues of interpretation of the Italian Constitutional text: the Constitutional Court, despite not having expressly judged on the right to vote, has stated in *sentence no. 11/1968* that the only rights that cannot be extended to citizens are those strictly inherent to the status civitatis. With *Sentence no.174/1999*²⁹³ the Court stated that the current legislation, in affirming the principle of full equality between citizens and non-citizens, implies that the latter are part of a “community of rights”, notwithstanding their citizenship status; despite the case did not refer to voting rights, the decision and Court interpretation inspire a reasoning on the possibility of foreigners to hold the right to vote on the basis of their belonging to the above-mentioned “community of rights”.

The proposal to extend voting rights to permanent residents enters the political debate periodically since the EU legislation granted this right to European citizens. The first proposals in this sense were

²⁹⁰ Schmitt C. (1928), *Dottrina della Costituzione*, p. 277 and 306

²⁹¹ D’Orazio G. (1992), *Lo straniero nella Costituzione Italiana*, p. 224

²⁹² Lanchester F., *Voto: diritto di*, p. 1124

²⁹³ Sentenza **174/2016** (ECLI:IT:COST:2016:174)

made by the anti-racist movement and by local authorities, who led the first initiatives of political participation of non-EU citizens in the 80s and 90s through the institution of a municipal councillor with right to speak and propose initiatives in the Municipal Council. In the light of this initiatives, several attempts have been made by the executive and legislative power to pass legislation allowing foreign nationals from non-EU countries to vote in administrative elections, but with no success. In 1994, the discipline of municipal voting rights to non citizens reached the parliamentary chambers in the form of a draft law proposed by the Study Commission for an organic law on the juridical condition of the foreigner in Italy, also known as the “Contri elaborate”; the draft law foresaw in art. 45 the right to active electorate at the municipal and circuit level. The proposal, which was not transformed into law, made an explicit reference to the dispositions of the Convention on the Political Participation of foreigners in the public life at the local level in Europe (Strasbourg, 1992), suggesting the introduction of the administrative vote for EU citizens. Despite Italy did not ratify the Chapter of the Convention concerning voting rights, the ratification of the convention was often considered as a step forward towards the recognition of the foreigners’ political rights.

In 1998, the introduction of the possibility to extend the active and passive voting rights at the local level to non-EU citizens in the immigration law 40/1998²⁹⁴ sparked a harsh debate in Parliament, resulting in the removal of the right to vote as originally drafted from the adopted law, but introducing for the first time a reference to Chapter 3 of the Convention. This reference, despite not being followed by a legislative amendment to the Italian legislation, represented a tacit consent to the accession to the provisions of the Convention with regards to voting rights. In 2009, in fact, the *biparstisan* law proposal 2840/2009²⁹⁵, which was not approved by the legislative chambers, proposed the access to

²⁹⁴ See paragraph 3.2.2.

²⁹⁵ **Atto Camera: 2840, Proposta di legge:** VELTRONI ed altri: "Riconoscimento e disciplina del diritto di elettorato attivo e passivo dei cittadini di Stati esteri non comunitari e degli apolidi nelle elezioni comunali e circoscrizionali. Ratifica ed

non-EU citizens to active and passive electorate in circuit or municipal elections as a way to promote integration and the “responsibility” towards the *res publica* of permanent residents. Other legislative initiatives were brought before the Constitutional Court in order to introduce a statutory provision granting to non-citizens the right to vote.

Many of these proposals, of regional initiative²⁹⁶, stemmed from the belief of local authorities that permanent residents, in virtue of their active participation in the social life of their communities: the law proposals were based on an integration of the discipline already stated in art. 48 of the Constitution²⁹⁷, submitting the drafting of limit, requisites and different modalities to the ordinary law. None of the above mentioned proposals, however, was approved by the Commission, which was simultaneously drafting the new legislation on citizenship; the relevant extension of the rights to vote of Italians abroad, and the new discipline of the second-generation *jus sanguinis* determined a sharp position of the doctrine in favour of the extension of the right to vote to non-citizens, with some authors going as far as speaking of “strabismus” of the Constitutional legislator²⁹⁸. The Constitutional Court, called upon to judge on the admissibility of the regional and local provisions extending the right to political participation to permanent residents, did not provide for a clear solution of the question at hand. Despite rejecting the opinion of the Executive that the Regional Statutes instituting the right for foreigners to vote in regional and local elections, the Court stated that these regional provisions do not produce a legal effect: in *sentence no. 379/2004*²⁹⁹ the Court rejected the claim of unconstitutionality of

esecuzione del capitolo C della Convenzione sulla partecipazione degli stranieri alla vita pubblica a livello locale, fatta a Strasburgo il 5 febbraio 1992" (2840)

²⁹⁶ Atto Parlamentare n. 5410: progetto di legge costituzionale dell'Assemblea Regionale Siciliana; Atto Parlamentare n. 4406: progetto di legge costituzionale Fioroni, Sinisi; Atto Parlamentare n. 4326: progetto di legge costituzionale Diliberto, Cossutta, Rizzo, Belillo ed altri; Atto Parlamentare n. 2374: progetto di legge costituzionale Pisapia, Bertinotti ed altri; Atto Parlamentare n. 1616: progetto di legge costituzionale Soda; Atto Parlamentare n. 1464: progetto di legge costituzionale Turco, Violante, Montecchi, Soda

²⁹⁷ Regulating the exercise of the right to active electorate

²⁹⁸ Onida V. (2009), *Lo statuto costituzionale del non cittadino*, p.3

²⁹⁹ Sentenza **379/2004** (ECLI:IT:COST:2004:379)

the Statute of Emilia Romagna, which introduced the possibility for permanent residents to participate in regional referendums. The Italian executive, by claiming the unconstitutionality of the Statute, stated that the discipline of the political participation of foreigners fell within State competences; the Court, however, rejected this idea by also noting that the regions actively participate in the discipline of political rights of non-citizens through the enforcement of EU directives on the theme. Municipal decisions to introduce the right to vote for permanent residents were also rejected by the Italian executive³⁰⁰, in line with the action of the Ministry of Interior that had taken down local initiatives in this sense³⁰¹.

3.6 Social rights of migrants: health care

Before moving on to an analysis of the right to health care and social assistance in Italy, a brief consideration about the respect and protection of social rights is necessary. As already noted, the social rights contained in the Italian constitution are granted to citizens and non-citizens alike: once established the existence of social rights at the constitutional level, the protection of the rights held by foreigners is granted by the Italian Constitution and Constitutional Court. Despite being beneficiaries of social rights however, foreigners are often discriminated by the great degree of discretionality recognized to the legislator in the application of the different social rights. Differently from civil and political rights, as well as from the fundamental rights and freedoms, which are granted to every citizen within a state, the enjoyment of social rights presupposes a “tie” with the community which should be measured by the legislator. Social rights, in fact, imply the direct intervention of both the local and

³⁰⁰ The city of Genova had introduced this possibility, and their action was annulled by the D.P.R. 17 agosto 2005 su parere del Consiglio di Stato (Sez. I) il n. 9771/04 del 16 marzo 2005

³⁰¹ Circolare n. 4 del 22 gennaio 2004

central government in order to grant their respect, requiring the implementation of actions which often imply a financial burden on the state³⁰². The Constitutional Court stated that, with regards to social rights, the legislator is able to subordinate its performances to the demonstration of the foreigners' permanent residency, their degree of integration in the society, and the performance required by the government, as long as the discretionality of its action is reasonable. From the point of view of the expansion of social rights to immigrants, the Constitutional Court showed a positive approach towards the recognition of right to non-citizens, provoking an enlargement of the welfare beneficiaries with respect to ordinary legislative prescriptions.

The profile of the right to health care and social assistance represents a fundamental parameter in the analysis of the social discipline of immigration, especially with regards to the legitimacy of the current legislation of treatment of the foreigner. The Italian legal order grants the right to access health care and social assistance to all individuals, citizens and non-citizens alike; non-citizens who reside illegally in the Italian territory are also granted basic health care and emergency care, even in the cases in which the illegal immigrant requires continuous cures. The Constitutional Court, in fact, stated in *sentence no. 252/2001*³⁰³ that the core principles of the protection of health, in their virtue of fundamental human rights, must be also granted to non-citizens, notwithstanding their legal position with respect to immigration legislation. The Court confirmed thus opinion in the *sentence no.269/2010*³⁰⁴, by excluding the Government claim of unconstitutionality towards the regional law of Tuscany which contained the discipline of specific regional interventions in favour of the right to health care for irregular immigrants; in its reasoning, the Court protected both the regional power to pass such

³⁰² This theory, considering social rights to be “second-generation” rights, is now being reframed in the light of the action that civil and political rights also require in order to be correctly implemented

³⁰³ Sentenza **252/2016** (ECLI:IT:COST:2016:252)

³⁰⁴ Sentenza **269/2010** (ECLI:IT:COST:2010:269)

legislation, and the right to basic health care of individuals, by stating that this right could not be restricted in its essential core.

The right to health in fact, contained in art. 32 and 38 of the Italian Constitution, is the only right being expressly qualified as “fundamental” by the framers of the Constitutional text, and is considered within the text not only in its connotation of right of the individual, but also as a collective interest; it is in this light that the Court privileged its protection with respect to the migrant population, sometimes even in the balancing of national security. The Constitutional Court, as already noted, showed a tendency towards the granting of the right of health care and social assistance for foreigners, even in the case of undocumented migrants and in the absence of situations of emergency: sentences *no. 306/2008*³⁰⁵ and *no. 11/2009*³⁰⁶ are the leading cases with respect to the access to invalidity checks, in which the Court expanded the access to this performance to non-EU citizens who reside permanently in Italian territory. It is evident that the decisions of the Constitutional Court were based on the will to protect the individual’s dignity and health, notwithstanding their citizenship status and the cost of social policies for the state. Despite this tendency, legal situations of discrimination between citizens and non-citizens have been often reported to administrative tribunals, which mainly followed the lead of the Constitutional Court. With respect to health care, it is interesting to point out that the regional statutes were also often discriminatory in their provisions. The law of Lombardy, for example, limited the right to free circulation in public transportation for invalid people to only Italian citizens; this law was later declared unconstitutional through *sentence no. 432/2005*³⁰⁷ on grounds of discrimination. Similarly,

³⁰⁵ Sentenza **306/2008** (ECLI:IT:COST:2008:306)

³⁰⁶ Sentenza **11/2009** (ECLI:IT:COST:2009:11)

³⁰⁷ Sentenza **432/2005** (ECLI:IT:COST:2005:432)

some years later, *sentence no. 40/2011*³⁰⁸ declared the regional law of Friuli Venezia-Giulia illegitimate for excluding migrants from the integrated system of social services and health care.

The right to access the basic health care and emergency cures, protected in Italy at the Constitutional level, represents the great degree of social protection enjoyed by immigrants within the Italian territory; the positive attitude of the Constitutional Court towards the protection of social rights, in operating an effective and concrete balancing of the rights of citizens and immigrants, led the Italian legislator to significantly expand the scope of social rights, granting their respect at the constitutional level, showing an attentive attitude towards the important issues of health, which is recognized by international conventions as a basic human right.

³⁰⁸ Sentenza **40/2011** (ECLI:IT:COST:2011:40)

CONCLUDING REMARKS

The analysis carried out in the present dissertation shows how the integration of immigrants has been treated differently by the two countries, thus producing different results, for reasons that can be identified in the differing standards of inclusion and protection of rights accorded to immigrants, mainly in the field of political participation and State commitment in the granting of social rights. The difficult theme of integration policies, now at the center of the political and academic debate on immigration, showed contrasting outcomes with respect to the treatment of immigrants, and mainly in the field of the protection of their rights.

The status of citizenship presents the same criticism in both States, mainly representing a gradual erosion of its content by effect of globalization and the development of the concept of global citizenship, in the form of a *jus domicili* model⁴²⁴. The introduction of the legal status of the European citizen and the proliferation of international tools of protection of human rights, and namely of immigrant rights, are both facilitating this process and leading national high courts towards a more extensive approach to citizenship legislation.

For what concerns the status of non-citizen and the rights tied to this condition, the protection of the fundamental rights of this category appeared to be mostly inefficient in the case of Canada, where the Supreme Court chose a restrictive approach with regards to the expansion of political and social rights of citizens to immigrants. It is interesting to note that, despite the multicultural policy effectively protects all individuals from discriminations grounded on nationality, ethnicity, race and color, nor the Constitution or the Federal Jurisprudence showed a positive approach with regards to the protection of the fundamental rights established by international legal instruments of which Canada is signatory. The

⁴²⁴ Varsanyi, M. (2006). *Interrogating "urban citizenship" vis-à-vis undocumented migration*. p. 245; Baubock, R. 2005. *Expansive citizenship—voting beyond territory and membership*, pp. 683-686; Bauder, H. (2012). *Jus domicile: in pursuit of a citizenship of equality and social justice*, pp 184–196

peculiar decision not to grant rights of political participation to immigrants and permanent residents, despite the government's encouragement in their partaking of the social and political life of the country, evidently clashes with the values of multiculturalism, perhaps suggesting the existence of a formally "perfect" inclusion, and a factual superficial integration.

The Italian model, on the other hand, still clearly undergoing a legislative and political reshaping, presents various critical findings in its development, mainly in the light of the complex political and therefore legislative scenario, making the introduction of a needed renewed legislation extremely difficult. The current Italian legislation on immigration, mainly consisting of outdated norms which do not account for the current needs of the changing society, is in fact in need of a profound reform finally accounting for the new socio-cultural and normative context. On the other hand, the institutes of protection of fundamental rights of non-citizens appear to be effective and up-to-date in their provisions; the Constitutional Court proved to be efficient and extensive in its decisions, by significantly expanding a growing number of rights to non-citizens, often recalling the above mentioned principle of a different and more plastic concept of belonging.

Despite would be erroneous to ignore the dialectic between *demos* and *ethnos*, that is between the political and cultural dimension within a society, the discipline of immigration should be addressed with a stronger hand by the part of States and governments: the complexity of the phenomenon should perhaps be considered as a way to face social and cultural issues which have been taken for granted historically. Such an approach, in imposing to the jurist a peculiar attention to the content and subjects of the legislative provisions, would lead to more precise answers to the questions concerning the rights of political belonging. This "mongrel constitutionalism" ("*costituzionalismo meticcio*"), as was defined by Bonfiglio⁴²⁵, would push Constitutional Court in maintaining the sense of union and belonging in

⁴²⁵ Bonfiglio S. (2016), *Costituzionalismo meticcio: Oltre il colonialismo dei diritti umani*, Torino, Giappichelli, p. 92 ss

the light of the respect of fundamental freedoms, yet in relation to an expansion of subjects, models and structures and towards a more global definition of society.

SUMMARY

Nowadays, more than ever, States find themselves questioning their own identity in the light of the migratory phenomenon: despite, in Europe, the migratory crisis hit mainly Southern-European countries, showing the fragile equilibrium of the old continent, the force of the migratory flows was felt across the Atlantic, finding western states often unprepared to the various cultural, social and political challenges deriving from the welcoming of newcomers, and of their effective integration into the host societies. The recent introduction of travel bans and entry restrictions since the beginning of the Trump Presidency in the US⁴²⁶ is best representative of the mistrust governments display towards immigrants, their background and motives behind their choice to migrate. These provisions mirror clearly the dilemma of contemporary societies, which find themselves facing the challenge of re-shaping and re-creating a common sense of belonging in the growing heterogeneity of their social tissue.

The following work, in the light of the recent developments of the legal academic debate on migration, aims to investigate the problematic issues concerning the responsibilities of host states in the welcoming and integration of immigrants, through an analysis of the protection of the latter within the Constitutions of two States which, for different reasons, are at the forefront of immigration policies: Canada and Italy.

The decision to compare the two States stemmed from the interesting considerations concerning the building of an Italian model of integration, which is developing in the form of assimilationism in its intentions, and multiculturalism in its effects. In this context, the present work attempts to analyze two different models of integration, the Canadian multicultural tradition and the Italian still undefined, and perhaps unshaped, model. These two patterns, characterized by two different approaches to migration

⁴²⁶ The Travel Ban was introduced in Sept. 24, 2017 in the framework of security and anti-terrorist measures, as a review of Homeland Security of the vetting of immigrants, and implied travel restrictions and limitations in the issuing of visas for Chad, North Korea, Venezuela, Iran, Libya, Somalia, Syria and Yemen.

and to diversity, will be analyzed in the light of the legislation in force and of their ability to adapt to the ever changing needs of their growing societies by providing protection, assistance and welcoming to immigrants. For this purpose, this dissertation focused on three main criteria for “measuring” immigrant integration in the two case studies: citizenship legislation, the protection of civil and political rights in the form of the right to vote and the enforcement of social rights in the form of health care.

Citizenship will be considered in this analysis in the light of its changing definition and borders, coming to represent a de-territorialized concept⁴²⁷. According to this trend, citizenship rights should not rely strictly on the birth or descent requirement anymore: contemporary authors like Varsanyi⁴²⁸, Baubock⁴²⁹ and Bauder⁴³⁰ all hold that citizenship legislation is destined to be revised and amended on grounds of presence in a State, announcing a new strand of citizenship based on *jus domicili* instead of *jus sanguinis* or *jus soli*. The emergence of a *jus domicili* citizenship, based on residency and integration in a State and a society, is changing the law-makers approach to the issue of citizenship legislation, representing a step forward towards the concepts of global, post-national or transnational citizenship. The two other indicators, the protection of civil and political rights, namely the voting rights, and the social right to access appropriate health care, will be analyzed through the lens of a changing concept of citizenship: traditionally granted only to citizens, the growing importance of these rights in the human rights scenario gave them the leverage to be discussed in national debates of discrimination and prioritization of nationals, often with interesting results. In this light, the right to vote will be analyzed in its connotation of concept *ab origine* reserved to citizens, yet now expanding in favor of an all encompassing integration policy in the light of the introduction of the tool of

⁴²⁷ Bosniak L. (2006), *The Citizen and the Alien. Dilemmas of Contemporary Membership*

⁴²⁸ Varsanyi, M. (2006). *Interrogating "urban citizenship" vis-à-vis undocumented migration*. p. 245

⁴²⁹ Baubock, R. 2005. *Expansive citizenship—voting beyond territory and membership*, pp. 683-686.

⁴³⁰ Bauder, H. (2012). *Jus domicile: in pursuit of a citizenship of equality and social justice*, pp 184–196

European citizenship in Italy and its consequence on the active and passive electorate of immigrants. As for health care, the analysis of this dissertation of the right to health care and basic cures will focus on the possibility for legal and illegal immigrants to access these rights notwithstanding their citizenship status; the choice of this criterion as a measure of integration stems from its nature of fundamental right, established by several international treaties and acknowledged by international law as part of the core values of human dignity. The interesting findings of the research will highlight the different behaviors and attitudes of national legislators and high courts, showing a tendency of the Italian Constitutional Court towards a strenuous protection of this right, as opposed to a restrictive approach adopted by the Canadian Federal Court.

These three dimensions will highlight throughout this research how the formal tools of integration may not always mirror the effective integration of the migrant, or the respect of his rights, In the light of this preliminary considerations, it is necessary to question the degree of effectiveness of contemporary integration policies, and what is the role of Constitutional Courts in overcoming the shortcomings of national legislation through the enlargement of Constitutionally granted rights to immigrants.

CHAPTER 1 - Integration Policies – A Legal Perspective

Before moving on in analyzing integration policies, the following paragraph will clarify what we mean by integration, and in what way integration national policies can be examined to “measure” a State’s level of integration. In order to do so, a definition of integration itself should be clarified.

Among the different frameworks to explain the interactions between migratory flows and public policies, the concept of integration became increasingly important. In fact, the phenomenon of growing migration and the need to evaluate the level of inclusiveness of migrants into different societies has led to a complex doctrinal debate about the definition of the term. Integration is a complex and long-term

phenomenon which includes a social, economic, political and cultural dimension: for this reason, it is a two-way process concerning not only migrants but also the citizens of the host country. Differently from migration, in fact, integration does not entail the mobility of a single individual, but must take into account a plurality of actors and dynamics of inclusiveness within the host society.

CHAPTER 2 - Canadian Multiculturalism: a Constitutional Law analysis

The Canadian philosopher Charles Taylor has analyzed the topic of identity politics, and concluded that the modern concept of identity is to be considered under the light of politics, as its acknowledgement inevitably calls for recognition: since recognition of a shared individual humanity has historically been insufficient, modern identity politics came to develop around demands for the recognition of group identities, in their connotation of recognition of an equal identity of historically marginalised and discriminated groups. Taylor's consideration sheds light on the aspect of multiculturalism this work will analyze more in depth, that is the demand for legal recognition of equal rights for racially, culturally and religiously diverse sections of the contemporary society, and the controversies concerning its establishment in modern liberal democracies.

Over time, and at least until the Patriation of the Constitution Act in 1982, Canadians would continue to refer to the Canadian model through the notion of dualism. What emerged from the 1982 Constitution was a federal contract representing the union of communities, with a focus on the societal cultures shaping the citizens' world views rather than emphasizing the salience of the territorial community⁴³¹. Despite the 1982 Act maintained the provinces as the original constituent power of the country, the introduction of a Constitution Act with an entrenched Bill of Rights was of course portending the birth of a national civic identity transcending provincial borders.

⁴³¹ Barry B. (2001), *Culture and Equality: An egalitarian Critique of Multiculturalism*

Expressing this peculiarity was the formula “ethnic mosaic”, a typically Canadian model which excludes any attempt of assimilation, thus differentiating itself from the US model. The Canadian ethnic mosaic attempts to interact with different groups through the respect of their differences, with the main goal of succeeding in integrating minorities into the dominant society by way of recognition of cultural and collective rights.

The adoption of a *Canadian Charter of Rights and Freedoms* in 1982⁴³² empowered federal courts to take multicultural policies and the multiethnic necessities of the Canadian society into account at the highest legal level; Section 27 of the Canadian Charter of Rights and Freedom, as absorbed into the Constitution, makes the Canadian Act the sole Constitutional document in the world recognizing multiculturalism as a founding value of its community. The culminating phase of the Canadian multicultural model was the adoption of the *Canadian Multiculturalism Act*⁴³³ in 1988; the multicultural policy had developed from the celebration of differences in the 1970s, to the managing of social and ethnic diversity in the 1980s, to implement a constructive engagement of multiculturalism in all its aspects in the 90s⁴³⁴.

The new legislation recognized multiculturalism as a structural feature of the Canadian society, fully acknowledging its weight in the decision-making of the highest governmental levels, and its importance in the Federal government agenda. The Act expressly stated the right of individuals to identify with the cultural group and heritage of their choice, yet holding full and equal participation in all aspects of the Canadian social life.

⁴³² 1982 was also the year in which the British Parliament enacted the Canada Act, Canada’s primary constitutional document, empowering Canada and its Government and Parliament of all necessary powers to rule over its people. The Canada Act encompassed both the Constitution and the Charter.

⁴³³ Available at <http://laws-lois.justice.gc.ca/eng/acts/C-18.7/page-1.html> (accessed Jan. 15 2018)

⁴³⁴ Kirova A. (2015), *Critical and Emerging Discourses in Multicultural Education Literature: an (Updated) Review*, p. 240

Citizenship in Canada is ruled by the *Strengthening Canadian Citizenship Act* (SCCA): the Canadian model *per se* represents the sum of mixed citizenship procedures and legislation, alternating pure *jus soli* solutions to more defined forms of citizenship by descent. For this reason, the Canadian citizenship model assumes a double connotation: if, on the one hand, the typically European request for specific prerequisites -as the acceptance of national values and the demonstration of fluency in one of the two official languages- remains intact, on the other hand citizenship represents the main tool for immigrants to access participation in the Canadian society. As already noted by De Lucas, in this kind of citizenship legislation, the acquisition of the status of citizen is not the apex of the process of integration, but “an emancipating tool, a remedy against inequalities”⁴³⁵. The Canadian vision of citizenship, in fact, is growing farther and farther from the monistic tendency which is typical of European States, leaving space to a distinct and separate evaluation of the concept of nationality, since the original nationality of the subject is already preserved within a system of free ownership secured by the Canadian authorities.

The academic opinion of the late 19th century held that the role of citizenship as an important threshold for the granting of rights within the national legal order was being overshadowed by the strength of human rights, and the Courts’ tendency to extend traditionally “national” rights to immigrants. Since that time, citizenship and its privileges have undergone a rebirth in national legal orders: in Canada, for once, non-citizens do not hold the right to vote or run for office in Federal, provincial or even municipal elections, or perform certain jobs requiring a high-level security clearance requirement⁴³⁶.

⁴³⁵ Cit. De Lucas J. (2006), *La ciudadanía basada en la residencia y el ejercicio de los derechos políticos de los inmigrantes*, p. 25

⁴³⁶ <https://www.canada.ca/en/immigration-refugees-citizenship/services/new-immigrants/pr-card/understand-pr-status.html> (accessed on Jan. 24, 18)

The Canadian Charter of Rights and Freedoms, the main tool for granting non-citizens' rights, does not contain any provision concerning economic and social rights, only providing for a catalogue of fundamental civil freedoms. The subsequent gap in the protection for social and economic rights is bridged by a partial protection granted by sources of law of a subordinated level. Generally speaking, in fact, migrants who hold the status of permanent residence enjoy the same rights as Canadian citizens in the field of healthcare, being able to access publicly founded health care programs. Among precarious status migrants', however, publicly founded health care is not accessible in most of the cases: the Canadian judiciary and policymakers, in all, proved to be largely irresponsible and unsympathetic of the situation of precarious status migrants'. The government's consideration of migrants as a temporary or irregular category has ultimately legitimized the federal level to cut back the social rights of non-citizens, legalizing rights violations and protecting those violations from judicial scrutiny, often leading to the application of double standards of interpretation of Section 15 of the Canadian Charter of Rights and Freedoms. In this light, Canadian Courts should be the leading promoters of a dialogue of the Charter with the legislative, supporting the claims of non-citizens to broaden health care protection to all residents in the country, notwithstanding their legal status.

CHAPTER 3 - Integration in Italy – A “Work In Progress” Model

Italian legislators and policy-makers have always considered the phenomenon of immigration to be a temporary one, and the government did not address the issue if not after the first relevant immigration wave which followed the collapse of the communist regime; even then, the attitude of the State towards the event proved to be approximate and rough at best, legally addressing the issue only from the point of view of national order and security, never going further in securing any control or policy of welcoming. This approach resulted in a hybrid integration model which was assimilationist in its intentions and multicultural in its effects. This model of integration has proved to be largely inefficient

in imposing the respect of Italian laws and traditions on the newcomers: the absence of a facilitated path towards citizenship makes the Italian social standard unappealing to migrants, who are expected to give up their traditions, religion and identity in exchange of a still precarious membership in the Italian society.

The emergence of this non-model, perhaps resulting from the political instability of the Italian governments (which in the 1990s were facing the tumultuous transition to the democracy of alternation), favored the cultivation of the immigrants' ethnic and even juridical separateness⁴³⁷. In the silence of the executive with respect to the phenomenon of immigration, improper actors have taken charge of integration policies. The institutional deputizing was operated by the judiciary, local institutions, charities, school and the police, which forcibly gave life to a model extremely rich in contradictions, based on a downward assimilation handing over to migrants a marginalization and stigmatization, self-producing a harsh debate about religious and ethnic differences.

The comparative analysis of the concept of citizenship in Italy is particularly interesting for the study of the legislation on the matter; the awaiting of an appropriate normative intervention reshaping the current legislation has resulted in a renewed interest in the issue of the national model of citizenship and its current needs in the light of the new migratory flows. The concept of citizenship, and consequently the legislation regulating it, is undergoing a process of lengthy and slow adaptation to the requests of a new class of "potential citizens"⁴³⁸, an extremely fitting definition for Italian immigrants in the current legal and political discourse about citizenship legislation. the prevalent perspective of citizenship in Italy is the *jure sanguinis* model, with some kind of disregard of the effective and

⁴³⁷ As demonstrated by the proliferation in Italy of Mosques based on shaaritic family law, which gave life to a *de facto* parallel law and jurisprudence stemming from the dissociation of the State from any cultural development of the immigrant society.

⁴³⁸ V. Onida (2009, *Relazione introduttiva, Convegno dell'Associazione Italiana Costituzionalisti "Lo statuto costituzionale del non cittadino"*, p. 3 ss

longstanding bond with the Italian territory and society. This strand of opinion is evident in the process of acquisition of citizenship, clearly favoring Italian descendants and Italians by marriage. The opposite citizenship criterion, the *jus soli*, remains now residual to children born in Italy by unknown or stateless persons, and to children born in Italy by foreign citizens who lose citizenship according to the law of the parents' State.

The Constitution addresses the specific rights of non-citizens only through art. 2, which omits the distinction between citizens and non-citizens: the Constitutional Court intervened in this debate by amplifying the protection of rights granted by the Constitution, going as far as defining as “arbitrary” and “unreasonable” any disparity in the treatment based on citizenship, without taking into account other factors underlying the constitutional provision of a specific right. As far as voting rights are concerned, Italy grants to the permanent residents coming from EU states and legally residing in the Italian territory to participate in administrative local elections, allowing them to choose their closest representatives under the principle of subsidiarity.

The profile of the right to health care and social assistance represents a fundamental parameter in the analysis of the social discipline of immigration, especially with regards to the legitimacy of the current legislation of treatment of the foreigner. The Italian legal order grants the right to access health care and social assistance to all individuals, citizens and non-citizens alike; non-citizens who reside illegally in the Italian territory are also granted basic health care and emergency care, even in the cases in which the illegal immigrant requires continuous cures. The Constitutional Court, in fact, stated in *sentence no. 252/2001*⁴³⁹ that the core principles of the protection of health, in their virtue of fundamental human rights, must be also granted to non-citizens, notwithstanding their legal position with respect to immigration legislation.

⁴³⁹ Sentenza **252/2016** (ECLI:IT:COST:2016:252)

CONCLUDING REMARKS

The difficult theme of integration policies, now at the center of the political and academic debate on immigration, showed contrasting outcomes with respect to the treatment of immigrants, and mainly in the field of the protection of their rights.

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⁴⁴⁰ Varsanyi, M. (2006). *Interrogating "urban citizenship" vis-à-vis undocumented migration*. p. 245; Baubock, R. 2005. *Expansive citizenship—voting beyond territory and membership*, pp. 683-686; Bauder, H. (2012). *Jus domicile: in pursuit of a citizenship of equality and social justice*, pp 184–196

The Italian model, on the other hand, still clearly undergoing a legislative and political reshaping, presents various critical findings in its development, mainly in the light of the complex political and therefore legislative scenario, making the introduction of a needed renewed legislation extremely difficult. The current Italian legislation on immigration, mainly consisting of outdated norms which do not account for the current needs of the changing society, is in fact in need of a profound reform finally accounting for the new socio-cultural and normative context. On the other hand, the institutes of protection of fundamental rights of non-citizens appear to be effective and up-to-date in their provisions; the Constitutional Court proved to be efficient and extensive in its decisions, by significantly expanding a growing number of rights to non-citizens, often recalling the above mentioned principle of a different and more plastic concept of belonging.

Despite would be erroneous to ignore the dialectic between *demos* and *ethnos*, that is between the political and cultural dimension within a society, the discipline of immigration should be addressed with a stronger hand by the part of States and governments: the complexity of the phenomenon should perhaps be considered as a way to face social and cultural issues which have been taken for granted historically. Such an approach, in imposing to the jurist a peculiar attention to the content and subjects of the legislative provisions, would lead to more precise answers to the questions concerning the rights of political belonging. This “mongrel constitutionalism” (“*costituzionalismo meticcio*”), as was defined by Bonfiglio⁴⁴¹, would push Constitutional Court in maintaining the sense of union and belonging in the light of the respect of fundamental freedoms, yet in relation to an expansion of subjects, models and structures and towards a more global definition of society.

⁴⁴¹ Bonfiglio S. (2016), *Costituzionalismo meticcio: Oltre il colonialismo dei diritti umani*, Torino, Giappichelli, p. 92 ss

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