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Political Rights of Resident Aliens: the Current Political
Opportunity Structure.
France and Italy in Comparison.

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Table of Contents

Introduction	6
 Chapter 1: Defining Political Participation	8
1.1 Political participation of migrants and democratic legitimacy	9
1.1.1 Individual participation: voting rights and citizenship	10
1.1.2 Group participation: analysis of consultative bodies.....	14
1.2 Political participation of migrants and integration	16
1.1.1 A definition of integration.....	18
1.1.2 The role of political participation in the process of integration	20
1.3 Political participation of migrants and the Institutional approach	22
1.1.1 The Institutional approach and the Political Opportunity Structure.....	23
1.1.2 Political Opportunity Structure and factors assessing political participation.....	25
 Chapter 2: Supra-national Legal Standard Setting	28
2.1 The United Nations	29
2.1.1 Freedom of expression	32
2.1.2 Freedom of assembly and association	34
2.1.3 The Right to vote.....	36
2.2 The Council of Europe	38
2.2.1 European Convention on Human Rights	39
2.2.2 Convention on the Participation of Foreigners in Public Life at the Local Level	41
2.2.3 Convention on Nationality	43
2.3 The European Union	45
2.3.1 Political Rights for EU citizens and TCNs.....	46
2.3.2 EU Competences and Inconsistencies	48

2.3.3 The Soft Policy Approach of the Union	51
Chapter 3: France and Italy in Comparison	56
3.1 Italy: the “flexible” model	57
3.1.1 Foreigners’ rights in Italian Constitution	59
3.1.2 Electoral Rights	62
3.1.3 Consultative Bodies.....	67
3.1.4 Citizenship.....	69
3.2 France: the Republican model	72
3.2.1 Foreigners’ rights in French Constitution.....	75
3.2.2 Electoral Rights	78
3.2.3 Consultative Bodies.....	83
3.2.4 Citizenship.....	85
Conclusion.....	88
Bibliography	91
Legal references.....	98
Summary	102

Introduction

*“Everyone who is affected by a decision has a right to participate in making it”*¹. On this principle, not lacking in contradictions, Robert Dahl based his concept of democracies’ legitimacy. Therefore, reformulating the statement, the core substantive principle of democracy is that *“those subject to the law should have a voice in its formulation”*². In modern democracies, the most direct means of participating in the decision-making process still is the right to vote; this precious right, often obtained after tough political struggles, during the years has come to identify the national status of citizens. Following this reasoning, in practical terms democracies eventually rooted their legitimacy in citizens’ political expressions and decisions.

Nonetheless, unexpected phenomena shook legitimacy’s roots: faster economic, financial and political globalization, increased migration flows and, with respect to this thesis, the development of a European integration process. All these contexts affected contemporary democratic systems: nation states are now formed of fragmented populations, not solely composed of citizens, but also including well settled communities of “non-nationals” who contribute to the economic life of the Country. In spite of their contribution, new members of the national political community are bound by laws over which they have no direct control, as they are not citizens. Consequently, with new demands and necessities, democratic legitimation must be founded on more inclusive principles in order to cope with the legitimacy deficit of modern institutions.

Democracies might solve this problem by three different arrangements: a first option envisages the facilitation of newcomers’ naturalization through more permissive laws on citizenship acquisition; alternatively, a State could also extend voting rights at the local level to resident aliens, as already happened in the case of the European Union; finally, a third possible choice considers the setting up of innovative forms of participation, explicitly designed for foreign residents, such as local or national consultative bodies. This said, the tool chosen by each State reflects the peculiarity of national constitutional culture; indeed, national approach to foreigners’ participation to the public life strictly depends on two factors, namely

¹ Robert Dahl, *Democracy and its Critics*, New Haven: Yale University Press, 1989, p. 108.

² Cristina M. Rodrigues, *Noncitizen voting and the extraconstitutional construction of the polity*, Oxford University Press and New York University School of Law, *ICON*, vol. 8, no. 1, 2010, p. 30-49.

values and structure of constitutional debates around the matter and migration law and policies affecting noncitizen population.

Through this text I made an attempt to analyze the current available possibilities for resident aliens' political participation in their receiving Country through an institutional approach: in the first chapter I primarily outlined the main theoretical frameworks and interpretations relating to this issue and its effects on modern democracies; then, in chapters 2 and 3 I developed a vertical and horizontal evaluation of the so called "Political Opportunity Structure" to which migrants are subjected. More precisely, the second chapter assess the international legal system under which foreigners are right holders independently from their nationality; this brought to a comparison between the UN system, the Council of Europe system and the European Union system. The choice of the last two systems is moved by the last chapter horizontal comparison between France and Italy. In fact, both Countries are part of the same transnational institutions which, as we will see, also affected resident aliens' status and rights. France and Italy will be studied under the following indicators: foreigners' rights in the Constitutional text; electoral rights available for resident aliens; presence of national, regional and local consultative bodies; and, eventually, citizenship and naturalization laws. In this way, I will try to develop a comparison between French Political Opportunity Structure and Italian Political Opportunity Structure. This kind of approach is not meant to evaluate the real effectiveness of both systems, but only to show that, even with the same supranational backgrounds and with similar levels of immigrants' integration, the Political Opportunity Structure for foreigners available in the two Countries differs according to their particular constitutional culture and history.

The two level comparison will help to show the two paradoxes of our post-national era: first, the opposition between national sovereignty and universal human rights; secondly, the contrast between the concepts of identity and rights.

Chapter 1:

Defining political participation

In 1950 T. H. Marshall³ suggested that equality among every class of society could have been achieved if all citizens had access to three categories of rights: civil rights (concerning individual nature and autonomy), political rights (the possibility of voting and being elected) and social rights (sufficient economic welfare, access to education and social services). Still today, even if almost all Western Countries accord to regular foreign nationals a wide range of civil and social rights (right to a free trial, partial access to welfare state, family unification, etc.), the same cannot be said for political rights. In contemporary debates about citizenship and nationality, the tension between the concepts of resident and citizen in the enjoyment of certain rights has been found as a potential threat for democratic States. As I will further explain in paragraph one, these definitions are now considered obsolete taking into account the increasing movement of migrants in a globalized world.

Normally, political participation is just conceived as participation in electoral activities and, therefore, as part of political rights *stricto sensu*. Nonetheless, I should precise here that any action made to influence the decision-making process can be considered a form of political participation⁴: consultation activities, protests and lobbying are all alternative models of political participation. When political liberties are granted, as it happens in modern democracies, we can distinguish between electoral participation and non-electoral participation: the first strictly depends on the entitlement of full political rights, while the latter on the presence of political liberties as a whole. Most scholars strongly support the recognition of full political rights to resident immigrants (at least in local elections) as a concrete mean to facilitate foreigners' integration in the host society. The second paragraph of this chapter is completely dedicated to this issue.

With respect to the international legal framework about political participation of migrants, in 1966, the two UN Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights were enacted; they largely translated the Universal Declaration of Human Rights of 1948 into binding provisions. No human being has to be discriminated in

³ T. H. Marshall (1950), *Citizenship and Social Class and Other Essays*, Cambridge, Cambridge University Press, pp. 10-27.

⁴ J. Niessen and T. Huddleston (2009), *Legal Frameworks for the integration of Third-Country Nationals*, Leiden, Martinus Nijhoff Publishers, p.220.

the fulfillment of those rights listed in the Covenants on the basis of nationality or legal status, with the major exception of electoral rights. As a consequence, political liberties such as those of expression and association are protected by international law and considered essential to ensure human dignity, without any distinction between citizens and foreign residents. On the contrary, with particular reference to main political rights (the right to vote and to stand in national or local elections) international law does not require States to grant this kind of rights to foreign nationals. This kind of transnational legal considerations are necessary in order to depict the general structure in which immigrants are allowed to act: the institutional approach is strictly linked to the so called Political Opportunity Structure, properly described in paragraph three.

1.1 Political participation of migrants and democratic legitimacy

At this point, it will be useful to make a first introduction about the concept of representation in modern democracies. According to Niessen and Huddleston⁵, when studying political representation, scholars should take into account two forms of the concept: descriptive representation and substantive representation. The first descriptive representation considers the composition of political bodies compared to the population represented; descriptive representation occurs if the distribution of seats in State's institutions reflects the particular socio-demographic components of society. One of the main objectives (and controversial issues) of contemporary democratic States is the achievement of this ideal of representativeness. It is easier said than done: although States often try to reach real descriptive representation, amending and reviewing their electoral law, they rarely succeed. An example is the little presence of women into the corridors of power that even public incentives cannot increase; or, apart from the women case, the same controversy arises when comparing the number of people of foreign origins in a defined society with their real presence in public institutions. On the other hand, substantive representation relates to the actual possibility of population's subgroups to make their voice and interests heard and taken into account in the decision-making process. Given the assumption that descriptive representation drives to substantive representation, political scientists considered this second form of representation as more connected to the effectiveness of the election: are representatives of particular sub-groups actually securing those sub-group interests? This is

⁵ Jan Niessen and Thomas Huddleston, Op. cit. p.1, and see also Ricard Zapata-Barrero (2017), *How do political parties deal with the "diversity gap"? Democratic deficits and party strategies*, Journal of Ethnic and Racial Studies, Vol. 40, n.5, pp. 766-786.

not always the case: a female politician or an activist of foreign origins could also advocate for positions that are respectively against feminist values or pro-immigration attitudes. Therefore, Niessen and Huddleston try to remind us that, despite the symbolic legitimacy embodied by descriptive representation, the final goal of modern democracies should always be the protection of minority group interests and the establishment of effective measures in order to achieve this aim.

This sort of reasoning about representation is crucial when analyzing current forms of political participation available to foreigners in liberal democracies. There are two main instruments around which the academic discourse developed: individual participation, namely the opportunity to vote, and group participation, primarily represented by the access to consultative bodies. With respect to the former, theoretical discussions largely concern the basic principles of democracy and the true meaning of citizenship and nationality; the latter, instead, is linked to the above mentioned substantive representation and to all the issues stemming from the actual establishment of these bodies. This said, both instruments affect the structure of democracy according to different considerations; however, States that decide to put in place these arrangements are generally trying to cope with major changes in their economic, political and social environment: the fact of modifying their democratic organization is seen as a way to strengthen democracy itself.

1.1.1 Individual participation: voting rights and citizenship

In the 1990s a controversial resident alien voting law was passed by the German regional assembly of Schleswig-Holstein: the act allowed residents with a foreign citizenship⁶ to vote in local elections. The German Constitutional Court judged the norm as unconstitutional because it violated the basic principles of democracy according to art. 20 and 28 of Germany's Basic Law⁷. In its motivation the Court specified that since "all state power proceeds from the people", only German citizens could exercise self-determination through elections at every level (national and local level) as an actual "political community of fate"⁸ to which foreigners were not bound. With resident aliens voting, the fundamental unity and cohesion of self-governing German people were undermined. With this justification the Court linked the concept of *demos* to the one of *ethnos* in better defining Germany's democratic

⁶ Namely Swedish, Norwegian, Danish, Swiss, Irish and Dutch. The choice of the German *Land* was due to the fact that Germans living in these country were allowed to vote in local elections.

⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 31, 1990, BVerfGE 83, 37 (F.R.G.).

⁸ Seyla Benhabib (2004), *The rights of others: Aliens, residents and citizens*, Cambridge, Cambridge University Press, p. 203-4.

legitimation; in other words, in the opinion of the German Court, the right of self-governing derives from “a national consciousness of belonging to the same people shaped by common ancestry, language and history” (Habermas 1998, p. 113). However, Munro (2008, pp. 66-7) argues that in the current multicultural and postnational world old sources of legitimation based on nationality cannot survive: with new demands and necessities democratic legitimation must be founded on more inclusive principles in order to cope with the legitimacy deficit of modern institutions.

Most scholars tried to revisit general principles of democratic legitimation in the light of those demands and necessities mentioned by Munro through deeper investigations about the true nature of democracy itself. An example is the “all affected principle” (also known as the principle of inclusion) presented by Robert Dahl in his work *Democracy and its Critics* (1989, p.108): the author affirms that any adult subject to or affected by government and its laws is entitled to vote and, therefore, to exercise complete political rights. From this perspective, also resident aliens living in a certain Country should be allowed to participate in the decision-making process through voting, since their interests too are surely affected by decisions of the State in which they reside. The same conclusion follows when applying another fundamental principle of democratic legitimacy theory defended by Dahl, that is the coercion principle: all those subject to the coercive authority of the state should be able to decide how this power has to be exercised⁹. So, given the fact that an essential value of liberal democracies is personal independence, State must both justify its actions and be accountable for the exercising of its power obtained by “the people”. As a result, in this case too resident aliens have all rights to be part of the electorate.

Both principles, however, are not exempt from blames of vagueness and abstractedness. Their main failure is the scope of their application: as Song (2009, pp. 607-20) disputes (and many scholars before her) in an increasingly interconnected world, the assumptions deriving from the principle of inclusion and the principle of coercion would not only extend the right to participate to resident noncitizens, but also to foreigners living abroad. A significant number of migration laws, for example, rules about aliens’ access to the Country; does this mean that, by virtue of their affected interests, migrants trying to cross borders can have a say on that law-making process? And as generally Country legislation encompasses different matters and issues, does people affected by governments vary from one decision to another?

⁹ Definition took from Sarah Song (2009), *Democracy and noncitizens voting rights*, *Citizenship Studies*, Vol. 13, n. 6, pp. 607-620.

Ludvig Beckman (2006, pp. 158-61) tried to answer to these questions with a reinterpretation of Dahl's principles, taking a "contributivist" and a legal view which both support the right to vote for resident foreigners. In particular, through the contributivist view, the author gives a first meaning of "affected" in financial terms. If we perceive State as a public company where citizens become shareholders on the basis of taxes paid to the government, then all those resident aliens who participate in the economy should also have the right to participate in the decision-making process. Beckman, in fact, underlines that until universal suffrage was achieved, the entitlement of the right to vote followed this kind of reasoning in most of Western States¹⁰. The legal view, instead, accords the right to vote to all persons considered legal subjects that are affected by the government. Since State's authority and legal duties obtained from the people end with territorial borders, the status of legal subjects is defined by territorial location. This means that the mere residence in the land of a certain Country could convert a foreigner into a legal subject entitled of voting. However, the side-effect of this view is the exclusion from the right to vote of all those citizens who live abroad.

Likewise, the political scientist Rainer Baubock¹¹ tried to solve Dahl's theoretical problems, adding his principle of stakeholding which could grant both right to vote and citizenship to resident aliens. As a first assumption, citizens not only have an interest in the result of the political process, but also have the right to claim representation in order to participate in the decision-making process. This is due to their status of stakeholder citizenship that is to say, citizens have full membership and voting rights in a self-governing polity. More in general, with the author's words, stakeholding expresses in general terms "an interest in membership that makes an individual's fundamental rights dependent on protection by a particular polity and that ties an individual's well-being to the common good of the polity"¹². There are two fundamental concepts in this definition; the first one is membership: finally, the existence of social ties or affiliation is taken into account for the inclusion of resident foreigners. From a certain point of view Baubock is saying that, given those connections created by the immigrant with the local context, in the long term the alien will be member of that society or, in other words, a stakeholder with the right to claim for participation and representation; In this way, his well-being will be linked to the common good of the host society. Secondly, contrary to Dahl's approach, Baubock's interpretation

¹⁰ Represented by the well-known battle cry "No taxation without representation" which broke out in United States during the 1700s.

¹¹ Rainer Baubock (2005), *Expansive Citizenship, Voting beyond Territory and Membership*, Political Science and Politics, Vol. 38, pp. 683- 684

¹²Rainer Baubock, Footnote 11,p. 686.

gives the burden of justification and democratic legitimacy directly to the singular person (and not to institutions themselves): in order to obtain the right to vote there is need for a true claim, through which the “express interest in membership” can be manifested.

What all these theories have in common is a universalist approach: their normative premise is that all individuals are entitled to equal rights and political morality. This means that, as Soysal’s (1994, p. 3) noticed, “universal personhood replaces nationhood”; personhood is replacing citizenship as a criterion for the recognition of rights and, in particular, voting rights. In fact, most rights that were citizens’ rights in the past are now extended to aliens in general: from these developments, the same concept of citizenship has been reconsidered, so as to separate it from the one of nationhood and find new foundations for the very notion.

According to Soysal (1994, pp. 6-8) and Mantovan (2007, pp.19-26), these changes are mainly due to two phenomena: the first, is the direct effect of globalization on States’ powers; the second concern the internationalization of human rights law. In fact, in the first case, the State is threatened at two levels by globalization: at supranational level through an increasing number of transnational political structures which take powers from national governments; but also at the infra-national or sub-national level, where the growing movement of migrations contributes to a greater presence of foreigners. In addition, with respect to International Law, new universalistic rules about individuals’ rights and international aspects of migration set standards that are enforceable without any consideration of citizenship (such as the elimination of disparities based on gender, nationality, religious faith). The fact that, through these two phenomena, rights expanded outside national parameters, makes the current model of membership (based on national citizenship) more and more outdated. To sum up, we have firstly outlined one of the two paradoxes in our post-national era: the opposition between national sovereignty and universal human rights. If, as we said, human rights create a de-territorialized status, the reinforcement of State sovereignty through policies of closure still bounds the exercise of these rights to specific national regulations and organizational forms. The second important paradox mentioned by Soysal is strictly connected to the very notion of modern citizenship: the contrast between identity and rights. As human rights are defined at the global level, the same cannot be said for identity: due to its particularity and territoriality, identity as national-citizenship still prevails, but, translated into rights, it cannot be relevant anymore. Therefore, the universal personhood coexists with different and specific national identities that belong to human beings.

The same concept of identity is one of the most studied concepts linked to citizenship. What is often peculiar of immigrants is their “cultural hybridization” or, in other words, the coexistence of multiple memberships in defining their identity (especially when second generation migrants are considered). In particular, Brubaker (1989, pp. 145-62) develops a model of “dual membership” that should describe the new membership form originated by postwar immigration. Migrants’ membership is conceived as concentric circles, where the inner circle which represents citizenship is based on nationality, while the outer circle of denizenship¹³ is based on residence. In fact, the right to cultural identity is often used by migrants communities to claim for more participation in the public sphere of the host country.

To conclude with the words of Alain’s Touraine (2000, p. 920), if modern democracy wants to be saved, it should recognize the “creative freedom of the individual”: citizenship cannot consist of a mere unification of multiple identities in just one and only national conscience; it should, instead, enhance diversity and strengthen individual rights.

1.1.2 Group participation: analysis of consultative bodies

The idea of establishing consultative bodies for foreigners spread in the 1960s and 1970s in many European Countries. They were mainly used at the local level in order to increase the engagement of migrants in the political process and to facilitate the expected extension of voting rights, but, in the end, their central objective failed. In fact, the setting up of these mechanisms did not result in an increased political power, but in a more evident exclusion. As Martiniello (1999, pp.77-89) stresses, not every form of political participation, such as consultation, brings to effective political power; given the fact that the right to vote still is the fundamental means of political power in modern democracies, consultative bodies cannot exempt from a structural debate on broadening universal suffrage to resident aliens. Hence, consultation should be considered as an auxiliary of political rights *stricto sensu*.

With a view to avoid the mistakes of the past, current discussions on consultative bodies concern several questions: who consults whom? how should the consultative bodies be composed? When to consult? And about what issues?

As regards the first question, we should consider the supranational level of globalization explained in the past paragraph: due to the transnational aspects of today’s

¹³ The term “denizen” was introduced by Thomas Hammar (1985, p. 292). The derived form of “denizenship” indicates an intermediate status between citizen and foreigner obtained with a visa that is valid for an unlimited period of time and which grants the same rights of citizens.

issues, it would be simplistic to just limit the scope of consultation at the municipal level; the European Union Migrants' Forum is an example. This said, consultation at the local level still plays an important role in the participation of migrants in their host community: ideally speaking, consultation between immigrants and decision-making bodies should take place at any level that could significantly affect foreigners lives and opportunities. However, the most problematic aspect of consultative bodies is representativeness: who can represent the immigrants? And through what mechanism of selection?

First of all, we need to stress the symbolic meanings of providing consultative bodies: on one hand, it can be a positive signal from national/supranational institutions which are taking seriously foreign groups, using consultative bodies as an official recognition; on the other, the formal acknowledgments of certain groups entails the exclusion of others. In particular, with this second case, the decision about consultation is likely to make a distinction between problematic and non-problematic immigrants or even between credible/non-credible talking partners (Martiniello 1999, pp. 77-89). We should consider the previous example of the European Migrations' Forum, from which EU nationals are excluded. This selection contributed to the idea that immigration solely concerns Third-Country Nationals and that most of cultural, political and social problems are caused by these non-EU nationals flows. Another example is the inclusion of immigrants which support radical religious and political position: should they be represented? We can say that their involvement in a formal process could have two positive results: first, their participation allows better control of their influences, and secondly, their exclusion could, instead, exacerbate their attitude. On the other hand, those against the inclusion of extremists fear a sabotage of the system from the inside.

For what concerns the specific composition of these bodies, scholars are still torn between three positions: should all representatives be part of the same ethnic group? Or should they represent the entire foreigner community as a whole? And what about including national organizations concerned with immigration? In answering the first question, we have to consider the role of the group leaders: if selection of representatives happens through authorities' appointment, there is a considerable risk to choose the wrong partner (someone who can be considered credible but does not really represent his community); in this case it would be better to first understand the community targeted. For this reason, most scholars suggest to let the group elect their own representatives. With respect to the second question, it could be difficult to comprehend in just one category the entire patchwork of cultures, religions, expectations and needs. As several studies underlined (Mantovan 2007) migrants are often influenced in their perception of political participation by their group's inner logic

and their approach to the decision-making process is still influenced by their cultural values. This does not mean that the creation of one institution for all migrants will not be possible (since this kind of measures are already in place in many European Countries), but just that it will be more difficult to handle. Lastly, participation of national associations or organizations is a value added in the consultative process, since they could act as intermediaries between authorities and migrants; Mantovan (2007, p. 312), however, points out that these national groups tend to overcome immigrants' voices: foreigners do not feel represented by these organizations, indeed they complain of being hampered in becoming protagonists instead of assisted.

We are finally at the last question: when should consultation occur? Consultative bodies may be summoned on an *ad hoc* basis or could be permanent. Probably, everything depends on what issues these bodies will be allowed to express an opinion. There are those who affirms that consultations should occur just for those matters that directly concern migrant communities; however, this is not easy to be defined. Just like any other citizens, foreigners (especially those with a long-term residence) are affected by a wide range of policies covering different and opposite issues. For this reason, another possibility proposed by scholars was the creation of a consultative body which included the overall immigrant population for any policy area, following the Swedish case.

Surely, the fact of having a permanent consultation with immigrant groups at each level of governance, instead of an *ad hoc* one, will facilitate the awareness of migration flows as a structural phenomenon of modern States and, generally speaking, of the current post-national world.

1.2 Political Participation of migrants and Integration

The term “integration” is currently used and abused in political and sociological debates; but what does it mean? Concepts of inclusion, incorporation, assimilation and inculturation prevailed in American academic researches. From the World War I until 1970 what we now conceive as integration was perceived as something irrelevant: some scholars thought that immigrants and their descendants would inevitably assume natives' habits and customs during time, with the consequence of becoming progressively indistinguishable from the host society; other believed that, due to irreconcilable cultural differences, foreigners were surely meant to come back to their Countries.

In particular, with respect to the European area (that will be further investigated in Chapter 2) the interest in long-term migration's consequences was very low, despite the strategic position of Europe as a crossroad for migrants as early as the end of World War II, with migration flows coming from Eastern Europe and Balkans. Nevertheless, after the establishment of the Iron Curtain, the European economic development was still in need of labor force: in this light, Northern European Countries started to recruit low-skilled workers from Southern Europe and former colonies through bilateral treaties. The newly arrived "guest-workers" were just seen as a temporary means to satisfy a specific need of the host Country: every policy put in place by these Countries had the precise objective of controlling foreigners and facilitating their future homecoming¹⁴. For instance, in most bilateral treaties, recruitment agencies undertook to ensure separate residential, educational, religious and welfare infrastructures to guest-workers based on their national origin. In this way, migrants were incentivized to maintain their cultural characteristics and, on the other hand, discouraged to create connections with the community at the local level.

However, the oil shock of 1973 determines the failure of this first migration policies; following the crisis, between 1973 and 1975 all European labor importer Countries decide to close the guest-workers' project, with the consequent expectation of foreigners leaving the State. On the contrary, foreign citizens had not only acquired residence and welfare rights by virtue of their stay, but also preferred to bring their own families to the host Countries. At this point, all Countries of immigration's efforts to reduce the presence of alien workers were opposed by national courts

Between 1973 and 1985 European States slowly become aware of the structural nature of immigrants' presence in their territory. Consequently to the diffused inability to push alien workers back, integration becomes a hot topic in politics' debates starting from mid-1980s. The main aims of the States concerned were, on one hand, to prevent further foreigners from entering their Country through restrictive policies and, on the other, to facilitate the integration of those already staying within their borders. With respect to the latter goal, scholars had the task to define possible integration models that could be compatible with the different European political cultures: the assumption was that each European State could, with its own political identity, bind the process of integration to well-defined determinants¹⁵.

This particular aspect will be further analyzed in section three, with a description of the Institutional Approach and the Political Opportunity Structure. In the next paragraphs,

¹⁴ Giuseppe Sciortino (2015), *è possibile misurare l'integrazione degli immigrati?* Trento, Università degli Studi di Trento, Dipartimento di Sociologia e Ricerca Generale, Quaderno 63. p. 21.

¹⁵ G. Sciortino, footnote 14.

instead, I will give a brief definition of integration in a European sense and a consequent explanation on the role played by political participation of migrants in the achievement of real integration in the host society.

1.2.1 A definition of integration

Defining the concept of integration is not an easy task. In 1997 the Council of Europe published a report based on the studies of almost sixty experts who met in Strasbourg to develop an effective method to measure immigrants integration in European Countries. What they affirm at the very beginning of the report is that the word integration can have a different meaning according to each national policy goals. In fact, each member state of the Council of Europe is said to have its own migratory traditions and migration policy which shape fundamental assumptions on the integration of foreigners shared by society itself¹⁶. Consequently, when comparing foreigners' integration in different Countries, the assessment of successful national policy should always occur in the light of the varying forms of what is thought to be a successful policy in each State examined.

From these considerations we derive the first element characterizing the different concepts of integration, that is the culture's relation with private and public domain. In other words, ideas of integration might vary according to what kind of cultural adaptation is required for resident aliens by the host State and at which level it should occur (public or private). In addition, experts mentioned two more factors affecting national concept of integration: the potential inclusion or exclusion of foreigners from some non-cultural features of the public sphere (that will be defined later) and the direct role of the migrant itself in the process of integration according to his expected duties. Moreover, since integration is defined as a two-ways social process¹⁷ that involves both immigrants and host society, I think a fourth element should be added to the above mentioned list: citizens' shared perception of immigrants and their integration¹⁸. I will now explain through further details what each of these factors includes in their definition.

With respect to the first element introduced, Castles (1993, p. 247) proposed three possible States' approaches to migrant individual culture which define immigrants

¹⁶ Council of Europe (1997), *Measurement and Indicators of Integration*, Strasbourg, Council of Europe Publishing, pp. 32-33.

¹⁷ This is mentioned in the same report, Council of Europe (1997), footnote 16.

¹⁸ This idea is also based on the term *pensée d'État* or State thought introduced by Pierre Bourdieu (1994, p. 130).

incorporation in the host society. One form could be the well-known assimilation: a one-way social process in which the effort of being integrated is entirely on the migrant. In fact, he has to renounce his peculiar cultural or linguistic attributes (especially in the public domain) so as to acquire the same characteristics of the major population. Secondly, a model that Castles names “integration” implies the same waiver of the foreigner’s habits foreseen by the assimilation model; in this case, however, adaptation is a two-side process in which migrants and natives learn from each other. Then, there is multiculturalism, under which immigrant populations in a certain Country develop around ethnic communities who maintain their peculiarities but still interact with locals. Finally, the commission charged of the report adds a fourth approach: cultural segregation. In this last case there is a complete isolation of immigrant groups from the rest of native population, both in terms of socialization and cultural contamination.

The second important factor affecting the definition of integration is the existing inclusion or exclusion of foreigners about non-cultural elements of the public domain. Generally speaking, the concept of integration is usually formed by four dimensions: social integration, economic integration, cultural integration and political integration. We are now considering those aspects among these listed that are not part of the system’s cultural elements (that I described previously). In mixing the Council of Europe findings and Sciortino’s studies, two non-cultural areas can be reformulated, namely the socio-economic and legal-political sphere of integration. The inclusion or exclusion of foreigners with respect to the former dimension primarily depends on the condition of immigration as temporary or permanent: seasonal or circular migration is rarely subject of integration policies while, in the case of long term stays, resident aliens’ socio-economic factors are usually considered by public actions. In fact, in this dimension integration aims first at granting equitable opportunities to education for both foreigners and locals; and then at reducing differences between alien and native workers in the access to the work market. The latter dimension, that is the legal-political sphere, concerns in the same way two fields: legal status and political liberties. The first one focuses on procedures available to resident aliens in order to obtain a long-term visa and eventually citizenship. The second, instead, relates to political liberties and rights accorded to foreigners depending on their legal status, from freedom of association to voting rights; this last legal-political dimension will influence the analysis developed in Chapter 2 and 3.

The third dimension mentioned above concerns, as we said, the expected role of migrants in the integration process. In this case the Council of Europe’s experts precise that

definitions of integration may change according to what ideas of migrant's role and duties are considered by the very process of integration; migrants could be subject to positive or negative sanctions according to their involvement in policies applied to increase foreigners' possibilities of participation in the host society (for example through mandatory language courses or professional education).

Lastly, the fourth dimension analyzed is the one concerning host society's perception and image of the process of integration. In 1994 Pierre Bourdieu underlined as a fundamental State's characteristic not only the monopoly of legitimate violence, but also the use of symbolic capital: the State distributes social recognition through the imposition of principles that will be later attributed by social agents to any entity (physical or symbolic) related to their lives. Briefly, the State produces certain cognitive structures under which its population perceive their Country and everything associated to it. This kind of reasoning is called *pensée d'État* (State thought) and becomes relevant when approaching integration issues: the main effect of this phenomenon is the host community's perception of foreigners as individuals who do not belong to the national order based on the overlap between politics and nation. The fact of thinking the foreigner contributes to the definition of the State itself and to a clear separation between the "in-group"(us) and the "out-group" (them). In her study about Italian immigration and citizenship, Claudia Mantovan (2007, pp. 312-4) points out that most of the resident aliens interviewed complain about not feeling part of Italian society. In spite of their period of residence they are still treated as immigrants by locals, even after several years of residence. The author argues that the perception of immigrants as subjects ontologically out of place cannot be modified with a change in their legal status. Thus, immigrants are extraneous to the "in-group" due to their inner characteristics and independently from their actual status; this often happens in Countries where the principle of *ius sanguinis* is well rooted, as it occurs in Italy.

1.2.2 The role of political participation in the process of integration

Social, cultural and economic dimension of integration will hardly be disputed as fundamental in the process of adapting to the host society. However, political life is an important aspect of individual existence.

Munro (2008) describes two tendencies in connecting political participation (here considered as the right to vote) and integration: the first envisages integration before participation; on the contrary, the second expects integration through participation. According

to the first connection, immigrants could not be able to participate in the electoral process due to their lack of knowledge about local language and policy mechanisms. Thus, providing them with the right to vote will result in harmful consequences for the entire democratic system and the quality of its public policies. Foreigner residents should be granted voting rights only when they will be sufficiently educated and integrated in the political society or, in other words, when they will become citizens. On the other hand, supporters of the second tendency believe that the possibility to vote in local or regional elections could improve aliens residents' knowledge of rules and norms acting in the host Country. In fact, they could either acquire the basic skills and information through practice or definitely decide not to be part of the political process so, without undermining democratic quality. In accordance with Munro's opinion, the disenfranchisement of foreign residents can operate as well as a public recognition of migrants as members of the above mentioned "in-group". Moreover, public authorities would be accountable for immigrants interests being defended. This approach is probably the one applied by the Council of Europe which, as we will see in Chapter 2, often stressed the importance of granting political rights and liberties in order to achieve better integration of both Third-Country nationals and EU citizens living in a member State.

The "integration through participation" concept is not exempted from criticisms; the first comes from a study developed by Catherine Neveu who, in 1993, compared immigrants' condition in the United Kingdom and in France. Her aim was to verify if, thanks to the voting rights granted to New Commonwealth migrants, foreigners living in UK were better off than in France, a Country in which no non-citizen can vote. The research shows that the enjoyment of full political rights did not improved significantly immigrants' social condition. In fact, there still was a barrier to real integration in UK: the *nationness*. With this term the author translates a concept similar to the one expressed by Pierre Bourdieu through the *pensée d'état*, that is, a feeling of belonging to a national community. This symbolic border between integrated and not integrated migrant implies a tight connection among all those dimensions mentioned in section one of this paragraph, namely the equal access to economic and social opportunities. In Munro's view, this last assumption could explain the progressive lower turnouts at political elections experienced by those immigrant communities allowed to vote and demonstrated by empirical researches¹⁹.

¹⁹ In particular, studies on immigrants participation in Swedish elections showed that, despite lower turnout for the overall population during years, the percentage of foreigner residents voting (solely based on the foreigner community) was always less than that of citizens.

For further information see Rath, Voting Rights, 1990; but also Jaspreet Kaur Srail, Political Participation amongst Migrants: The Case of the Nordic Countries, Master Thesis, University of Tampere, 2012.

This said, the group dimension of participation cannot be excluded when assessing integration. In 1999, Fennema and Tillie developed a first study concerning the idea of social capital related to migrants who join political activism in the host society. The scholars showed that the level of membership and networking in migrants' ethnic associations affects foreigners' participation and trust in the public arena²⁰. In other words, the more resident immigrants join group associations and the more these associations interconnect with each other, the more opportunities for participation in the decision-making process are available for migrants. Therefore, even membership in ethnic groups is proved to affect positively resident aliens' integration through the consistent activity of networking carried out by this kind of associations²¹. Moreover, the contamination among different groups drives to immigrants joining more than one association (cross-ethnic membership), fostering the process of integration in the host community. In this sense, the results produced by the *Localmultidem project*²² seem to underline the importance of giving resident aliens means to enhance migrant-self initiatives in the public sphere: migrant networks have themselves the power to facilitate immigrants' political integration.

1.3 Political participation and the institutional approach

During time scholars tried to define what are the main factors driving migrant political participation in the host society. Initial works were based on considerations of migrants' working class identity²³: trade unions were thought to be the main political arrangement enhancing migrants' participation in public life. However, when after the 1980s business owners raised from immigrant groups, the class-based perception of resident aliens was hardly arguable; thus, ethno-cultural approaches emerged. According to this view, immigrant groups' political interests and attitude to the political activity were determined by the belonging to a particular cultural, religious or ethnic identity. Therefore, academics expected different ethnic groups to participate in the political debate according to different patterns affected by their peculiar cultural heritage. However, empirical analysis demonstrated that, even if the ethno-cultural approach succeeded in explaining diverging degrees of political

²⁰ OSCE, Migrant Political Participation.

²¹ D. Jacobs and J. Tillie, 'Introduction: social capital and political integration of migrants', *Journal of Ethnic and Migration Studies*, 2004.

²² Localmultidem Project (Multicultural Democracy and Immigrants Social Capital in Europe: Participation, Organisational Networks, and Public Policies at the Local Level), (2009), <http://www.um.es/localmultidem/>

²³ Evren Yalaz, *Immigrant Political Activism: Political Opportunities, Group Resources, and Inter-Ethnic Context*, 2015.

activism among different ethnic groups residing in the same Country, it failed in comparative researches where cross-national variation of the same group was accounted.

At this point, group-based approaches were integrated by wider theoretical frameworks which could depict effectively immigrants' participation in the public debate. In my opinion, the most comprehensive approach is the one proposed by Koopmans, Stratham, Giugni and Passy (2005, p. 74): in their work the four scholars try to develop a theoretical framework that could explain modalities of migrant claims making. According to them, types of migrant claim making are influenced by three factors; the first is labeled as "homeland influences"²⁴, that is sending countries' actions towards its citizens abroad: while some countries encourage its emigrants to integrate in the State of arrival, others prefer to keep their migrants' loyalty through, for example, negative consequences deriving from the loss of their former citizenship (such as loss of property or inheritance rights). The second factor relates to the group-based approaches, since it is represented by the collective identity of each foreign group: the feeling of belonging to a particular religion, race or ethnicity could shape political behavior. However, the scholars do not exclude that collective identities could be just a side-effect of the "homeland influences" mentioned above and of host Country's policies of integration; in fact, once settled, a foreigner has the possibility to define his collective identity following categories defined by the receiving State, such as asylum-seeker, illegal immigrant or ethnic minority. The third and determinant is the one that will be further analyzed in this section: the political opportunity structure (POS). Generally speaking, the POS represents all those constraints and opportunities put in place by national institutional regimes and integration models that influence the political participation and activity of migrants.

1.3.1 The Institutional Approach and the Political Opportunity Structure

In the Political Science field, the study of organized political institutions has always been a fundamental aspect of researches related to political participation. Through the Institutional approach, scholars tend to attribute more descriptive functions to institutions such as parliaments, governments, courts and ministries, instead of individual actors or social framework. More precisely, the Institutional approach consider institutions as "enduring collection of rules and organized practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover of individuals and changing external

²⁴ Koopmans et al. (2005), *Contested Citizenship: Immigration and Cultural Diversity in Europe*, Minneapolis, University of Minnesota Press, pp. 74-106.

circumstances²⁵“. In fact, all bodies mentioned before produce rules and reforms under which actors are allowed to participate in the system: an institutional perspective takes into account “structures, procedures, rules, practices, socialization patterns, styles of thought and interpretative traditions²⁶” that are relevant in a defined national context. For this reason, the extent and mechanisms of institutionalized activity “vary across political systems, policy areas, and historic time²⁷“. Different institutionalized state systems correspond to different theoretical and organizational configurations of the political order within which states frame their actions²⁸.

If we apply this approach to migration studies and in particular, to migrant political participation, we should investigate the characteristics of social and political institutions in order to find the fundamental driving factors of immigrants’ actions in the public debate. A core concept developed in this sphere is the one of Political Opportunity Structure: national institutions and, widely speaking, the organizational system affect actual migrants’ possibilities of accessing the political process, individually or grouped. According to Koopmans et Al. the mentioned possibility of access is determined by two factors acting in the political system; the first is the degree of horizontal and vertical centralization of power: in a more decentralized state with more levels that are independent from central authority (like regional powers, judiciary powers, etc.) collective actors will have more possibilities to access the decision-making process. On the contrary, in those polities where state power is highly centralized, activist group are less likely to succeed in affecting the policy process. The second factor, instead, is the kind of informal strategies put in practice by the elites with the view of engaging with political challengers²⁹. Generally, this element depends on the state’s political heritage about social conflict resolutions: on one hand, there are elites’ political forces who pursuit a consensus-oriented strategy, with the main aim of including the opinion and interests of different actors; on the other, where political polarization persists, elites in power tend to challenge minority groups. Moreover, the same Political Opportunities Structure affects interest groups through established possibilities and constraints in two ways: the first direct way is shaping collective actors mobilization with the determination of, on one hand, the possible success of their strategies and, on the other, different patterns of action for the same collective identity present in different countries. The second indirect means

²⁵ Maassen, P. and J.P. Olsen (eds) (2007), *University Dynamics and European Integration*, Dordrecht: Springer.

²⁶ Johan P. Olsen (2009), Change and continuity: an institutional approach to institutions of democratic government, *European Political Science Review*, Vol. 1, n.15, pp. 3-32.

²⁷ Johan P. Olsen, footnote 26.

²⁸ Yasemin Nuhoglu Soysal (1994), *Limits of Citizenship: Migrants and Postnational Membership in Europe*, Chicago, University of Chicago Press, p. 65.

²⁹ Koopmans et al., *Op. cit.* footnote 24.

influences self-perception and aims of collective actors: in a closed Political Opportunity Structure, immigrants are less likely interested in the political process of the receiving State, and will probably focus on homeland politics.

1.3.2 Political Opportunity Structure's factors assessing political participation

Once a general definition of Political Opportunity Structure is provided, the main difficulty is still represented by the identification of assessable indicators through which a definition of the system's mechanism and possibility of participation can be drawn. Scholars comparing different States' Political Opportunity Structures all used diverse set of indicators that had in common their focus on State's laws.

The attempt made by Koopmans et Al. (2005) was based on the concept that, despite the crucial role of groups and collective identities, the fundamental means to gain real access in the public debate was citizenship: for this reason, they analyzed five Countries (namely Germany, France, Switzerland, Britain and Netherlands) on the basis of citizenship and naturalization law. Citizenship analysis, however, is based on two dimensions, that are individual equality and cultural difference. The first dimension assesses nationality acquisition laws ("ethnic" or "civic-territorial" conceptions of citizenship) but also foreign nationals access to civic and social rights and the presence of anti-discrimination provisions. The second dimension of citizenship, instead, concerns those rights granted by virtue of foreigners' membership in some minority group. Thus, a first opposition between assimilationist Countries (which do not grant any "poly-ethnic right") and multicultural Countries (in which religious and cultural practices are allowed and accommodated in public institutions) is drawn. The study of this cultural difference's aspect is made through the examination of: cultural requirements for naturalization (for example, knowledge of national language or history); allowances for religious and cultural practices both outside and inside of public institutions (like public prayers for Muslims or the right to wear the headscarf); and, finally, political representation rights through advisory bodies or councils. Then, these scholars develop a scheme of citizenship's configuration for all five Countries that moves horizontally from a cultural monism approach to a cultural pluralist one and vertically from an ethnic conception of citizens (based on bloodline) to a civic-territorial one (based on residence).

There is also another kind of categorization made by Soysal (1994, pp. 65-83) who defined four models of immigrant participation according to the Political Opportunity Structure of six Countries: Sweden, Netherlands, Switzerland, Britain, Germany and France.

Models are created according to two factors, namely the organizational configuration of the State and the locus of action and authority. The first factor considers whether the public space and authority are centralized or decentralized: organizational configuration indicates to what extent state, public or voluntary local powers control social functions and organizing³⁰. The second dimension, instead, defines to whom the action is oriented and from whom the action is expected in the public sphere³¹, so whether action is organized around society or State. In this way, the author could identify the corporatist model, the liberal model, the statist model and the fragmental model. In the first corporatist model, membership is formulated around corporate groups (defined by a particular gender, ethnicity, religion or employment) which occupy the central place of action and authority. Individuals are entitled of rights because of their membership in these groups and can participate in the political process by virtue of their belonging to a community. Therefore, this model is centrally organized and group oriented: if, on one hand, public interests and welfare of corporative groups is pursued by State structures, on the other, corporatist polities produce top-down policies for the integration of foreigners, with clear standardized protection and assistance. Examples of the corporatist models are Netherlands and Sweden. Then, we have the liberal model, under which the individual is the core of action and power. Central authority is weak and the system is decentralized: individuals and private associations are facilitated in affecting the public debate. Therefore, integration occurs horizontally, through private and voluntary associations: migrants are just considered in their individuality as right holders and local powers play an important role in providing assistance. Representatives of the liberal model are Britain and Switzerland. The statist model, instead, has a strong central power and thus, the state is the source of power and authority: citizens are subordinate to it. In fact, societal functions are mostly carried by the State and statist policies are top-down: they lack intermediary structures and migrants have to directly face the State when making claims. France is the Country that mostly correspond to this description. Finally, the author considers the fragmental model: The State has the power, but its organization is weak; in fact, public life is dominated by primordial groups, such as clans, families or even the church. Therefore, migrant integration is partial: they widely participate in the labor market, but the same does not happen in institutional structures; Gulf oil countries are the best representatives of this model. And what about Germany? Soysal places this last Country in a space between the corporatist model (focus on corporative groups) and the statist one (focus on state authority).

³⁰ Yasemin Nuhoglu Soysal, footnote 28, p. 79.

³¹ Soysal, footnote 30..

Another scholar who contributed to the identification of POS factors in the academic field is Patrick Ireland: in his study “The policy challenge of ethnic diversity”, Ireland compared France and Switzerland with respect to levels of political participation among similar migrant groups. Therefore, the authors describes the Political Opportunity Structure as a set of variables that include “the immigrant’s legal situation; their social and political rights; host-society citizenship laws, naturalization procedures, and policies in such areas as education, housing, labor market and social assistance that shape conditions and immigrant’s responses”³². Moreover, also those institutions that act as institutional intermediary, such as trade unions, political parties, religious and humanitarian solidarity groups, play a relevant role in the political process, according to Ireland’s view.

The last group of indicators was proposed by the Organisation for Security and Co-operation in Europe (OSCE) which, in 2009, commissioned Thomas Huddleston, Policy Analyst with the Migration Policy Group, to draft a background paper on civic and political participation of immigrants in Europe³³. The aim of the research was to analyze and compare the experience of several European Countries on foreigners’ participation in the political process. In order to do so, factors compared are: general political liberties (such as freedom of association and freedom of joining political parties and trade unions); electoral rights; public funding for ethnic groups; the presence of consultative bodies for foreigners and naturalization laws. Moreover, in this work the transnational aspect is crucial: the paper also includes a brief overview of the main International and European provisions that affect civic and social participation of migrants in national public debates. In fact, as also Soysal underlined in his book mentioned above, transnational discourse and structures, but also world-level factors, now affect the national context too, by producing provisions and norms that alter national Political Opportunity Structure.

Nevertheless, I think the most comprehensive approach to the Political Opportunity Structure is the one provided by the Migrant Indicators Policy Index (MIPEX)³⁴ that from 2004 prepares regular updates on European and North-American State policies on migrants integrations. This kind of evaluation is assessed in normative terms rather than statistical: eight dimensions of foreigners’ lives are evaluated on a scale of 0 to 100 for a range of defined States and then compared. These eight dimensions are: Labour market mobility,

³² Patrick Ireland, 1994, *The policy challenge of ethnic diversity: Immigrant politics in France and Switzerland*, Cambridge, Harvard University Press, pp.78-79.

³³ Thomas Huddleston (200), *Migration and Democracy: Migrant Participation in Public Affairs*, Organisation for Security and Co-operation in Europe, Warsaw.

³⁴ Migrant Indicators Policy Index, official website retrievable at: <http://www.mipex.eu/> [accessed 12 February 2019].

education, political participation, access to nationality, family reunion, health, permanent residence and anti-discrimination; for each of the categories just mentioned the final national evaluation can be: critically unfavourable (0 points); unfavourable (1-20 points); slightly unfavourable (20-40); halfway favourable (41-59); slightly favourable (60-70); favourable (80-100). I just want here to underline that political participation is separated from naturalization policies and that it is formed in its turn of four indicators: electoral rights; political liberties; consultative bodies and implementation policies. Following these considerations we can now continue with the fourth paragraph of this Chapter.

1.4 Methodology

In this last paragraph I will simply outline the structure of this work starting from the last assumptions of Political Opportunity Structures and its indicators. Given the importance of the “transnational Political Opportunity Structure” my analysis of French and Italian approaches to immigrants’ political participation will start with a brief overview of the European area’s commitments and provisions on the matters. However, with respect to the European Union policy, I think that a further explanation on its main attitudes towards migration policies during time is due. In fact, as we will see, the distinction between Union citizens and Third-Country national concerning voting rights intensified debates on the issue.

Moreover, Chapters concerning the comparison between France and Italy will be structured in the same way: they will start with a comment on the different ideas of integration in each Country and on their main intentions for migration policies followed by a legislative analysis of those provisions affecting political participation of migrants. Thus, I will mix both MIPEX and OSCE indicators. The research will be carried according to these dimensions:

- Naturalization and citizenship Law;
- Foreigners’ rights in the Constitutional Text
- Electoral Law (right to vote and stand for national, regional or local elections);
- Activity of consultative bodies formed by immigrants (at the national, regional or local level);

Chapter 2:

Supra-national Legal Standard Setting

As I mentioned in the last chapter, in order to understand the existing Political Opportunity Structure available to foreigners, we should take into account the current arrangement of the multilevel legal system. With the emergence of supra-national bodies and institutions, the protection of human rights primarily lays on international treaties and covenants or, in particular cases, such as prohibition of torture, slavery and genocide, on the *jus cogens*. However, with respect to specific political rights of foreigners, these instruments do not address the issue directly; they mainly cover what we defined in chapter 1 as political liberties, that is political rights at large³⁵. Migrants' political rights *stricto sensu*, namely the right to vote and to stand for elections in the host Country, are not addressed in these texts, with few exceptions. Indeed, more explicit references to foreigners' political rights can be found in regional treaties: the second and third paragraph of this chapter will focus on the European area, through the analysis of the Council of Europe and European Union's norms and political commitments. As we will see, regional legislation, and in particular EU legislation, carries a number of problems in terms of allocation of powers in the immigration field; States and supra-national powers are constantly fighting about their respective competences. Surely, both the lack of international provisions on the matter and the heated dispute among regional and national powers reflect the general trend of linking participation in elections to an intimate relationship between the individual and the State, expressed by citizenship³⁶. Therefore, the thorny question of foreigners voting is mostly left to decisions of the host State, with just few supra-national suggestions or recommendations, while other political rights are internationally recognised as binding. For this reason, in the first paragraph I will briefly describe what are the relevant UN conventions and provisions regarding general

³⁵ By political liberties I mean freedom of expression, freedom of assembly and freedom of association.

³⁶ Ruma Mandal(2003),*Political Rights of Refugees*, United Nations High Commissioner for Refugees, Legal and Protection Policies Series, PPLA/2003/04, p.13.

political liberties accorded to foreigners by virtue of their status as human beings³⁷ or migrant workers³⁸.

2.1 The United Nations

The protection of human rights is a fundamental characteristic of the United Nations legislative body. In fact, in the Preamble of the UN Charter it is stated that:

“We the peoples of the United Nations [are] determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...³⁹”.

In this paragraph I will analyze three fundamental texts for international human rights approved through the UN bodies: the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. In all these provisions, a major relevance is given to non-discrimination principles in the enjoyment of rights and, particularly, in any area of civic and political rights. Obviously, the only exception to this golden rule is electoral rights. However, with respect to freedom of association, trade union membership, assembly and expression, international legal standards are guaranteed for both documented and undocumented migrants, that is, illegal migrants.

I will firstly give a brief overview of these treaties and then compare what are their measures for freedom of expression, freedom of assembly and association and the right to vote. I decided to compare the three areas on the basis of the Human Rights Committee's General Comment No. 25 (the right to participate in public affairs, voting rights and the right of equal access to public service) in which a clear relationship among this rights is highlighted.

the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is the first international instrument that specifically addresses the need for

³⁷ United Nations General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, resolution 2106 (XX) of 21 December 1965, available at: <https://ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (18 December 2018) and International Covenant on Civil and Political Rights, resolution 2200A (XXI) of 16 December 1966, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [accessed 18 December 2018].

³⁸ United Nations General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, resolution 45/158 of 18 December 1990, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx> [accessed 18 December 2018].

³⁹ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html> [18 December 2018].

eliminating and condemning racial discrimination. The convention was adopted in 1965 and entered into force in 1966; as of December 2018 it has 88 signatories and 179 parties⁴⁰. The implementation of ICERD carried by States parties is monitored by the Committee on the Elimination of Racial Discrimination⁴¹ to which each State party should submit regular reports on the appropriate measures enacted in their countries⁴². The only article that will be considered here is article 5. Nonetheless, a definition of racial discrimination is given in art. 1 para. 1⁴³, and in the second and third paragraphs of the same article it is stated that:

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens, and

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

The second instrument is the well-known International Covenant on Civil and Political Rights (ICCPR), adopted in 1966 and entered into force in 1976, after the thirty five instruments of ratification were deposited; as of December 2018 there are 172 States parties and 6 Signatories⁴⁴. This convention is a milestone in International law for the recognition and protection of human rights, especially with respect to minorities and endangered categories. Along with the International Covenant on Economic, Social and Cultural rights and the Declaration of Human Rights, this convention is part of the International Bill of Human Rights. Moreover, under art. 28 the Human Rights Committee has been established with the clear role of reviewing States parties regular reports on the implementation of human rights. The articles relevant for our overview are those from art.19 to art.22, but also art. 25 and 27. However, the key to correctly interpret the Covenant is art. 2, para. 1, according to which:

⁴⁰ Parties to the International Convention on the Elimination of All Forms of Racial Discrimination, United Nations Treaty Collection, retrievable at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en [accessed 20 December 2018].

⁴¹ Established by art. 8 of the ICERD.

⁴² References in art. 9 of the ICERD.

⁴³ "In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing *the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*".

⁴⁴ United Nations Human Rights, Office of the High Commissioner, Status of Ratification Interactive Board, retrievable at: <http://indicators.ohchr.org> [accessed 21 December 2018].

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [...]

Finally, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) was adopted in 1990 and entered into force in 2003. As of the 13 December 2018 there are 54 States Parties and 13 Signatories⁴⁵. In protecting migrant workers' economic, social, cultural, civil and political rights, this convention stresses the existing connection between migration and human rights. In its preamble, the treaty recalls previous International Labour Organization's provisions regarding migrant workers' rights⁴⁶ and states, in art. 7:

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Most of its provisions are applicable to both documented and undocumented migrants, but some specifically refer only to the latter category. Despite being the most comprehensive convention on the issue, no migrant receiving State in North America and Europe signed it: States parties and Signatories are mainly migrant sending Countries which tried to protect their citizens abroad. In art. 72 a Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families was established in order to monitor the implementation of the convention in member States. Unfortunately, the low participation of Western States undermines the effectiveness and relevance of the treaty itself. For the purpose of this study I will refer to art.12 and 13, art. 26 and then articles from 40 to 42.

France and Italy are States Parties to both the ICERD and the ICCPR, while either of them has taken actions with respect to the ICRMW.

⁴⁵ United Nations Human Rights, Office of the High Commissioner, Status of Ratification Interactive Board, retrievable at: <http://indicators.ohchr.org> [accessed 21 December 2018].

⁴⁶ Forced Labour Convention (1930), Migration for Employment Convention (1949), Abolition of Forced Labour Convention (1957), and Migrant Workers Convention (1975).

2.1.1 Freedom of expression

Freedom of expression is widely recognized as one of the fundamental human rights. With respect to the ICERD, this freedom is mentioned in the long list of rights included in art. 5, where we can read:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...]

(viii) The right to freedom of opinion and expression [...].

The same right is recognized by the ICCPR in art. 19, paras. 1 and 2, where it is stated that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Therefore, the right to freedom of expression as guaranteed in art. 5 of the ICERD and in art. 19 of the ICCPR is universal in its coverage, without distinctions between citizens and aliens⁴⁷. Nonetheless, freedom of expression can be subject to restrictions by States when proved to be necessary and proportionate by law, according to those cases mentioned in art. 19, para. 3 of the ICCPR:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a) For respect of the rights or reputations of others;
 - b) For the protection of national security or of public order (ordre public), or of public health or morals.

In subparagraph (a), by the word “rights” The Human Rights Committee means all human rights included in the Covenant and, widely speaking, recognized by international

⁴⁷ Office of the High Commissioner for Human Rights, CPPR General Comment No. 15: The Position of Aliens Under the Covenant, Adopted at the Twenty-seventh session of the Human Rights Committee, on 11 April 1986.

human rights law. For example, a restriction of the freedom of expression is lawful when protecting the right to vote of citizens (art. 25 of the ICCPR) from intimidation or coercion⁴⁸. Moreover, the term “others” identifies persons individually or as members of a community, which may be defined also by a particular religious faith or ethnicity⁴⁹. Finally, in General Comment n. 22, the Committee pointed out that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition⁵⁰”.

Hence, foreigners’ right to express their political opinion is not absolute: the right of the individual gives way to the right of the host State community. Nevertheless, considering also art. 2 of the same Convention, any restrictions imposed on aliens should be the same as those for citizens, without discriminations based on national origin. Any greater restrictions on aliens’ right of expression, imposed in the absence of any reasonable and objective justification, would appear as an unlawful discrimination⁵¹.

Furthermore, some forms of expression, as those which incite to hatred, are explicitly prohibited in both Conventions:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention [...]⁵²

And:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law⁵³.

⁴⁸ Office of the High Commissioner for Human Rights, General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34.

⁴⁹ Office of the High Commissioner for Human Rights, footnote 48.

⁵⁰ Office of the High Commissioner for Human Rights, General Comment No. 22: the right to freedom of thought, conscience and religion, CCPR/C/21/Rev.1/Add.4, 30 July 1993.

⁵¹ Mandal, Op. cit. footnote 36.

⁵² United Nations General Assembly, already cited in footnote 27, ICERD, art. 4.

⁵³ United Nations General Assembly, already cited in footnote 27, ICCPR, art. 20.

In the latter case, the Human Rights committee specifies that art. 19 and 20 of the ICCPR are compatible with each other: the main difference between the two is that violations addressed in art. 20 there is an explicit measure required from the State, that is prohibition by law⁵⁴. On the contrary, for those acts mentioned by art. 19, the State is required to provide for legal justification of restrictions.

Finally, art. 13 of the Convention on the Protection of Migrant Workers and Members of their Families largely refers to both the ICERD and ICCPR. In fact, with regard to the scope and definition of this right we can find a clear reference to art. 19 of the ICCPR when reading:

1. Migrant workers and members of their families shall have the right to hold opinions without interference.
2. Migrant workers and members of their families shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of their choice.

Moreover, in this text too, freedom of expression is subject to limitations and sanctions, as for the cases included in art. 4 of the ICERD and art. 20 of the ICCPR:

3. The exercise of the right provided for in paragraph 2 of the present article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a) For respect of the rights or reputation of others;
- b) For the protection of the national security of the States concerned or of public order (*ordre public*) or of public health or morals;
- c) For the purpose of preventing any propaganda for war;
- d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

2.1.2 Freedom of assembly and association

As for the right to freedom of expression, freedom of assembly and association are recognized in all three UN instruments, without any difference between foreigners and

⁵⁴ Human Rights Committee, footnote 48.

citizens⁵⁵. In fact, among the civil rights listed in art. 5 of the ICERD there is also “(ix) *The right to freedom of peaceful assembly and association*”. Moreover, art. 21 of the ICCPR stresses that:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

In a similar way, art. 22 of the same Covenant states in para. 1:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

However, according to the Covenant, the right of association may be subject to the same restrictions by law expressed in the ICCPR art. 21⁵⁶. Moreover, we should bear in mind art. 20 of the ICCPR and art. 4 of the ICERD: associations involved in war propaganda or advocating for “national, racial or religious hatred” could be lawfully banned⁵⁷. This said, peaceful political associations formed by migrants of any legal status (refugees, migrant workers, etc.) are always protected.

Finally, Part III of the ICRMW should be considered: here we find articles dedicated to the protection of all migrant workers’ human rights, with no distinction of their status. Art. 26 explains in detail what is the relationship between migrants and associations in the host Country, securing freedom of assembly in subparagraph (a) and freedom of association in subparagraph (b):

1. States Parties recognize the right of migrant workers and members of their families:

a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to

⁵⁵ Human Rights committee, cit. footnote 27.

⁵⁶ Restrictions to the freedom of association foreseen in art. 22, para. 2 of the ICCPR:

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

⁵⁷ UNHCR, Rosa Da Costa (2006), Legal and Protection Policy Research Series, Rights of Refugees in the Context of Integration: Legal Standards and Recommendations, POLAS/2006/02.

protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;

- b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;
- c) To seek the aid and assistance of any trade union and of any such association as aforesaid.

The fact that these rights pertain to both documented and undocumented migrants is underlined by the presence of a fourth part in the Convention addressed specifically to “Migrant Workers and Members of their Families who are Documented or in a Regular Situation”⁵⁸. In fact, here an additional article entitles documented migrant workers and documented members of their families to the right to freedom of assembly and association:

1. Migrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests.
2. No restrictions may be placed on the exercise of this right other than those that are prescribed by law and are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others⁵⁹.

2.1.3 The Right to vote

As I mentioned at the beginning of this chapter, in international law the right to vote is explicitly accorded only to citizens. No one of the three UN Conventions examined in this section entitle migrants with the right to participate in the receiving State’s national or local elections. However, there are a few exceptions in international legal provisions (such as those included in the ICRMW or those produced by the European Union community) which, at least, expressly recognize the possibility for States to let foreigners living in their territory vote in local elections.

In art. 5 of the ICERD, no discrimination is allowed with respect to

- (c) Political rights, in particular the right to participate in elections -to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the

⁵⁸ While Part III of the ICRMW is titled “Human Rights of All Migrant Workers and Members of their Families”, thus including migrant workers belonging any legal status.

⁵⁹ Art. 40 of the ICRMW.

Government as well as in the conduct of public affairs at any level and to have equal access to public service;

Subparagraph (c) primarily refers to political rights of citizens, bearing in mind art. 1 paras. 2 and 3 of the ICERD. In this sense, no discrimination on the basis of race, color, national or ethnic origin should undermine the principle of universal suffrage of all citizens.

A more precise statement is included in art. 25 of the ICCPR:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c) To have access, on general terms of equality, to public service in his country.

In General Comment No.25, the Human Rights Committee specifies that: “the conduct of public affairs is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers⁶⁰“. According to the Committee, direct participation in public affairs mentioned in subparagraph (a) may equally be the exercise of power as members of legislative or executive bodies, the fact of voting in referendums and the taking part in popular assemblies at the local level. On the contrary, indirect influence of public affairs involves the choosing for representatives and the joining of public debates and dialogues with them, but also the citizens’ capability of self-organizing.

Finally, the ICRMW, while not obliging Member States to recognize migrant workers’ right to vote, leaves choices open to States themselves. In fact, in art. 42 we read:

1. States Parties shall consider the establishment of procedures or institutions through which account may be taken, both in States of origin and in States of employment, of special needs, aspirations and obligations of migrant workers and members of their families and shall envisage, as appropriate, the possibility for migrant workers and members of their families to have their freely chosen representatives in those institutions.

⁶⁰ Office of the High Commissioner for Human Rights Committee, General Comment No. 25: Article 25, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21Rev.1/Add.7.

2. States of employment shall facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities.
3. Migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights.

This article is included in Part IV of the Convention, solely refers to documented migrants. Furthermore, the text allows migrants to be heard through alternative means to voting rights (paragraph 1 and 2).

2.2. The Council of Europe

The Council of Europe is an international organization founded in 1949 with the primary aim of achieving greater unity in the European continent, right after World War II⁶¹. Council objectives are, above all, the protection of human rights, pluralist democracy and rule of law. Therefore, the organization's political mandate from 2005⁶² consists in seeking solutions to European society's problems, such as discrimination against minorities, xenophobia, environmental protecting, terrorism, organized crime and corruption, but also in promoting Europe's cultural diversity and supporting democratic stability in all European countries⁶³.

In this second paragraph I will analyze the Council of Europe's legal provisions that concern wider political participation of migrants in European Countries. Respectively, the first paragraph is dedicated to the European Convention on Human Rights⁶⁴ and to a case judged by the European Court of Human Rights; then, the Convention on the participation of foreigner in public life at the local level⁶⁵ and the Convention on nationality⁶⁶ will be addressed.

⁶¹ Natalino Ronzitti (2013), *Introduzione al Diritto Internazionale*, Torino, Giappichelli Editore, p. 312.

⁶² Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005).

⁶³ Council of Europe, Council of Europe in Sarajevo, Bosnia and Herzegovina, Objectives and Mission: <https://www.coe.int/en/web/sarajevo/objectives-mission> [Accessed 2 January 2019].

⁶⁴ 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: <https://www.refworld.org/docid/3ae6b3b04.html> [accessed 19 January 2019]

⁶⁵ Council of Europe, Convention on Participation of Foreigners in Public Life at Local Level, 5 February 1992, ETS 144, available at: <https://rm.coe.int/168007bd26> [accessed 19 January 2019].

⁶⁶ Council of Europe, European Convention on Nationality, 6 November 1997, ETS 166, available at: <https://www.refworld.org/docid/3ae6b36618.html> [accessed 19 January 2019].

2.2.1 The European Convention on Human Rights

The most important achievement of the Council of Europe was the European Convention on Human Rights (ECHR): this convention, drafted in 1950 and entered into force in 1953, has been ratified by all Council's members, and new members are expected to ratify it at the earliest opportunity⁶⁷. Moreover, the ECHR, formulated on the inspiration of the Universal Declaration of Human Rights, contributed to the improvement and consciousness of Human Rights in Europe. In fact, as for art. 19 of the ICCPR, art. 10, para. 1 of the ECHR recognizes freedom of expression for all peoples living in a member State. By freedom of expression, the Convention means : *"freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers"*⁶⁸. Nevertheless, para. 2 of the same article provides for possible restrictions to this right *"in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"*. Same restrictions are allowed for freedom of assembly and association, considered in art. 11.

The most controversial article of ECHR is art. 16, which provides for additional restrictions on aliens' political activity:

Nothing in Articles 10, 11 and 14⁶⁹ shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

This provision seems to recognize an opposite view to the human rights law, the ICCPR and the ECHR itself: it is the only and first specific exception to the principle of non-discrimination. In fact, the article has been heavily criticized for contrasting with art. 1⁷⁰ and, potentially, with art. 14 too⁷¹. Unfortunately, case law on art. 16 is insufficient in order to define the scope of restrictions.

⁶⁷ Council of Europe, Parliamentary Assembly, Resolution 1031 (1994), Honouring of commitments entered into by member states when joining the Council of Europe, retrievable at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16442> [accessed 2 January 2019].

⁶⁸ European Convention of Human Rights, art. 10

⁶⁹ *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"*.

⁷⁰ *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"*.

⁷¹ Helene Lambert (2007), *Position of aliens in relation to the European Convention on Human Rights*, Strasbourg, Council of Europe Publishing, Human Rights File No. 8, Retrievable at:

With respect to the application of this article on freedom of expression for foreigners, the 27 April 1995 the European Court of Human Rights⁷² judged on the case *Piermont v. France*⁷³. The applicant was a German citizen, member of the European Parliament (MEP), who participated in “green” groups’ demonstrations in French Polynesia, against nuclear tests and the government. The German MEP, then, was expelled with a ban to return to the Country. Therefore, the woman claimed that the action taken by French government was violating her freedom of expression, laid down in art. 10 of the ECHR. On the other hand, France tried to justify the measure taken by its OT⁷⁴ arguing that it could fall under provisions of art.16. The final judgement did not examined the nature of art. 16, but concluded that:

[...] Mrs Piermont’s possession of the nationality of a member State of the European Union and, in addition to that, her status as a member of the European Parliament do not allow article 16 of the Convention to be raised against her [...]

Thus confirming an existing violation of art. 10 put in place by French Polynesia. By virtue of her German citizenship, she was not defined as “alien”⁷⁵: citizenship of a Community treaties’ member State was sufficient for the case to not be considered under art. 16. However, commentators⁷⁶ criticized the absence of a Court in-depth reasoning on the issue, stressing the importance of the case judged: according to them, Ms Piermont was clearly an alien before French law. Therefore, further explanations on the scope of restrictions was needed in scholars’ opinion to avoid States discretion on the matter. Consequently, they interpreted the legal provision of art. 16 as only affecting direct participation in the political process or, in other words, the possibility to vote and to stand for elections. At the same time, they analyzed the Court’s view on other ECHR rights’ restrictions and noted that generally, art. 16 was interpreted in a limited way. In fact, in the *Piermont* case too, the Court concluded that restrictions provided by art. 16 of ECHR must respond to the principle of proportionality since States’ powers are not limitless.

[https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-08\(2007\).pdf#page27](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-08(2007).pdf#page27) [accessed 19 January 2019].

⁷² This regional court began operating in 1959, judging on alleged violations of the ECHR; complaints can be submitted by individual persons, groups or NGOs.

⁷³ Council of Europe, European Court of Human Rights, Case of *Piermont v. France* – Judgement, Application no. 15773/89; 15774/89, of the 27 April 1995. Retrieved at: <http://www.legal-tools.org/doc/b99fd2/pdf/> [accessed 3 January 2019].

⁷⁴ Overseas Territory.

⁷⁵ With respect to the possible European citizenship, the Court replied: “The Court cannot accept the argument based on European citizenship, since the Community treaties did not at the time recognise any such citizenship”.

⁷⁶ Harris, O’Boyle and Warbrick (2003), *Law of the European Convention on Human Rights*, Oxford, OxfordUniversity Press, p. 510.

2.2.2 Convention on the participation of foreigners in public life at the local level

The Convention on the participation of foreigners in public life at the local level was adopted in 1992 and came into force in 1997, after four ratifications. This is probably the most comprehensive European Convention on immigrants' civic and political participation⁷⁷. Its provisions are divided into three chapters:

- ⇒ Chapter A (that is mandatory for all signatory States): it addresses fundamental rights, such as freedom of expression, association and assembly, but also the right to be involved in local public inquiries and consultation procedures⁷⁸. This part is considered as complementary to other Conventions adopted by the Council of Europe and, in particular, to the ECHR discussed in the previous paragraph. In fact, paras. a and b of art. 3 have the same descriptions of freedom of expression, assembly and association included respectively in art. 10, para.1 and art. 11, para.1 of the ECHR.
- ⇒ Chapter B (opt-out option at the moment of the signature): this sections deals with the creation of consultative bodies or other institutional arrangements for resident aliens. Art. 5 is significantly relevant because it defines the aim of these bodies and the procedures for their creation:

1. Each Party undertakes, subject to the provisions of Article 9, paragraph 1:
 - a) to ensure that there are no legal or other obstacles to prevent local authorities in whose area there is a significant number of foreign residents from setting up consultative bodies or making other appropriate institutional arrangements designed:
 - i. to form a link between themselves and such residents,
 - ii. to provide a forum for the discussion and formulation of the opinions, wishes and concerns of foreign residents on matters which particularly affect them in relation to local public life, including the activities and responsibilities of the local authority concerned, and
 - iii. to foster their general integration into the life of the community [...].

⁷⁷ Thomas Huddleston (2009), Migration and Democracy: Migrant Participation in Public Affairs, Migration Policy group, Background paper for 4 September 2009 expert meeting on civic participation of migrants, Warsaw.

⁷⁸ Art. 3 and 4 of the Convention.

And:

1. Each Party shall ensure that representatives of foreign residents participating in the consultative bodies or other institutional arrangements referred to in paragraph 1 can be elected by the foreign residents in the local authority area or appointed by individual associations of foreign residents.

⇒ Chapter C (opt-out option at the moment of the signature): it recognizes the right to vote and to stand in local elections to resident aliens after a maximum of five years. Originally, the Parties envisaged to accord this right to one another's nationals on the basis of reciprocity. However, this right was then extended to all foreign nationals in order to avoid future discriminations based on nationality. Moreover, questions were raised on art. 6, para. 1⁷⁹ which formalizes political rights: legal requirements for foreigners and the period of residence⁸⁰. In the first case, art. 6 para. 1 is not considered to exclude the possibility of establishing specific procedural requirements for foreigners that are different from those expected for nationals; nonetheless, the fundamental characteristics of these specific requirements should not constitute an obstacle in the enjoyment of resident aliens' active and passive political rights. With respect to the period of residence, instead, two questions were examined: the length of the stay and its nature. The length mentioned in art. 6 para.1 is of five years maximum, but each State can decide on the most appropriate period in order to guarantee foreigners the best integration in their local community. On other hand, residence has to be continuous for the period established but not necessarily permanent in the same local authority during years.

Art. 9 (Part II) of the convention provides for restrictions to rights included in Part I (Chapters A, B, C). Restrictions are allowed: "in time of war or other public emergency threatening the life of the nation⁸¹"; if "are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the

⁷⁹ 1. Each Party undertakes, subject to the provisions of Article 9, paragraph 1, to grant to every foreign resident the right to vote and to stand for election in local authority elections, provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections [...].

⁸⁰ Council of Europe, European Treaty Series - no. 144, Explanatory Report to the Convention on the participation of Foreigners in Public Life at Local Level, Strasbourg, 5 February 1992.

⁸¹ Art. 9 of the Convention on the participation of foreigners in public life at the local level, para. 1.

protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary⁸²”.

The general impact of this convention is limited in both its scope and effects: nine States ratified the Convention and Finland is the only Country to sign without reservations, while Denmark, Norway and Netherlands decided to apply geographical limitations to their islands and OTs. With respect to France and Italy, the first neither signed nor ratified the Convention, while the second opted-out for Chapter C⁸³. However, given the fact that most ratifying States already met minimum standards required by the Convention, these legal provisions did not improve the situation of political rights for migrant residents; instead, Signatory States secured their national legislation through the adoption of this international arrangement (not clear, further explanation needed...).

2.2.3 Convention on Nationality

The Convention on Nationality⁸⁴ was adopted in 1997 and came into force in 2000, after the ratification of three Countries. Its main achievement is the consolidation in a single text of principles and rules on different crucial aspects of nationality, emerged from the development of international and national laws on the matter⁸⁵. As of January 2019, 21 States ratified the Convention: Italy and France neither signed nor ratified it, while the majority of ratifying States are from Eastern Europe. In fact, considering the historical period, the drafters mainly aimed at harmonizing Eastern Countries legal provisions with the Western rule of law on the acquisition and loss of nationality, due to their changing states and citizenships⁸⁶. Despite this convention is not directly linked to political rights of foreigners, the fact that it deals with acquisition and loss of nationality makes this convention relevant in this study.

After the description in art. 1 of the object of the Convention, art. 2 gives a definition of nationality: *"nationality means the legal bond between a person and a State and does not indicate the person's ethnic origin"*[...]. This definition was included in the convention due to an argument supported by some members of the CJ-NA⁸⁷ : the use of the term nationality

⁸² Art. 9, paras. 2 and 3.

⁸³ Council of Europe, Chart of signatures and ratifications of Treaty 144, Convention on the Participation of Foreigners in Public Life at Local Level, retrieved at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/144/signatures?desktop=true> (accessed 5 January 2019).

⁸⁴ ETS No. 166.

⁸⁵ Gerard-René de Groot, *The European Convention on Nationality: a step towards a ius commune in the field of nationality law*, Maastricht journal of European and comparative law, Vol. 7, N° 2, 2000, p. 117-157.

⁸⁶ Huddleston, Op. cit. footnote 44.

⁸⁷ Committee of Experts on Nationality.

instead of citizenship could have raised a potential misunderstanding. Most of Eastern and Central European countries distinguished between the two terms: the word “citizenship” described the legal bond between individuals and a particular Country, while “nationality” expressed people’s ethnic origins. Moreover, in other Countries, such as United Kingdom, both terms had the same definition of “legal bond”, so being interchangeable⁸⁸.

Chapter II of the Convention⁸⁹ deals with general principles related to nationality: first, each State has the right to determine under its laws who are its nationals (art. 3); then, in art. 4 we read:

- a) everyone has the right to a nationality;
- b) statelessness shall be avoided;
- c) no one shall be arbitrarily deprived of his or her nationality;
- d) neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse;

finally, art. 5 establishes the principle of non-discrimination for:

- 1. Rules of a State party on nationality⁹⁰;
- 2. State parties’ treatment of its nationals⁹¹.

It should be remarked here that the right to nationality set in art. 4, para. 1, was firstly introduced by art. 15 of the Declaration of Human Rights (1948). However, neither the Convention nor the Declaration indicate to what nationality individuals are entitled: even if granted in the text this right is difficult to enforce in reality⁹².

Apart from these general principles, the core of the Convention is Chapter III on rules relating to nationality. It consists of four articles: art. 6 on the acquisition of nationality; art. 7 and 8 on the loss of nationality, respectively at the initiative of a State party (or *ex lege*) and at the initiative of the individual, and art. 9 on recovery of nationality. The importance of this Convention in international law is mainly due to this specific Chapter: for the first time an international treaty establishes on what grounds the loss or acquisition of nationality is

⁸⁸ Gerald-René de Grot, footnote 84.

⁸⁹ From art. 3 to art. 5.

⁹⁰ Art. 5, para. 1: The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.

⁹¹ Art. 5, para. 2: Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.

⁹² Gerald-René de Grot, op.cit footnote 84.

acceptable. For example, according to the Convention, subjects to the acquisition of nationality *ex lege* are primarily children: children who acquire the nationality of a State party from his parents; foundlings; children who do not acquire at birth another nationality or became stateless during time⁹³. With respect to adults, instead, the acquisition of nationality might occur after a period of maximum ten years of residence⁹⁴ and the following categories should be facilitated in obtaining the nationality of a State party: spouses of a State party national; children adopted by a State party national; habitually resident stateless persons and recognized refugees⁹⁵. Art. 7, instead, consist of a list of cases according to which nationality may be lost automatically *ex lege* or by initiative of a State party. The use of the negative statement “*A State Party may not provide in its internal law for the loss of its nationality ex lege or at the initiative of the State Party except in the following cases*” is due to the necessity of limiting to a set of specific events the loss of nationality decided by the State itself. Finally, art. 8 and 9 indicate to State parties to provide for rules allowing the voluntary loss of nationality or its wished recovery by individuals: in this Convention the will of the individual is considered a relevant factor in the maintenance of the legal bond described in art. 2⁹⁶. Nonetheless, art. 9 does not establish a right to recovery of nationality: its minimum requirement is, at least, the facilitation of such recovery by State parties’ national laws.

2.3 The European Union

We finally arrived to the last paragraph of this Chapter. However, the reality of the European Union approach to foreigners’ political rights and, more broadly, to integration of third country nationals is far from being clear and without paradoxes. Indeed, European complexities are summarized in three main issues covering EU law and policies: first, the struggle between European institutions and Member States on matters of competence covering the area of immigration. During years, Union competences expanded from the border control mentioned in the Treaty of Amsterdam (1999) to the ensuring of “fair treatment” to all TCNs ⁹⁷ established by the new Lisbon Treaty (2007). This first battlefield between the Commission and the Council paved the way for the second complexity, that is the production of an intricate mixture of both law and soft-policy tools. In fact, the wider EU framework on the integration of migrants is characterized by a dual structure, consisting in the

⁹³ Art. 6, paras. 1 and 2.

⁹⁴ Art. 6, para. 3.

⁹⁵ Art. 6, para. 4.

⁹⁶ Council of Europe, European treaty Series - no. 166, Explanatory Report to the European Convention on Nationality, Strasbourg, 6 November 1997, p. 5.

⁹⁷ Third Country Nationals.

EU immigration law and the EU framework on integration. Lastly, a third contradiction worth mention: the institutional, legal and discursive difference between policies addressed to EU citizens and those concerned with TCNs.

2.3.1 Political Rights for EU citizens and TCNs

Broadly speaking, political rights for all EU residents, both TCNs and EU citizens, are secured by the adoption of the Lisbon Treaty (2007) that included the EU Charter of Fundamental Rights⁹⁸ into the body of EU law⁹⁹. Here, in fact, political rights of freedom of expression, assembly and association are established in art. 11 and 12:

Article 11: freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Article 12: freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests [...].

Furthermore, freedom of association and representation in unions and professional organizations for TCNs are also granted by Directive 2003/109/EC on the status of third-country nationals who are long-term residents:

1. Long-term residents shall enjoy equal treatment with nationals as regards [...]:

(g) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations [...]¹⁰⁰

⁹⁸ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 362/02, published in the Official Journal of the European Communities, 18 December 2000 (2000/C 364/01).

⁹⁹ Huddleston, *op. cit.* footnote 44.

¹⁰⁰ Directive 2003/109/EC, art. 11, para. 1(g).

However, when assessing the specific right to vote and to stand in local elections, measures concerning EU citizens' rights diverge considerably to those addressed to TCNs. Political rights of EU citizens have always been relevant in the process of economic, political and social integration of the Union member States. Nonetheless, the first binding legal provision regarding the status of EU citizens and political rights attached to this status was ratified in 1992 with the Treaty of Maastricht. In fact, in art. 8 the Citizenship of the Union was established and in art. 8(b) political rights of EU citizens were defined¹⁰¹: “*every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate*” for both municipal elections and the European Parliament in the State in which he resides. Moreover, later approved Council Directives 93/109 and 94/80 regulated arrangements for the exercise of the right to vote and stand as a candidate in elections for EU citizens residing in another Member State of the Union. Notably, in these texts we find out that political rights *stricto sensu* are not only under Union duty to “organize, in a manner demonstrating consistency and solidarity, relations between the peoples of the Member States¹⁰²”, but also “a corollary of the right to move and reside freely enshrined in art. 8(a)¹⁰³” of the Treaty establishing the European Community (TEC)¹⁰⁴. In particular, EU citizens residing in another member State should express the wish of exercising the right to vote and stand in elections through a formal declaration¹⁰⁵ and are subject to the same legal requirements of their host Country's nationals¹⁰⁶. These rights are also included into the Charter of Fundamental Rights of the European Union¹⁰⁷ and then reaffirmed by art. 20¹⁰⁸ and 22¹⁰⁹ of the Treaty on the Functioning of the European Union (TFUE)¹¹⁰:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*: [...]

¹⁰¹ Now art. 19. The latest consolidated version of the Treaty was renumbered by art. 12 of the 1999 Amsterdam Treaty.

¹⁰² Recital 1, Directive 93/109 and Recital 1, Directive 94/80.

¹⁰³ Recital 3, Directive 93/109 and Recital 3, Directive 94/80.

¹⁰⁴ Now renamed Treaty on the Functioning of the European Union (TFEU) by the Lisbon Treaty of 2007.

¹⁰⁵ Art. 8, Directive 93/109.

¹⁰⁶ Art. 3, Directive 93/109 and art. 3, Directive 94/80.

¹⁰⁷ Art. 39 and 40.

¹⁰⁸ Former art. 17 of the TEC.

¹⁰⁹ Former art. 19 of the TEC

¹¹⁰ European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, available at: <https://www.refworld.org/docid/4b17a07e2.html> [accessed 19 January 2019].

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State [...] ¹¹¹.

Instead, when considering voting rights for TCNs, there is no binding legal provision in EU body of law. The 2003 Directive on long-term residence does not mention voting rights in the long list of rights accorded to foreign nationals possessing the status of long-term residents. Furthermore, if we consider resident aliens' political rights as part of the broader term "integration", then EU institutions have a complementary competence on integration policies, with an explicit exclusion from harmonization of member States' actions:

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States ¹¹².

Therefore, with respect to integration policies, the EU may only introduce financial incentive and measures, without acting directly on the matter. Nonetheless, in the light of art. 79 of the TFEU and of national governments' reluctance, the real extension of EU competence on the issue is still debated.

2.3.2 EU Competences and Inconsistencies

In this subparagraph, inspired by the work of Federico Fabbrini ¹¹³, the impact of supranational laws on State law will be examined. As mentioned in the last chapter, EU institutions have a shared competence in the migration field with its member States. This competence dates back to the 1999, when the Treaty of Amsterdam ¹¹⁴ entered into force: for the first time the European Community was entitled to a formal legislative role on migration policies, apart from the intra-EU freedom of movement; privileged areas of intervention were border control, policing, expulsion and exclusion ¹¹⁵. Moreover, the Council of Ministers

¹¹¹ Art. 20 of the TFEU.

¹¹² TFEU, art. 79, para. 4.

¹¹³ Federico Fabbrini, *Voting Rights for Non-Citizens: The European Multilevel and the US Federal Constitutional Systems Compared*, 2011.

¹¹⁴ European Union: Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997, available at: <https://www.refworld.org/docid/51c009ec4.html> [accessed 19 January 2019].

¹¹⁵ Carmel, Cerami, Papadopoulos, *Migration and Welfare in the new Europe: social protection and the challenges of integration*, Policy Press, Bristol, 2011.

could decide by unanimity or by merely consulting the European Parliament, thus causing difficulties in the lawmaking process, hampered by domestic migration politics. This decision-making process was then modified by The Treaty of Lisbon¹¹⁶, entered into force in 2009. Art. 79, para. 1 of the new Treaty on the Functioning of the European Union (TFEU)¹¹⁷ states:

The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

Therefore, new purposes of EU migration policies became the ensuring of “fair treatment” and the protection of the rights of all TCNs residing legally in a Member State, thus expanding the previous mandate. Despite the fact that a definition of “fair treatment” is not provided by the Treaty, Azoulai and de Vries¹¹⁸ assume that this expression could ensure at least the conformity with the European convention on Human Rights, thus determining that standards for entry and residence of foreigners should respect fundamental rights norms. Moreover, para. 2 of the same article underlines that “in accordance with the ordinary legislative procedure” the Union will adopt measures on: conditions of entry and residence of TCNs; definition of the rights of TCNs legally residing in Member States territories; illegal migration, repatriation and trafficking of persons¹¹⁹. Finally, according to the ordinary legislative procedure, the Parliament is allowed to participate in migration policies in co-decision with the Council¹²⁰. Remembering the exclusion of harmonization of art. 79, para. 4, mentioned in the last subparagraph, EU competence does not cover volumes of admissions too, as stated in art. 79, para. 5 of the TFUE¹²¹, but only general aspects of economic migration (such as grounds for admission and the admission process)¹²². Finally, the European institutions are also allowed to sign international agreements with third countries for

¹¹⁶ Official Journal of the European Union, 2007/C 306/01.

¹¹⁷ European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, available at: <https://www.refworld.org/docid/4b17a07e2.html> [accessed 19 January 2019].

¹¹⁸ Azoulai, de Vries, *EU Migration Law: legal complexities and political rationales*, Oxford University Press, Oxford, 2014.

¹¹⁹ TFUE, art. 79, para. 2

¹²⁰ TFUE, art. 79, para. 4. The ordinary legislative procedure consists of a qualified majority in Council and co-decision with the European Parliament.

¹²¹ “This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed”.

¹²² Maria Giovanna Repaci, *Different Paths to Integration of Immigrants in Comparative Constitutional Law: the cases of Canada and Italy*, Master Thesis, Libera Università Internazionale degli Studi Sociali, 2016-2017, p. 25 et seq.

readmission of TCNs irregularly residing in a member State territory¹²³. The shared competence with member States is then reaffirmed in art. 80 of the TFUE:

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

This said, as Carrera argues¹²⁴, despite the fact that integration and inclusion occur at the local or regional level, EU and governments still hold the financial, operational and political arrangements to develop a coherent and efficient policy.

I will now address the major consequences produced by supranational laws extending electoral rights for second-country nationals and third-country nationals. The development of the EU legal framework gave rise to some inconsistencies which still challenge national laws, putting pressure on States' legislation through the overlap and interaction with EU provisions on voting rights. If, on one hand, domestic arrangements of member States generate asymmetries in the entitlement of electoral rights for second-country nationals, on the other they also fragment TCNs' treatment, to the point of excluding them from the franchise. With respect to second-country nationals, we already said that EU citizens living in another member State are allowed to vote and to stand as a candidate in municipal and supranational elections. However, a first inconsistency arises from the lack of a European Union law definition of the term "municipal" mentioned in articles 20 and 22 of the TFUE: what in a State is considered "municipal" could be viewed as "national" in others. Thus, it should be noticed that Directive 94/80 acknowledges in Recital 7 that this notion has not the same meaning in every member States, and that it suggests a general definition in art. 2, para. 1(b):

'municipal elections' means elections by direct universal suffrage to appoint the members of the representative council and, where appropriate, under the laws of each Member State, the head and members of the executive of a basic local government unit;

The same Directive adds, in Annex I, a list of basic local government units which should fall under the scope of articles 20 and 22 of the TFUE¹²⁵. This adjustment did not

¹²³ TFUE, art. 79, para. 3.

¹²⁴ Carrera, Sergio. (2006) A Comparison of Integration Programmes in the EU: Trends and Weaknesses. CEPS CHALLENGE Papers No. 1, 1 March 2006, p. 1-28.

¹²⁵ In this list there are also Italy and France. For the former the *circoscrizione* and *comune* are considered, while, for the latter, the *arrondissement* and the *commune* are mentioned.

prevent from inconsistencies emerging from the TFUE; for example, whereas Germany and Austria only allow nationals to vote for the Lander, the UK extended to EU citizens the right to vote even for the legislatures of Wales, Scotland and Northern Ireland¹²⁶. These kind of differences and discrepancies harm the idea of equality among citizens: in real terms, the status deriving from the EU citizenship does not cover the same rights in each member State, depending instead on national provisions.

When considering TCNs electoral rights something similar occurs. Most EU States excluded TCNs voting on the basis of an ethnic concept of people, as it happens in Germany, or of an ideal of republican citizenship, as in France. What could be asked legally is what grounds justify the disenfranchisement of TCNs once voting rights for other EU citizens are allowed: Countries that already extended local voting rights for EU citizens residing in their territory inevitably paved the way for a major and further extension of those rights to TCNs. This assumption can be supported by Directive 2003/109 on the status of third-country nationals who are long-term residents. According to the text, after a TCN gains the status of long-term resident he is entitled to many of those rights enjoyed by EU citizens, with the main exception of voting rights. However, even if the Directive only grants a set of minimum standards, a major principle is entrenched in this legal provision: domicile produces entitlements both in equalizing the treatment of nationals and TCNs socially and economically, and also in increasing TCNs' protection from expulsion and freedom of movement. Therefore, asymmetries occur also for third-country nationals: if, on one hand, they all obtain the long-term resident status after a period of five years in a member State and consequently enjoy a common body of rights, not everyone is entitled to voting rights, dependent to each member State's law. This inconsistency mainly arises from the lack of a common EU approach and of a greater coordination among member States.

2.2.3 The Soft Policy Approach of the Union

The last issue covered by this paragraph concerns the intricate output produced by EU institutions on matters of integration of third-country nationals. In fact, as mentioned at the beginning of this section, difficulties in establishing a common European legislation on EU framework for integration policies, mostly due to resistances from the EU Member States, resulted in a double structure of provisions: on one hand, the hard law framework consisting of the proper EU immigration law; on the other, the soft policy law tools describing what is

¹²⁶ Federico Fabbrini, footnote 112.

known as the EU Framework on Integration¹²⁷. The latter body formally falls outside EU Treaties and dates back to 2002, but first things first. In 1999 the Tampere Programme¹²⁸ was warmly welcomed in the academic and civil society; four main principles (the Tampere Milestones) were included in an ambitious political agenda:

1. The principle of fair treatment for legally residing TCNs;
2. The need to develop a comprehensive integration policy capable of equalizing TCNs and EU citizens condition;
3. Grant rights to long-term TCNs that are ‘as near as possible’ to those of EU citizens;
4. The harmonization of the condition of admission and residence for TCNs among all member States national legislations¹²⁹.

However, the putting into practice of the Tampere milestone was harder than expected, mostly due to the Council resistance on adopting legal texts on regular immigration. In addition to this, the 2001 Open Method of Coordination for the Community Immigration Policy¹³⁰, proposed by the Commission, failed. Generally speaking, Open Methods of Coordination (OMC) emerged in 2000s as a mean through which the Commission could coordinate and support member States’ policies in different fields, promoting the exchange of best practices and periodic reporting. Nonetheless, after the Commission pressure, the only significant legislative measures adopted by the Council to implement the Tampere Programme have been the 2003/109 Directive on Long-Term Residents (LTR Directive) and the 2003/86 Directive on Family Reunification (FR Directive), which respectively took four and five years of negotiations. This is the reason why the EU Framework on Integration emerged. Officially, the starting point coincides with the Justice and Home Affairs Council meeting of 2002, during which a major need for coherence and coordination among EU member States’ policies on integration was identified. Four main instruments were provided: the national contact points on integration, the common basic principles on integration, the European integration fund and, finally, the European integration forum and the European website on integration.

The National Contact Points on Integration (NCPIs) were firstly organized in 2003; during time, the network consolidated as a crucial supranational platform for discussion and exchange of ideas and best practices for EU integration policies. The assembly is chaired by

¹²⁷ Azoulai, de Vries, Op. cit. footnote 117.

¹²⁸ European Union: Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999, available at: <https://www.refworld.org/docid/3ef2d2264.html> [accessed 19 January 2019].

¹²⁹ Azoulai, de Vries, Op. cit. supra, 117.

¹³⁰ COM (2001) 387.

the Commission with the participation of all EU member States representatives. The most relevant output of the NCPIs is the three editions of the Handbook on Integration for Policy Makers and Practitioners, published in 2004¹³¹, 2007¹³² and 2010¹³³. These Handbooks were primarily meant for exchanging information among States on current good practices around issues related to integration of resident migrants. The issues to be discussed were decided by representatives of member States during closed-doors seminars of NCPIs; they were then structured into specific workshop topics in cooperation with the Commission. For example, major themes such as civic participation, education, economic integration and labour market are assessed in these documents, thanks to the Migration Policy Group (MPG) researches¹³⁴.

The Common Basic Principles on immigrants' integration were adopted by unanimity of the Council in 2004¹³⁵, with the aim of: providing a non-binding guide to member States in order to judge and assess their own policies according to basic principles; supporting States implementation of interactions among all levels of integration governance (supranational, national, regional, local); assisting the Council in the agreement of mechanisms and policies at the EU level improving national and local integration arrangements. CBPs were meant to realize an official description of the term integration in EU general view; nonetheless, they are so broad and symbolic that they hardly propose a shared and defined EU model of integration. This said, CBPs n. 9 worth mention for our case:

CBP 9 'The participation of immigrants in the democratic process and in the formulation of integration policies and measures, especially at the local level, supports their integration'

Moreover, Council explanation of CBP 9 gives more details on the importance of civic and political participation of immigrants:

Allowing immigrants a voice in the formulation of policies that directly affect them may result in policy that better serves immigrants and enhances their sense of belonging. Wherever possible, immigrants should become involved in all facets of the democratic process. Ways of stimulating this participation and generating mutual

¹³¹ European Union: European Commission, Handbook on Integration for Policy-Makers and Practitioners, November 2004, available at: <https://www.refworld.org/docid/4374978b4.html> [accessed 19 January 2019].

¹³² European Union: European Commission, Handbook on Integration for Policy-Makers and Practitioners, May 2007, retrievable at: <https://ec.europa.eu/migrant-integration/?action=media.download&uuid=29BCB8B1-CEAF-19AE-C7C64D75DA38B642> [accessed 19 January 2019].

¹³³ European Union: European Commission, Handbook on Integration for Policy-Makers and Practitioners, April 2010, retrievable at: <https://ec.europa.eu/migrant-integration/?action=media.download&uuid=29CC0180-9AD6-25EF-0AFE062D936F37B7> [accessed 19 January 2019].

¹³⁴ The MPG carries these analysis on behalf of the Commission.

¹³⁵ Council of the European Union, Justice and Home Affairs, Council Meeting 2618. 'Common Basic Principles on Immigrants Integration', 14615/04, 19 November 2004.

understanding could be reached by structured dialogue between immigrant groups and governments. Wherever possible, immigrants could even be involved in elections, the right to vote and joining political parties. When unequal forms of membership and levels of engagement persist for longer than is either reasonable or necessary, divisions or differences can become deeply rooted. This requires urgent attention by all Member States¹³⁶.

The European Integration Fund¹³⁷ is the third fundamental tool of the EU Framework on Integration. This financial arrangement precisely links priorities set in the EU agenda on integration, mostly inspired by CBPs, with the actual putting into practice of EU principles. Art. 3 of the Council Decision 2007/435/EC¹³⁸ establishing the Fund identifies one general and several specific objectives; if the general objective is the management of migration flows and the implementation of a common policy on asylum, specific objectives are four: first, to strengthen and develop all aspects of the Common European Asylum System; then, to support legal migration to the Member States in accordance with their economic and social need and to promote the effective integration of third-country nationals; thirdly, to enhance fair and effective return strategies in the Member States which contribute to combating illegal immigration; lastly, to enhance solidarity and responsibility-sharing between the Member States. For all these aims, the Commission adopts strategic guidelines, meant to implement the CBPs, according to which States develop multiannual programs and put them into practice after the approval of the Commission. Moreover, in their multiannual programs States are requested to target at least three of the priorities underlined by the Commission. Among these, the implementation of the CBPs at practical level and the development of indicators and evaluation arrangements are mandatory.

The last tools are the European Integration Forum and the European Website on Integration. By these instruments, the EU Framework involved also stakeholders other than members States, such as national experts, civil society representatives and relevant NGOs. The first meeting of the European Integration Forum occurred in 2009, after the Opinion adopted by the European Economic and Social Committee (EESC) in 2008 on the matter¹³⁹. It then established itself as a main Forum for discussions, consultations and recommendations at

¹³⁶ Council of the European Union, *supra* 101.

¹³⁷ Now the Asylum, Migration and Integration Fund (AIMF).

¹³⁸ Directive repealed by the EU Regulation No 516/2014 which merged the Integration Fund, the Refugee Fund and the Return Fund. The actual art. 3 of the Regulation considers the same objectives of Directive 2007/435/EC.

¹³⁹ EESC, Elements for the Structure, Organization and Functioning of a Platform for the Greater Involvement of Civil Society in the EU-level Promotion of Policies for the Integration of Third-Country Nationals, Opinion, SOC/281, CES 1208/2008.

the European level, inspired by the CBPs. On the other hand, the European Website on Integration (EWSI) from 2009 provides its users with information on funding, partners, best systems and events across the EU.

However, even considering these four pillars of the European Integration Framework developed by the Commission, the real situation is far more intricate than this. There are plenty of programs and Agendas developing the theme of European Integration of Third-Country National that would need more pages than those I dedicated to the issue. Nonetheless, the latest action taken by the Commission is the adoption of the EU Integration Action Plan of Third-Country Nationals in 2016¹⁴⁰. The new Plan provides for a framework for member States' integration policies, describing future Commission commitments to implement policy, operational and financial measures. Fifty cross-sectoral actions are identified, all focused on the European coordination with respect to the treatment of third-country nationals and, in particular, of refugees. Moreover, five priority areas are outlined¹⁴¹:

1. Pre-departure and pre-arrival measures, preparing both migrants and the local context for the integration process;
2. Education, through language and teacher training, inclusion of migrant children in the Education system;
3. Employment and vocational training to improve foreigners abilities to participate in the host Country labor market;
4. Access to basic services such as housing and healthcare;
5. Active participation and social inclusion, addressing foreign residents' participation to cultural life and exchanges with the local communities, in order to fight discrimination.

¹⁴⁰ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, Action Plan on the integration of third country nationals, COM (2016) 377.

¹⁴¹ European Web Site on Integration, Migrant Integration Information and good practices, Europe: Integration Action Plan of Third-Country Nationals launched. Retrieved at: <https://ec.europa.eu/migrant-integration/news/europe-integration-action-plan-of-third-country-nationals-launched> [accessed 18 January 2019].

Chapter 3:

France and Italy in Comparison

In the third and last Chapter I will try to develop a comparison between French Political Opportunity Structure and the Italian one. This kind of approach is not meant to evaluate the real effectiveness of both systems, also considering the difficulty in identifying a successful parameter of realized integration. My aim is to show that, even with the same supranational backgrounds and with similar levels of integration¹⁴², the Political Opportunity Structure for foreigners in two Countries differs according to a particular constitutional culture and history, but also to the historical relationship with immigration¹⁴³.

As I already explained in the first Chapter, the MIPEX¹⁴⁴ (Migrant Integration Policy Index), first published in 2004, measures European States' policies¹⁴⁵ towards integration of immigrants in their territory. Comparing France and Italy at first look, they are both part of the halfway favourable category, with a MIPEX Score of respectively 54/100 and 59/100¹⁴⁶; moreover, France ranks 17 out of 38 Countries, while Italy ranks 13. This first comparison shows us that, in terms of implementation of integration policies for migrants, Italy is slightly more active than France. On one hand this fact could also be unexpected, given long tradition of immigration experienced by France compared to Italy; on the other, however, we should not forget that Italy relies on a long tradition of relevance attributed to local contexts and autonomies which, in fact, played a prominent role in providing even basic services to newcomers. Furthermore, we should focus on measures of specific areas such as access to citizenship and political participation for foreigners. As expected, in terms of access to citizenship France is far more advanced than Italy, mostly due to a high score in eligibility requirements that are less strict than in Italy. On the contrary, political participation of resident aliens in Italy is slightly more favorable than in France: having clear that in both countries non-EU citizens cannot vote, Italy, at least, established several consultative bodies at the national level¹⁴⁷, while France has no national consultative body, but only local.

This said, the next chapter will be divided in two major paragraphs, each examining the Political Opportunity Structure in Italy and France. The first subject analyzed will be the Country's vision of integration, based on policies approach to migration; then, other subjects covered by the study will be general political liberties for foreigners; active and passive electoral rights; consultative bodies; citizenship and naturalization.

¹⁴² Based on the MIPEX.

¹⁴³ Cristina M. Rodriguez, *Noncitizen voting and the extraconstitutional construction of the polity*, ICON, vol. 8, No. 1, p. 30-49, Oxford University Press, 2010.

¹⁴⁴ Migrant Policy Integration Index, retrieved at: <http://www.mipex.eu> [accessed 24 January 2019].

¹⁴⁵ The index is also applied to some non-European countries, such as Turkey, United States, Canada, Japan and South Korea.

¹⁴⁶ Italy is one point far from the Slightly favourable category (60-79/100).

¹⁴⁷ And as we will see later, other consultative institutions at the regional and local level emerged autonomously during years.

3.1 Italy: the “flexible” model

It is difficult to find a precise definition for what is meant as “integration” in Italy: even if the first significant migratory flows arrived in this Country in the late 1980s and 1990s¹⁴⁸, Italy is still considered a Country of recent immigration. Moreover, the fact of always being a Country of emigration contributed to the general lack of legislative preparation when flows reversed. Therefore, the first approach to migration was a securitized one, due to the character of emergency of the early flows coming from Eastern Europe right after the fall of the Berlin Wall. During years, this approach, focused on the prominent role of the Government, did not change and, indeed, intensified: the main subjects of the public debate have always been the fight against irregular migrants and the regularization of foreign workers¹⁴⁹. What now emerges is, as Renzo Guolo¹⁵⁰ marks, a non-model or, as Giovanni Sale¹⁵¹ defines it, an hybrid model: assimilationist in its intent and multicultural in its effects.

In my opinion, the assimilationist intent is at least confirmed by three elements. First, the 2001 Reform of Chapter V of the Italian Constitution¹⁵², concerning Regions, Provinces and Municipalities, newly confirmed the previous centralization of migration governance when envisaging, in amended art. 117 Cost., an exclusive jurisdiction of the State on matters related to legal status of non-EU citizens (a) and immigration (b). As we will see later on, this provision caused quite a few complications at the local level when applied to the integration issue and political rights of foreigners. Second, an Integration Agreement was recently introduced in the Consolidated Law on Immigration of 1998¹⁵³ by the 2009 safety package¹⁵⁴, which then came into force through the Presidential Decree 179/2011¹⁵⁵. Through this tool a mandatory legislative process of integration is introduced for foreigners wishing to apply for a

¹⁴⁸ In reality, according to Annalisa Camilli who wrote “La lunga storia dell’immigrazione in Italia” for Internazionale Website, 10 October 2018, first migratory flows from Eritrea, Ethiopia and Somalia date back to 1960s and 1970s; these immigrants, however, occupied marginal places in both the economic and the territorial context and did not attract the attention of media, which still depicted Italy as a Country of transit. The article is retrievable at: <https://www.internazionale.it/bloc-notes/annalisa-camilli/2018/10/10/storia-immigrazione-italia> [accessed 24 January 2019].

¹⁴⁹ Between 1980s and 1990s the Italian government frequently applied wide amnesties for irregular workers after each adoption of an Immigration Law, in order to compensate general lacks of the actual Immigration system.

¹⁵⁰ Renzo Guolo, *Modelli di Integrazione Culturale in Europa*, paper presented to the Asolo Conference: Le nuove politiche per l’immigrazione. Sfide e opportunità, 16-17 October 2009, organized by Fondazioni italiani europei and Farefuturo, p. 5, retrievable at: https://www.italianieuropei.it/images/iniziativa/schoolfilosofia/materiali2010/IE_Modelli%20Di%20Integrazione%20Culturale%20In%20Europa_Guolo.pdf [accessed 25 January 2019].

¹⁵¹ Giovanni Sale, *L’immigrazione in Europa e i diversi modelli di integrazione*, in *La Civiltà Cattolica* 2016 IV 253-268 | 3993, November 2016. Retrievable at: http://www.notedipastoralegiovanile.it/index.php?option=com_content&view=article&id=11945:immigrazione-in-europa-e-i-diversi-modelli-di-integrazione-&catid=172:questioni-sociali [accessed 24 January 2019].

¹⁵² Constitutional Law 18 October 2001, n. 3 “Modifiche al titolo V della parte seconda della Costituzione”, published in *Gazzetta Ufficiale* n. 248, 24 October 2001.

¹⁵³ D.lgs. 25 July 1998 n. 286, *Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero*.

¹⁵⁴ 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).

¹⁵⁵ D.P.R. 14 September 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).

residence permit of at least one year. This agreement, signed at the moment of the application, provides for a point-based system: during a period of two years, the immigrant is requested to reach an integration minimum level of 30 credits, assigned on the basis of his participation to formative activities (courses of Italian language or Italian civic and civil culture) and his possession of certain characteristics (such as education titles, the conclusion of a leasing contract or the exercise of economic activities); if after the two years period (with a possible extension of one more year) the immigrant has not fulfilled the requirements, he should be expelled. As Carrera¹⁵⁶ and Cutitta¹⁵⁷ observe, the Italian legislation only establishes general objectives for the Integration Agreement, leaving all the specificities to the executive; in fact, the use of an administrative act, instead of Parliamentary ordinary legislation, could raise problems of constitutionality¹⁵⁸. Thirdly, the contemporary public discourse on migration should be taken into account: the political party Lega Nord¹⁵⁹, which often monopolizes the debate, stresses the one-side aspect of integration, that is, unconditional acceptance of the host Country's cultures and values by the immigrant; politically speaking, the fact that the current Interior Minister and vice-president of the Government¹⁶⁰ is a representative of the Lega Nord party could influence future trends on the issue.

On the other hand, I mentioned that, in reality, the effects of the assimilationist intent are multicultural, considered in terms of physical proximity to migrants. Generally speaking, this is surely due to the high ferment of local powers and third sector, which usually face controversies emerging from the lack of a comprehensive and structured system. For example, during the first migratory flows at the beginning of the 1980s, the main Italian trade union groups, CISL, CGIL, UIL, played an active role in providing basic assistance and support to both documented and undocumented migrants, due to the inadequacy of the legal provisions at the time¹⁶¹. Moreover, art. 42 of the aforementioned Consolidate Law on Migration identifies a plurality of actors and institutions in charge of facilitating migrants integration in the Italian society: apart from the State, Regions, Provinces and Municipalities, migrants associations and organizations are also included. Finally, the same National Integration Plan for Persons Entitled to International Protection of 2017¹⁶² recognizes the Italian multilevel structure of integration when dedicating the entire chapter 1 to the role of Regions, Local Authorities and Civil Society Organizations. The physical proximity of the Italian community to resident migrants is also underlined by Andrea Riccardi, the first Italian Minister of

¹⁵⁶ Carrera S. (2006), A Comparison of Integration Programmes in the EU. Trends and Weaknesses, CHEPS CHALLENGE Papers, Issue 1, pp. 3-6.

¹⁵⁷ Cuttitta P. (2013), L'accordo di integrazione come caso di discriminazione istituzionale in Italia, *Razzismi, discriminazioni e confinamenti*, Roma, Ediesse, p. 261.

¹⁵⁸ The fact of preferring executive acts instead of legislative acts is quite common in Italian immigration law, especially when concerning thorny issues such as irregular migration.

¹⁵⁹ Colombo M., Richardson J. (2013) Continuity and change in populist anti-immigrant discourse: An analysis of the visual propaganda of the Lega Nord, *Journal of Language and Politics*, Vol. 12, n. 2, pp. 180-202.

¹⁶⁰ Matteo Salvini, in charge since 1st June 2018, after the elections of the 4 March 2018, for the XVIII Italian parliamentary term.

¹⁶¹ Claudia Mantovan, *Op. cit.*, p. 90.

¹⁶² Ministry of the Interior, Department for Civil Liberties and Immigration, National Integration Plan for Persons Entitled to International Protection, October 2017, retrievable at: http://www.interno.gov.it/sites/default/files/piano_nazionale_integrazione_eng.pdf [accessed 26 January 2018].

International cooperation and Integration¹⁶³. In an interview of 2012¹⁶⁴, Riccardi believed that Italian integration was more domestic than institutional and thus, based more on interactions among families at the very local level; according to him, this kind of integration involved the wide category of immigrant housekeepers and should be replicable on the large scale. In reality, Italian multiculturalism evolved in an exclusionist way, due to a legislative framework and public discourse that are not aware of migration as a stable phenomenon but only as transitory one: through the encouragement of identity closure of resident foreigners' communities, the Italian model envisages a separation between local and immigrants, thus determining a diffused absence of loyalty to the host Country, that usually is a crucial feature of multicultural States, also influenced by Italian unwelcoming attitude¹⁶⁵.

However, as Guolo¹⁶⁶ reminds us, a context without a precise legal framework, in which a plurality of actors promotes different policies, only contributes to the involvement of subjects which does not hold the appropriate legislative justification for certain actions, such as the judiciary, security forces or schools. This institutional and social network affirmed the presence of a non-model in which the only positive aspects is its flexibility and ability to adapt to changes of the system. Indeed, Sale¹⁶⁷ sees Italy as a breeding ground for a new intercultural model of integration: contrary to France, where settled migrants are mainly nationals of former colonies, Italy hosts foreigners coming from 194 different Countries¹⁶⁸. Therefore, this patchwork, if well managed, could possibly enhance a process of mutual acculturation among locals and foreigners, reflecting the Italian heritage of the Roman Empire and its "millions of adoptions"¹⁶⁹.

3.1.1 Foreigners' rights in Italian Constitution

In the Italian Constitution's text there is only one explicit mention of the word "foreigner", included in art. 10 which addresses the condition of strangers without fully covering the issue: the task of defining the juridical condition of foreigners is attributed to ordinary legislation and international treaties. As I will explain later, in light of art.2, the Constitution intentionally referred to "all" in some articles, thus even including foreigners, while precisely mentioning only citizens in others. In this way however, the Constitution does not help legislators in defining the difference between citizens and foreigners residing in the Country in terms of entitlement of rights. During years, sentences of the Constitutional Court helped legal scholars in shedding light on the matter, thus identifying three principles that should drive any definition of foreigners rights: the personalist principle entrenched in art. 2

¹⁶³ The Ministry for International cooperation and Integration was firstly introduced in 2011. In 2013 the Ministry changed definition as Ministry for Integration. The Ministry was then removed in 2014.

¹⁶⁴ Stranieri in Italia, Riccardi: "Serve un'idea sull'immigrazione, non è solo clandestinità o flussi", 19 November 2012, retrievable at: <http://www.stranieriinitalia.it/attualita/attualita/attualita-sp-754/riccardi-qserve-unidea-sullimmigrazione-non-e-solo-clandestinita-o-flussiq.html> [accessed 26 January 2019].

¹⁶⁵ Maria Repaci Giovanna, Op. cit., p. 80 et seq.

¹⁶⁶ Op. Cit. P. 2.

¹⁶⁷ Op. Cit. P. 2.

¹⁶⁸ M. Impagliazzo, «Le vie dell'integrazione latina», in Limes, n. 7, 2016, 134.

¹⁶⁹ Andrea Riccardi, interviewed during the conference "L'Europa dell'integrazione. Modelli a confronto" (2012).

of the Constitution; the principle of equal treatment established by art. 3 of the same text; and finally, the principle of reasonableness introduced by sent. 104/1969.

With respect to the personalist principle, art. 2, para. 1 affirms: “*The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed*¹⁷⁰”. According to scholars, art. 10 and foreigners’ rights are inevitably linked to this article, which establishes the recognition and protection of fundamental rights of individuals and collectivities as one of the main duties of the Italian Republic: human beings should be the center of the Italian legal system. The Constitutional Court sentence n. 105 of 2001 confirms that inviolable rights proclaimed by the Constitution are due to individuals not as part of a well-defined political community, but as human beings¹⁷¹. From this perspective, migrants are not just considered under “foreigners” or “citizens” categories, but in a wider sense as persons¹⁷² and, by virtue of their individuality, their fundamental rights have to be respected. This sentence, applied to Italian Constitutional provisions, erases the idea of membership as fundamental requirement for the enjoyment of “core rights¹⁷³”, leaving space for a universal concept that covers each human being, independently from his origins.

Art. 3 of the Constitution, instead, grants the equal treatment among all citizens: “*All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions*¹⁷⁴”. The reference to “social dignity” links in a controversial way this article to the previous art. 2: on one hand, article 3 is not clear when mentioning first citizens, then the human person and lastly, all workers¹⁷⁵. On the other, however, Ruggeri¹⁷⁶ stresses that the Constitutional text, associating social dignity and equal treatment, inevitably implies that both dignity and equality are effective only when persons’ fundamental rights are respected; in fact, fundamental rights of human beings are part of individuals’ dignity. In confirmation of this interpretation, several times the Constitutional jurisprudence overcame the formal literal mention of “citizens” and extended the words of art. 3 to the condition of aliens: if it is true that art. 3 only refers to citizens, it is also true that the principle of equal treatment has to be applied in the same way to foreigners in the case of fundamental rights¹⁷⁷. Indeed, when the enjoyment of fundamental

¹⁷⁰ Translation from: Senato della Repubblica, Constitution of the Italian Republic, published by the Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication, retrievable at: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf [accessed 29 January 2019].

¹⁷¹ Translation of Corte Cost. Sent. 105/2001.

¹⁷² Michela Michetti (2015), L’integrazione degli stranieri, Istituto di Studi sui Sistemi Regionali Federali e sulle Autonomie (ISSIRFA), retrievable at: http://www.issirfa.cnr.it/michela-michetti-l-integrazione-degli-stranieri-aprile-2015.html#_ftn17 [accessed 28 January 2019].

¹⁷³ See also Corte Cost. Sent. 252/2001, where the existence of a hard core of rights (in this case, the right to health of foreigners) is protected by the Constitution as an untouchable part of humans’ dignity.

¹⁷⁴ Art. 3, para.1.

¹⁷⁵ Art. 3 para. 2: It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of **citizens**, thereby impeding the full development of the **human person** and the effective participation of **all workers** in the political, economic and social organisation of the country (emphasis added).

¹⁷⁶ Antonio Ruggeri, Note introduttive ad uno studio sui diritti e i doveri costituzionali degli stranieri, Associazione Italiana dei Costituzionalisti (AIC), publication No. 2, 2011, p.11.

¹⁷⁷ Corte cost. Sent. 120/1962 (principle of equality), 144 and 224 of 1970 (on labour rights and freedom of movement), 50/1972 (right of defense), 103/1977 (right to health).

rights is at stake, the constitutional principle of equality does not tolerate discriminations between citizens and foreigners¹⁷⁸.

Finally, considerations on the principle of equality derived from art. 3 inevitably brought jurisprudence to affirm the principle of reasonableness, in both a positive and negative interpretation. The principle of reasonableness for foreigners' rights is recognized in the Constitutional Court sentence no. 104 of 1969¹⁷⁹ of which I try to provide a translation : the principle of equality applied to subjects in the entitlements of fundamental rights shall not prevent the legislator from evaluating and adjust concrete differences among these subjects, according to his discretion and only limited by the reasonableness of his evaluation. This means that the difference between subjects is not established by the literal reference contained in a legislative text, but only by a reasonable evaluation on the concrete situations of the subjects involved. For this study, this principle has two consequences : in a negative sense, reasonableness principle provides for a legal basis in favor of limitations to certain foreigners' political rights¹⁸⁰; on the contrary, as Luigi Ciaurro affirms¹⁸¹, a different treatment between aliens and citizens is admissible only if proved to be reasonable and not arbitrary. In a positive sense, the comparison of concrete conditions should be made not only between foreigners and citizens, but also between third-country foreigners and second-country foreigners (other EU citizens). This comparison should pave the way for a possible the extension of TCNs' political rights that now are not recognized.

Generally speaking, the mention of international treaties in art. 10 para. 1 of the Constitutions grants to aliens all those fundamental rights included in international and regional conventions ratified by Italy. This said, as I pointed out formerly, several Court sentences contributed to the identification and definition of a number of aliens' fundamental rights. With a particular reference to political liberties, the following can be deduced :

- ⇒ Freedom of thought and expression, also concerning political opinions when not contrasting with the constitutional public order (otherwise punished with expulsion)¹⁸²;
- ⇒ Freedom of religion¹⁸³;
- ⇒ Freedom of assembly and association, especially for trade unions, with some limits to political associations¹⁸⁴;

¹⁷⁸ Corte cost. Sent. 62/1994.

¹⁷⁹ Corte cost. Sent 104/1969 on the constitutional concerns deriving from the d.lgs. 50/1948 which established the obligation to report whoever hosted foreigners, both freely or paid.

¹⁸⁰ Associazione Studi Giuridici sull'Immigrazione (ASGI), International and European Forum on Migration Research (FIERI), La partecipazione politica degli stranieri a livello locale, 2005, P. 37.

¹⁸¹ Luigi Ciaurro (2008), I Diritti Fondamentali dello Straniero, p. 30, part of P. Benvenuti (a cura di), Flussi migratori e fruizione dei diritti fondamentali, Roma, 2008. Retrievable at:

<https://www.federalismi.it/AppOpenFilePDF.cfm?artid=11007&dpath=document&dfile=07102008113526.pdf&content=I%2Bdiritti%2Bfondamentali%2Bdello%2Bstraniero%2B%2D%2Bstato%2B%2D%2Bdottrina%2B%2D%2B> [accessed 29 January 2019].

¹⁸² See Corte cost. Sent. 168/1971. Art. 21 of the Constitution.

¹⁸³ Corte cost. Sentt. No. 14/1973 and 188/1975. Art. 19 of the Constitution.

¹⁸⁴ Entrenched in art. 17 and 18 of the Constitution.

3.1.2 Electoral Rights

Italy introduced European Directives 93/109 of 1993 and 94/80 of 1994 in its legislation through, respectively, d.l. 408/1994¹⁸⁵ and d.lgs. 197/1996¹⁸⁶. Here, however, I will not analyze bureaucratic requirements for EU citizens who wish to participate in allowed elections; I will only outline according to which modalities EU citizens are granted the right to vote.

Citizens of other EU member States living in Italy are allowed, on their formal request, to:

- ⇒ Exercise the right to vote and to stand for elections of Italian representatives in the European Parliament; since, however, the right to vote cannot be exercised more than once in the same elections, second-country nationals voting for Italian representatives lose the right to vote for his Country representatives in the European Parliament.
- ⇒ Exercise the right to vote for the elections of majors, city councils and constituencies of Municipalities in which they reside. At the same time they are eligible as councilman and member of the city council, but they are excluded from the charges of major and deputy major.

If, however, the EU citizen loses the right to vote and to stand in his Country elections according to any legal provision of his State of nationality, he will then be forbidden to vote also in Italian local and Supra-national elections¹⁸⁷.

On the contrary, TCNs are not allowed to vote at any level of Italian elections; nonetheless, this does not mean that the issue of third country nationals voting has not been raised. Instead, Regions and local powers, opposed to the central government, played a crucial and vital role in the debate¹⁸⁸. Constitutional concerns on the issue mainly covered three questions: firstly, legal scholars analyzed whether the right to vote for resident aliens should have been introduced in Italian legislation through ordinary or constitutional laws; in other words, they investigated the necessity of modifying the Constitutional text in order to extend foreigners' political rights. Secondly, jurisprudence tried to determine to what kind of elections resident aliens could participate if they were allowed to; thirdly, the role of local powers, such as Regions, Provinces and Municipalities, was questioned in the enhancement of TCNs voting rights.

¹⁸⁵ D.L. Of the 24 June 1994, No. 408, Urgent measures on European Parliament elections, then converted into law by art. 1 of L. 483/1994 and modified by L.128/1998.

¹⁸⁶ D.lgs. Of the 12 April 1996, No. 197.

¹⁸⁷ Website Associazione sugli Studi Giuridici per l'Immigrazione (ASGI), il diritto di voto dei cittadini comunitari: http://old.asgi.it/home_asgi.php%3Fn=documenti&id=320&l=it.html [accessed 29 January 2019].

¹⁸⁸ ASGI, op.cit. Footnote 180.

3.1.2.1 Constitutional or Ordinary Law?

During years, all legislative proposals concerning the extension of resident aliens' voting foresaw changes in the Constitutional text¹⁸⁹. In fact, until late 1980s, the majority legal view¹⁹⁰ assumed as necessary an amendment of art. 48 of the Constitution, which establishes the right to vote for all Italian "citizens". Therefore, according to this restrictive theory, the fact that the Constitutional article explicitly refers only to the word citizen suggests that this right cannot be applied or extended to resident aliens; as a result, article 48 brings both positive and negative implications: on one hand, the article positively attributes right to vote to citizens; on the other, it excludes that ordinary laws could introduce the same rights for foreigners¹⁹¹. This diffused opinion started to be challenged during 1990s by a line of thought¹⁹² which envisaged in the political community, and not in the mere formal possession of citizenship, the source of political rights. The new thesis based its arguments on the absence, in the constitutional text, of an expressed interdiction of expanding aliens' political rights. At the beginning, claims raised involved a new permissive interpretation of the term "citizen" mentioned in art. 48, not in its literal sense, but as a wider indication for all subjects protected by constitutional guarantees¹⁹³; therefore, in this case ordinary laws should have been sufficient to intervene in the matter. Secondly, the same conclusions followed from Constitutional Court sentence 11/1968¹⁹⁴ through which the Court specified that rights also granted to foreigners by the Constitution are "all those democratic fundamental rights not directly linked to the status civitatis¹⁹⁵"; in other words, giving the fact that, according to the explicit mention of "citizens" in art. 48, ordinary laws cannot denying citizens the right to vote, the Constitutional text does not contain any foreclosure to legislative interventions in favor of foreigners' rights to vote¹⁹⁶, provided that they cannot be granted as fundamental¹⁹⁷. Two more legislative texts support a possible extension of foreigners' political rights through the ordinary legislation: on one hand, law 9/1989 and d.lgs. 197/1996 according some political rights to EU citizens, indirectly paved the way for a comparison between EU members and foreigners' condition; if the former are granted local political rights through ordinary legislation, why the latter should need an amendment of the Constitution?¹⁹⁸ On the

¹⁸⁹ For an in-depth analysis of these proposals see Ibidem and Davide Sardo, *Il dibattito sul riconoscimento del diritto di voto agli stranieri residenti*, Associazione Italiana Costituzionalisti (AIC), No. 00, 02 July 2010, p. 7-10.

¹⁹⁰ A legal view summarized by F. Lanchester, "Voto (diritto di) – Diritto pubblico" in *Enc. Dir.*, XLVI, Milano, 1993, 1107 ss.

¹⁹¹ Davide Sardo, *Op. cit.* footnote 189, p. 6.

¹⁹² Mainly represented by Grosso E. "Cittadini per amore, cittadini per forza: la titolarità soggettiva del diritto di voto nelle Costituzioni europee" in *Diritto pubblico comparato ed europeo*, 2000, vol. 2, pag. 505-553 and Luciani M. "Cittadini e stranieri come titolari dei diritti fondamentali. L'esperienza italiana" in *Rivista critica diritto privato*. 1992, 224 ss.

¹⁹³ ASGI, *Op. cit.* footnote 180, p. 36.

¹⁹⁴ Confirming the following interpretation, we should bear in mind the aforementioned Constitutional Court's sentences with respect to the principle of equality and reasonableness: on one hand, the Court defined a community of rights and duties of which resident migrants are part and, on the other, enabled the legislator to entitle foreigners to more rights or duties, insofar as the principle of reasonableness is respected and the constitutional position of the citizen is secured.

¹⁹⁵ Corte Cost. Sent. N. 11/1968.

¹⁹⁶ Davide Sardo, *Op. cit.* footnote 189.

¹⁹⁷ Massimo Luciani "Cittadini e stranieri come titolari dei diritti fondamentali. L'esperienza italiana" in *Riv. critica dir. priv.* 1992, 224. The author underlines the crucial difference between the right to vote considered as a fundamental right of citizens and the extension of foreigners' right to vote which is not a fundamental right.

¹⁹⁸ ASGI, *Op. cit.* footnote 180, p. 38.

other, instead, the same State Council, in its judgement no. 9771/04 of 16 March 2005¹⁹⁹, directly expressed a positive opinion on the possibility to increase resident aliens' political rights through an ordinary measure. In its reasoning the Council recalls art.9, para. 4 of the Consolidated law on Immigration of 1998 which provides aliens possessing a resident permit with the possibility to participate to local public life, even through voting, in accordance with Italian legislation and Chapter C of the 1992 Strasbourg Convention²⁰⁰.

3.1.2.2 What elections?

Legal scholars within the permissive view also have different positions with respect to determining to what elections foreigners should be allowed to participate by ordinary law. According to a first group of authors, the ordinary law granting the right to vote to migrants has to respect art. 1, para. 2²⁰¹ and art. 49²⁰² of the Constitution: foreigners should be allowed to vote only in those elections that do not imply the exercise of sovereignty acts, identified as acts that contribute to determining "national policies" or the general political direction of the Country. Therefore, the legislator can recognize aliens' right to vote for local elections, including provincial elections²⁰³, local referendums and national consultative referendums. Instead, national and regional elections, together with revocatory²⁰⁴, territorial²⁰⁵ and constitutional²⁰⁶ referendums would be excluded: through these sovereignty acts, the population directly exercises its sovereignty or appoints subjects who exercise legal powers and hence, sovereignty²⁰⁷. On the contrary, the second group of scholars bases its considerations on the already mentioned Reform of Chapter V of the Italian Constitution: the decision on the extension of migrants' voting rights rests with the Parliament political discretion. This specific resolution do not follow from the constitutional principle of popular sovereignty, but rather from politics²⁰⁸. In fact, the reformed Chapter V seems to support this view from two perspectives: on one hand, when defining the exclusive legal competences of the State, ordinary legislation is reserved for defining the legal status of non- EU citizens²⁰⁹, thus taking into account the fragmented legislative landscape in which different subjects, such as citizens, EU citizens, regular and irregular migrants, coexist. On the other, the entire Reform of Chapter V focused on recognizing the autonomy and importance of local autonomies as primary actors that exercise part of popular sovereignty in their competences,

¹⁹⁹ Council of the State, judgement no. 9771/04 of 16 March 2005 on the procedure initiated by the Government against the Genoa Charter for the section extending foreigners' right to vote for municipal elections and referendums.

²⁰⁰ Convention on the Participation of Foreigners in Public Life at the Local Level, Strasbourg, 5 February 1992.

²⁰¹ Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution.

²⁰² Any citizen has the right to freely establish parties to contribute to determining national policies through democratic processes.

²⁰³ Unless it is an autonomous province.

²⁰⁴ Former art. 75 Cost.

²⁰⁵ Art. 132 Cost.

²⁰⁶ Former art. 138 Cost.

²⁰⁷ Luciani M. "Il diritto di voto agli immigrati: profili costituzionali" in Commissione per le politiche di integrazione degli immigrati-Atti del Convegno Partecipazione e rappresentanza politica degli immigrati, 21 June 1999, Dipartimento Affari sociali, Rome, para. 5.

²⁰⁸ E. Grosso "La titolarità del diritto di voto. Partecipazione e appartenenza alla comunità politica nel diritto costituzionale europeo", op. cit. , p. 124.

²⁰⁹ Cost. Art. 117, para.a.

even with other means different from legislative power; therefore, even municipal and provincial councils' elections imply the exercise of sovereignty acts by the population²¹⁰.

3.1.2.3. Municipalities

The third and fourth parts of this paragraph will illustrate the debate on the role of local powers, in other words Regions, Provinces and Municipalities, in introducing the right to vote for those aliens residing in their territory. In fact, due to the immobility of central powers on the question, local authorities acted autonomously by virtue of the decentralizing process started with the aforementioned Reform of Chapter V. The recognition of foreigners' right to vote is analyzed at two levels: the first considers the sphere of the Municipality, while the latter considers regional elections. With respect to Municipalities, starting from 2001²¹¹, they adopted different approaches: some accorded the right vote only for Municipality's *circoscrizioni*²¹², while others tried to extend voting to the wider municipal elections. In 2004, however, the Ministry of the Interior tried to stop the first municipal provisions through the circular letter n. 4 of the 22 January 2004²¹³, according to which electoral rights solely pertained to formal citizens; the enactment of the circular letter eventually brought to a legal dispute between the Government and local administrations, initially solved by the State Council opinion 8007/04 of the 28 July 2004. The Council considered art. 17, para. 4 of the Consolidated Law on Local Authorities of 2000²¹⁴, where it is stated that: "Municipalities' *circoscrizioni* represent the needs of their **population** and are elected according to their charter and regulation²¹⁵" (emphasis added). Therefore, according to the State Council interpretation, the term "population" here covered all residents, so both citizens and foreigners who lived in districts' territories. Moreover, this interpretation did not clash with article 117, letter p²¹⁶ of the Constitution, given that district councils (*consigli circoscrizionali*) are not "governing bodies", but only administrative decentralizing bodies. However, opinion 8007/2004 rejects the Ministry's circular letter only by virtue of the particular nature of district councils' elections, reaffirming, in fact, the need for a Constitutional revision of art. 48 of the Constitution when elections of other governing bodies are at stake. This view will completely change in 2005, when the Italian government asks the State Council for another opinion on the possibility to annul the Genoa Charter which extended foreigners right to vote for both *circoscrizioni* and municipal elections. In this case, State Council opinion 9771/04 of the 16 March 2005²¹⁷ definitely rules out the possibility for municipal administration to determine subjects entitled of voting for both municipal and *circoscrizioni* elections. This

²¹⁰ Corte Cost. Sentt. 106/2002 and 306/2002 on the exercise of popular sovereignty by local power and the Parliament after the Reform of Chapter V of 2001.

²¹¹ The first Municipality that granted the right to vote and be elected in its municipal elections was the Forlì municipality, which modified its charter in 2001. Further informations can be found in ASGI, footnote 180, p. 43.

²¹² Constituencies or districts.

²¹³ Protocol no. 200400250 File 15600/779 "Elettorato attivo e passivo ai cittadini extracomunitari".

²¹⁴ D.lgs. 267/2000 of the 18 August 2000. Testo unico delle leggi sull'ordinamento degli enti locali, published in G.U. 28 September 2000, no. 227, S.O.

²¹⁵ I tried to translate the article from the Italian: "Gli organi delle circoscrizioni rappresentano le esigenze della popolazione delle circoscrizioni nell'ambito dell'unità del comune e sono eletti nelle forme stabilite dallo statuto e dal regolamento".

²¹⁶ The State has exclusive legislative powers in the following matters: [...]

p) electoral legislation, governing bodies and fundamental functions of the Municipalities, Provinces and Metropolitan Cities.

²¹⁷ State Council, cit. in footnote 199.

competence is completely attributed to the legislator who, by virtue of art. 9 para. 4 of the Consolidated Law on Immigration and ordinary laws on EU citizen voting rights, can intervene through ordinary legislation on the matter. Therefore, according to art. 138 of the Consolidated Law on Local Authorities²¹⁸, the Government was authorized to proceed with the special annulment of the Genoa Charter, also on the basis of the exclusive competence established by the aforementioned art. 117, letter p of the Consolidated law on Local Authorities. This second opinion totally reversed the first one and will be confirmed by the third State Council opinion 11074/04 of 13 July 2005²¹⁹. The extension of foreigners' voting rights carried by local authorities is not admissible for both circoscrizioni and municipal elections: on one hand, the definition of circoscrizioni as non-governing bodies is denied; on the other, "on protection of national legislation cohesion", Municipalities cannot be allowed to act independently on the extension of such voting rights, thus determining differential treatments in each city²²⁰. On the basis of this last opinion, the Governments will proceed, in the months after, to annul other several municipal and provincial charters²²¹.

3.1.2.4 Regions

At the regional level major interesting cases are those of the Emilia-Romagna and Tuscany regions. In fact, in both cases these regions modified their regional Charters in order to enfranchise immigrants residing in their territories. These provisions were brought before the Constitutional Court by the Italian Government which questioned their constitutionality: according to the Government, both Charters violated art. 48 and art. 117, letter f²²² of the Constitution. The Constitutional Court expressed its opinions through sentences 372 and 379 of 2004 which did not significantly contributed to the solution of the issue²²³: generally speaking, the Court rejected Government arguments, without, however, formally recognizing regional intervention legitimacy in the matter. Indeed, the Court affirmed that articles questioned²²⁴ included in the Charters, even if added in a source of law, do not have legal effects inasmuch they carry out a cultural or political role, rather than a normative one²²⁵. As stressed by Sardo²²⁶, through this argument the Court proposes a reprehensible interpretation of Charters' norms based on the separation between culture and law: this kind of approach undervalues the primary role of socio-cultural processes in creating and influencing law, and fosters a formalistic attitude which stops potential developments of constitutional culture²²⁷. This said, the sentence notices the potential risk of differential treatment at the national level with respect to fundamental political rights; therefore, Regions are only allowed to legislate in

²¹⁸ Special annulment. The Government, on protection of national legislation cohesion, through a decree of the President of the Republic, after a decision of the Council of Ministers and on proposal of the Interior Minister, is entitled, at any time, to annul local authorities acts tainted with illegality, after hearing the State Council.

²¹⁹ State Council, opinion no. 11074/04 of the 13 July 2005 which reconsidered opinion no. 8007/04 of the 28 July 2004 in the light of the last opinion 9771/04 of the 16 March 2005.

²²⁰ State Council, opinion 11074/04 of 13 July 2005, p. 8-9.

²²¹ Davide Sardo, Op. cit. footnote 189, p. 14.

²²² The State has exclusive legislative powers in the following matters: [...]

f) state bodies and relevant electoral laws; state referenda; elections to the European Parliament [...].

²²³ ASGI, op. Cit. Footnote 180, p. 55.

²²⁴ Respectively art. 2, para. 1, letter f of the Emilia-Romagna Charter and art. 3. para. 6 of the Tuscany Charter.

²²⁵ Corte cost. Sent. 379/2004.

²²⁶ Davide Sardo, op. Cit. Footnote 189, p. 12.

²²⁷ Gianluca Bascherini, *Immigrazione e diritti fondamentali: l'esperienza italiana tra storia costituzionale e prospettive europee*, Napoli, Jovene, 2007.

matters of participation rights, such as referendums and other forms of public consultations, or even in the establishment of consultative bodies for all residents. Constitutional concerns on these articles are, therefore, declared ineligible because of their unfitness. Moreover, Salazar²²⁸ also analyzed the case of self-government Regions; according to the scholar, on one hand, these local authorities have exclusive competences, attributed through constitutional law no. 2 /1993 and maintained by virtue of the most favorable condition clause²²⁹; on the other, however, they are required to comply with Italian legislation principles. In this way, the enfranchisement of foreigners carried out by an autonomous Region could be proved to be inconsistent with the principle of equality, thus preventing Local autonomies from extending non-UE citizens' voting rights before national legislation.

3.1.3 Consultative bodies

Italian legislation provided for consultative bodies for foreigners long before the raise of the political debate on resident aliens' right to vote²³⁰. During years, Immigration Law established consultative bodies at the national, regional and provincial level, while Municipalities autonomously set up two different tools: the Municipal Consultative Body (*Consulta Comunale per i cittadini stranieri e apolidi*) and the Additional Councillor (*Consigliere Aggiunto*). I will now describe each level.

The first Immigration Law no. 943/1986 envisaged in art. 3, para. 1 the creation of a "Council on the problems of non-EU workers and their families²³¹" at the Ministry of Labour and Social Policies, with the specific aim of removing obstacles to the enjoyment of those rights granted by law to foreigners. The Council was composed of experts, representatives of trade unions, voluntary associations and Regions, but also by representatives of non-EU workers; however, the latter were not elected but appointed among the most influential aliens associations: this particular aspect caused substantial delays²³² in the establishment of the Council, due to the difficult nomination of foreigner workers. The same Council changed its name with the Consolidated Law on Immigration of 1998; with this law two different tools were instituted²³³ at the national level: the "Council on foreigner workers and their families", lodged at the Prime Minister Office, and the "National Body for Co-ordinating Local Policies of Integration of Foreign Citizens" (ONC²³⁴), within the National Council of Economy and Labour²³⁵. On one hand, the reformed Council had to gather information on the implementation of the new Immigration Law, with the participation of representatives of the central and local public administration, trade unions, religious and voluntary associations; on the other, the ONC was composed of a diversified patchwork of representatives from the

²²⁸ Salazar C., Brevi note introno all'aspra contesta tra governo ed autonomie locali sull'estensione del diritto di voto e dell'elettorato passivo agli stranieri extracomunitari, Convegno "Discriminazioni ed Enti Locali", ottobre 2004, Università di Perugia.

²²⁹ Former constitutional law no. 2/2001.

²³⁰ ASGI, footnote 180, p. 60.

²³¹ Consulta nazionale per i problemi dei lavoratori non comunitari e delle loro famiglie.

²³² The Council was expected to be established within 3 months from the approval of the law; instead, the assembly saw the light of the day three years after.

²³³ D.lgs. 286/1998, art. 42, paras. 3 and 4.

²³⁴ *Organismo Nazionale di Coordinamento*.

²³⁵ *Consiglio Nazionale dell'Economia e del Lavoro*, CNEL.

government and third sector²³⁶: its main task was to support the development of new strategies of integration and reception for migrants and specifically to encourage their participation in the public life²³⁷. Nonetheless, national consultative bodies did not advance immigrants empowerment or their representation at the national level. In fact, in 2002, both the Council and the ONC ceased to operate²³⁸.

At the Regional level, “Councils for Immigration Problems” (*Consulte regionali*) have been set up in almost all regions²³⁹ after the entry into force of the aforementioned law 943/1986²⁴⁰. These Councils are formed at the beginning of each regional legislature and promote three-years plans on immigration policies, with a particular emphasis on socio-economic and cultural integration of immigrants. The composition of the Council is mixed: there are representatives of third sector, such as trade unions, voluntary organizations and migrants’ civil organizations, but also members of the government, for example from provincial and municipal administrations, from the Chamber of Commerce and from Foreign Affairs and Interior Ministries. However, Regional Councils do not have decision-making powers: they can only deliver opinions or make proposals on immigration policies plans of the Region, thus orienting the wider decision-making process²⁴¹. For this reason, their action is limited and so is their effectiveness, not to mention that representatives of migrant’s associations are often in a minority among Council’s members²⁴².

The Provincial level saw the founding of “Immigration Territorial Councils” (ITC²⁴³) with art. 57 of the Presidential Decree 394/99²⁴⁴: they have been set up in all provinces with the task of monitoring and making proposals on issues related to the migration phenomenon, including the possibility to design specific plans for local integration. These Councils are chaired by Prefects²⁴⁵ and are composed of State representatives of local and regional administrations, of the Chamber of Commerce and of employers’ associations and trade unions. Moreover, two foreign representatives of the main immigrants’ associations should participate; the expression “main immigrants’ associations”, however, is problematic, and the law does not give any explicit definition, due to its vagueness and ambiguity. What is more, the effectiveness of these Councils in enhancing immigrants’ representativeness has been criticized, mainly because during years the focus of their work shifted on security and public

²³⁶ Representatives of Local Authorities (Regions, provinces and Municipalities), of provincial labour offices and of the National Institute for Social Welfare (INPS), but also delegates of workers and employers trade unions, of migrants associations and local health units.

²³⁷ Ankica Kosciusko and Anna Triandafyllidou, *Active Civic participation of Immigrants in Italy*, Country Report prepared for the European research project POLITIS, Oldenburg, 2005, p. 29.

²³⁸ In particular, after the entry into force of l. no. 189 of the 30 July 2002, also known as Bossi-Fini Law, both the Council and the ONC have not been appointed again.

²³⁹ Ibidem.

²⁴⁰ In this case too, Councils for Immigration Problems were expected of being established within six months from the come into force of the law; instead, they were formed in almost all regions only around mid-1990s.

²⁴¹ Claudia Mantovan, op. Cit., p. 64 et seq.

²⁴² ASGI, footnote 180, p. 67.

²⁴³ Consigli Territoriali per l’Immigrazione, CTI.

²⁴⁴ D.P.R. 394/99, Implementing Regulation of the Consolidated Immigration Law of 1998 which envisaged Immigration Territorial Councils in art. 3, para.6.

²⁴⁵ The Prefecture is part of the Interior Ministry; according to the latter, in 2000 all Provinces set up their ITC.

order²⁴⁶, influenced by the role of Prefectures and by the diffused minority position of migrants²⁴⁷.

Finally, at the Municipal level two tools of civic engagement have been implemented: the “Municipal Consultative Body” (*Consulta per l’Immigrazione*) and the “Additional Foreign Councillor” (*Consigliere Aggiunto*). Considering the partial failure of all bodies analyzed until now, during 1990s the shared interest in experiencing new arrangements for the improvement of foreigners’ participation encouraged Municipalities to envisage particular elections for foreigners representatives. Therefore, these municipal institutions are not established by law, but rather introduced in the legislation by Municipalities themselves²⁴⁸. Both the Council and the Councilor are elected by TCNs residents that are at least 18, and candidates have to enroll in separate electoral groups²⁴⁹; both institutions work on issues related to access to social services provided by the region and, broadly speaking, on integration matters. Nonetheless, these bodies have limited decision-making powers. With respect to Consultative bodies, they are responsible for delivering proposals and giving opinions on programs affecting social and labor market integration, public security and on preventing foreigners’ marginalization. They can be composed of mixed members (foreigners and citizens) or just foreigners; furthermore, seats are attributed according to different criteria: some Municipalities distribute seats following nationality grounds, while others apply a cross-cultural approach²⁵⁰. On the other hand, the Additional Foreign Councilors seat in local councils with the same tasks of ordinary councilors and gains more visibility from elections: he usually is a mean to exert pressure on the government in order to grant more foreigners’ participation to the decision-making process²⁵¹.

3.1.4 Citizenship

The diffused process of citizenship disaggregation mentioned in chapter 1 also affected and shaped Italian concepts of citizenship; the evidence in support of this change is provided by the more than 150 draft laws pertaining citizenship acquisition and loss proposed from 1992 to 2017²⁵². The actual legislation on citizenship is regulated by law 91/1992, implemented by the Presidential Decree no. 572/1993: this legal provision seems quite backward and anachronistic, also considering how Italy reversed its position from emigration Country to Country of immigration during the years. What lacks in current legislation is an explicit link between foreigners’ acquisition of Italian citizenship and national structured intent of facilitating TCNs’ integration; as we will see, l. 91/1992 was primarily thought as to maintain and preserve Italian community’s bloodline (*ius sanguinis*).

²⁴⁶ ASGI, footnote 180, p. 64.

²⁴⁷ ASGI, footnote 180, p. 64.

²⁴⁸ Law 39/1990, allowing Municipalities to adopt their own rules on civic participation of foreigners, provided for a general legal basis on this matter.

²⁴⁹ According to ASGI (footnote 180, p. 71) this kind of elections usually occurs at the same time of Municipal elections, as to attract more visibility on the process.

²⁵⁰ Ankica Kosciusko and Anna Triandafyllidou, footnote 96, p.32.

²⁵¹ Ankica Kosciusko and Anna Triandafyllidou, footnote 96, p.32.

²⁵² Giammaria Milani, *Cittadinanza e integrazione. L’influenza del diritto comparato sulla disciplina italiana e sulle proposte di riforma*, in *federalismi.it*, no. 4, 2018, p. 2.

This said, law 91/1992 establishes a mixture of *ius sanguinis* and *ius soli*; the latter criterion, however, is mainly considered as a residual category. In fact, the only subjects automatically acquiring Italian citizenship by *ius soli* are:

- ⇒ Children born in the Italian territory to unknown or stateless parents, or even to parents that cannot transmit their citizenship²⁵³;
- ⇒ Children born to unknown parents and of which no other citizenship can be proved²⁵⁴;
- ⇒ Foreigners born in Italy who:
 - a) legally resided in the Italian territory without interruptions until they come of age, and
 - b) submit a formal request for Italian citizenship within one year from the above-mentioned date²⁵⁵.

With respect to foreigners' naturalization²⁵⁶, instead, a ten years period of residence is required in order to become citizens²⁵⁷; moreover, procedures for applying are complex, involving a high number of documents²⁵⁸, thus discouraging potential applicants. In fact, this law was mainly inspired by three necessities: first, the protecting and revitalizing of Italian roots of those emigrants who lost their Italian citizenship abroad²⁵⁹; secondly, the establishment of equality among spouses and between paternal and maternal line of descent, thus reaffirming principles already included in the Reform of Family Law of 1975; lastly, the elimination of any automatism in the loss and acquisition of Italian citizenship, hence stressing the importance of individual willingness²⁶⁰. According to Porena²⁶¹, the general reasoning behind this law implies a sort of "territorial bond" which is not aware of the substantial political community²⁶² discussed in the last subparagraph and also considered by the Constitutional Court²⁶³. Therefore, a paradoxical situation is produced in which an individual born and raised abroad, who merely speak Italian or has never been in Italy, is eligible for acquiring Italian citizenship and political rights if one of his parents is Italian, while a perfectly integrated foreigner living in Italy has to wait not only the ten years period of residence, but also the slowness of Italian bureaucracy²⁶⁴. The scholar identifies the formal-

²⁵³ L. 5 February 1992, no. 91, art. 1, para. 1, lett. b).

²⁵⁴ L. 5 February 1992, no. 91, art. 1, para. 2.

²⁵⁵ L. 5 February 1992, no. 91, art. 4, para. 2. This last provision is more correctly defined as a hardened *ius soli*, since a foreigner born in Italy has to satisfy additional requirements in order to obtain Italian citizenship.

²⁵⁶ EU-citizens naturalization requires a shorter residence period of four years, as described by art. 9, para. 1, lett. d) of the same law.

²⁵⁷ L. 5 February 1992, no. 91, art. 9, para. 1, lett. f). A shorter period of two years is applied in case of marriage with an Italian citizen, as indicated in art. 5, of the same law.

²⁵⁸ Ankica Kosciusko and Anna Triandafyllidou, footnote 96, p. 22.

²⁵⁹ Through the bloodline criterion descending from parents Italy secured Italian communities abroad and granted them the right to participate in the political life of their State of origin.

²⁶⁰ Paolo Bonetti, Osservazioni sul testo unificato delle proposte di legge di modifica della legge n. 91/1992 in materia di cittadinanza italiana, Associazione per gli studi giuridici sull'immigrazione (ASGI), 8 March 2007, p. 2.

²⁶¹ Daniele Porena, 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, *federalismi.it*, no. 2/2012, p.17.

²⁶² Grosso, footnote 50.

²⁶³ Corte Cost. Sent. 105/2001.

²⁶⁴ Daniele Porena, *Ivi*, footnote 261, p. 18.

juridical criterion as privileged in our citizenship legislation: the fact that citizenship is more easily “transmitted” than “acquired”, only promotes the ethnic-racial aspect of nationality, completely excluding national culture, which is historically associated with Countries’ territories and communities; broadly speaking, national culture depends on all those individual identity backgrounds that contribute to the definition of the idea of Nation²⁶⁵.

This idea of culture influenced the latest draft law on citizenship n. 2092, approved by the Chamber of Deputies the 13 October 2015. The text, later examined by the Senate, has never been ratified. The most innovative aspects, indeed, were the inclusion of a tempered *jus soli* and a new *jus culturae*: the former provided foreign children born in Italy with the entitlement to Italian citizenship if at least one of their parents held a long-term residence permit; the latter, instead, considered foreign children’s school enrollment. More specifically, those foreign children born in Italy to parents not holding the long-term residence permit, and children arrived in Italy before being twelve would become Italian citizens after proving a regular enrollment of at least five years to the Italian school system. In both cases, children should have declared their willingness through a formal request, presented by their parents or autonomously once come of age²⁶⁶.

Moreover, the 2018 Security Decree²⁶⁷ directly affected law 91/1992 in a restrictive sense, respectively intervening on acquisition and loss of citizenship for foreigners. First of all, the text finally requires the knowledge of the Italian language (level B1) in order to apply for citizenship. Then, art. 14, para. c) establishes a 48 months period for the examination of foreigners’ citizenship applications: according to ASGI, the decision seems highly discriminatory²⁶⁸. Furthermore, ASGI identifies four Constitutional articles that prove the manifest unlawfulness of article 14 of the Decree²⁶⁹. Its arguments are all related to the new article 10-bis, para. 1 of law 91/1992, introduced by article 14 of the Security Decree: in fact, a citizenship withdrawal is envisaged for all those foreigners who, after the acquisition of the Italian citizenship, are condemned for certain serious crimes²⁷⁰. In the ASGI report, this provision is in contrast with the following Constitutional articles:

⇒ art. 3: the citizenship withdrawal only refers to foreigners naturalized in the sense of articles 4, para. 2, 5 and 9 of law 91/1992 (*ius soli* and marriage cases). In fact, the

²⁶⁵ Daniele Porena, footnote 264.

²⁶⁶ Associazione per gli Studi Giuridici sull’Immigrazione (ASGI), La riforma della cittadinanza approvata alla Camera: un importante passo avanti, ma il testo va migliorato, from ASGI website, Cittadinanza italiana, l’ASGI fa il punto sulla riforma della legge, 23 October 2015, retrieved at: <https://www.asgi.it/notizie/cittadinanza-italiana-lasgi-fa-il-punto-sulla-riforma-della-legge/> [accessed 3 February 2019].

²⁶⁷ DL 113/2018 convertito in Legge n. 132/2018, recante: «Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell’Interno e l’organizzazione e il funzionamento dell’Agenzia nazionale per l’amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata».

²⁶⁸ Associazione per gli Studi Giuridici sull’Immigrazione, Il Senato approva il D.L. Sicurezza e Immigrazione. Tavolo Asilo: mancato senso di responsabilità istituzionale, 7 November 2018, retrievable at: <https://www.asgi.it/asilo-e-protezione-internazionale/il-senato-approva-il-decreto-legge-sicurezza-e-immigrazione-tavolo-asilo-mancato-senso-di-responsabilita-istituzionale/> [accessed the 12 February 2019]

²⁶⁹ Associazione per gli Studi Giuridici sull’Immigrazione, D.L. 113/2018 : i profili di manifesta illegittimità costituzionale secondo l’ASGI, 5 October 2018, retrievable at: <https://www.asgi.it/asilo-e-protezione-internazionale/d-l-113-2018-i-profil-di-manifesta-illegittimita-costituzionale-secondo-lasgi/> [accessed 12 February 2019].

²⁷⁰ per i reati previsti dall’articolo 407, comma 2, lettera a), n. 4), del codice di procedura penale, nonché per i reati di cui agli articoli 270-ter e 270-quinquies.2, del codice penale.

same withdrawal is not provided for *ius sanguinis* citizenship, thus treating differently similar conditions; once obtained a juridical status, the individual should be allowed to fully enjoy those rights connected to that status;

- ⇒ art. 22: “No-one may be deprived of his legal capacity, citizenship, or name for political reasons²⁷¹”. Serious crimes listed in art. 14 of the 2018 Decree have to some extent a political nature: acts of terrorism and subversion of the legal system;
- ⇒ art.27: “Punishments may not be inhuman and shall aim at re-educating the convicted²⁷²”. If punishment’s aim is to reintegrate sentenced person into society, then the citizenship withdrawal could only produce “anti-socializing” effects, enhancing the individual’s exclusion from the community;
- ⇒ art 117: “Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations²⁷³”. Art. 14 of the 2018 Decree does not protect potential stateless persons: the citizenship withdrawal is also allowed when the individual does not possess any other citizenship, thus being in contrast with Italian international obligations. More precisely, Italy adopted the 1961 Convention on the Reduction of Statelessness, that affirms in art. 8, para.1: “A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless²⁷⁴”.

3.2 France: the Republican model

Contrarily to Italy, France has a long past of immigration, which cannot be understood without considering three historical different contexts developed in the Country²⁷⁵: first, an economic context asking for a significant number of workers since the beginning of the Industrial Age; secondly, a cultural context where exchanges between local and foreigners were mediated²⁷⁶; thirdly, a political context which rejected and distanced immigrants. More precisely, as early as the middle of the XIX century France already was an immigration Country which, during years, experienced three types of migrations: labor migrations, on the basis of the guest-workers system, all along the industrial development and also between and after the two wars, when the Country was in need for labor force for its reconstruction; then, families migrations which, through the enlargement of foreigners’ communities, compensated the persistent demographic deficit; lastly, refugees and outlawed people’s migrations²⁷⁷.

²⁷¹ Art. 22 of Italian Constitution.

²⁷² Art. 27, para. 3 of Italian Constitution.

²⁷³ Art.117,para. 1 of Italian Constitution.

²⁷⁴ UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: <https://www.refworld.org/docid/3ae6b39620.html> [accessed 12 February 2019].

²⁷⁵ Ultime Schuerkens, Active Civic Participation of Immigrants in France, Country Report prepared for the European research project POLITIS, Oldenburg, 2005, p. 10.

²⁷⁶ At the end of the 1980s social and intercultural mediation among immigrants and French society occurred through the policy of the “femmes-relais”. For further information on the issue see Bénédicte Medellin, Le rôle des femmes-relais, Informations Sociales, no. 141, 2007, p. 120-127.

²⁷⁷ Jean-Claude Sommaire, La crise du “modèle français d’Intégration”. Une proposition d’outil, ERES, Vie sociale, no. 4, 2006, p. 14.

Michèle Tribalat²⁷⁸ links the first two flows and defines the phenomenon of migration in France as “*auto-engendré*”²⁷⁹. From the beginning of the 20th century France mainly received foreign workers, attracted by better economic opportunities that intensified on the wave of the *Trente Glorieuses*²⁸⁰; however, from 1974, right after the 1973 oil crisis and the early signs of mass unemployment, the government decided to suspend non-EU long-term workers’ migration²⁸¹. Since then and all along the 1980s, a first family migration flow arrived in France, on the basis of the family reunification principle²⁸². Then, throughout the 1990s, a second flow of family migration developed: foreigners born to immigrated parents who acquired French citizenship and all those naturalized resident aliens looked for spouses in their country of origin²⁸³. Therefore, French public discourse developed on concepts of “suffered migration”²⁸⁴ instead of “managed migration”. All these migrants mainly came from two areas of the world, namely the European neighborhood, in particular Belgium, Italy, Spain, Poland and Portugal, and from former colonies, especially from Algeria, but also from the Maghreb and Southern Sahara area²⁸⁵.

After this brief description of France immigration’s main features, I will now address what are the specific aspects identifying the French model of integration. According to literature, France is the best example for the assimilationist model outlined in chapter 1: “a one-way social process in which the effort of being integrated is entirely on the migrant”, who, in fact, has to “to renounce his peculiar cultural or linguistic attributes (especially in the public domain) so as to acquire the same characteristics of the major population”²⁸⁶. We should, however, investigate this model more in detail. The concept of integration in France became crucial when, in 1989, the Inter-ministerial Integration Committee²⁸⁷ and the High Council for Integration²⁸⁸ were established. In particular, the latter had the precise mission to deliver its opinion and proposition upon the request of the Prime Minister, on issues related to integration of foreign residents and residents with foreign origins²⁸⁹. In 2013, the HCI has ceased to exist. However, from 1991 to 2012, the Council published a series of interesting Reports which studied during time the effects of the French integration model. The first 1991 Report²⁹⁰ tries to give a preliminary definition of integration which is identified as “a process that encourages national society’s active participation, accepting the existence of cultural, social and moral differences and also taking into account the fact that the whole is enriched by

²⁷⁸ Former member of the French High Council for Integration (HCI), interviewed by the same Council the 4 March 2010. I will later explain the role of this institution in French integration policies.

²⁷⁹ Self-generating or self-produced.

²⁸⁰ “The Glorious Thirty” indicates the period thirty years from 1945 to 1975 during which French economy experienced a rapid growth and development.

²⁸¹ From the 3 July 1974 until now this suspension has not been withdrawn, but just made more flexible. For non-EU nationals, the only work permit allowed was for seasonal work.

²⁸² Law no. 84-622 of the 17 July 1984 which modifies the ordonnance no. 45-2658 and of the Code du travail and *relative aux étrangers séjournant en France et aux titres uniques de séjour et de travail*.

²⁸³ Haut Conseil à l’intégration (HCI), *La France sait-elle encore intégrer les immigrés? Bilan de la politique d’intégration en France depuis vingt ans et perspectives*, 2011.

²⁸⁴ Migration subie.

²⁸⁵ Ibidem.

²⁸⁶ Definition of assimilation provided in Chapter 1.

²⁸⁷ Décret du 6 décembre 1989.

²⁸⁸ Décret no. 89-912 du 19 décembre 1989.

²⁸⁹ Ibidem, art. 1, modifié par Décret n°2006-382 du 30 mars 2006 (translated).

²⁹⁰ Haut Conseil à l’intégration, *Pour un modèle français d’intégration, Premier rapport annuel*, La documentation française, Paris, 1991.

variety. Without refusing differences, taking them into consideration but not exalting them, an integration policy should emphasize similarities and convergences, within the equality of duty and rights [...]”²⁹¹. Therefore, the HCI confirms that its concept of integration follows a “logic of equality instead of minorities”; More specifically, this logic develops around four fundamental values of the *République*: identity, equality, nationality and secularity²⁹². Identity and equality principles find their roots in the Declaration of the Rights of Man and of the Citizen of 1789 which influenced the traditional relationship between the individual and State²⁹³: independently from their origins, race or religion, individuals are equal before the law and before the State²⁹⁴. Therefore, since the State cannot formally or institutionally recognize minorities by virtue of individual equality, France is a Republic united and indivisible, far from founding its integration policies on the recognition of ethnic communities. Secondly, France is a Nation-State²⁹⁵: national identity grounds on French nationality and thus, citizenship constitutionally overlaps with the *nationalité française*; this means that the acquisition of French nationality and hence, of French citizenship, is seen as a successful sign of integration, which can only be completely reached at the end of the process. As a result, even voting rights for foreigners are the last crowning of integration than its precondition²⁹⁶. Finally, the fourth fundamental principle of French Constitution driving integration policies is secularism²⁹⁷: France is a secular Republic. In other words, on one hand the Republic accepts every religion; however, on the other, these different faiths should be forbidden to undermine State neutrality. This said, in 1991 the HCI already put attention on fundamentalists’ pressure on the State, exercised as to “impose their thoughts and habits”²⁹⁸. Each manifestation of individual’s faith pertains to the private sphere, that is separated from the public sphere of the State. In this sense the ban on headscarves in school, illegal since September 2004²⁹⁹, should be considered.

The official recognition of the Republican integration comes with the *contrat d’accueil et d’intégration*³⁰⁰: a one- year reception and integration contract which provides foreigners with language courses and civic and habits courses. All these activities are completely free of charge. In this model, integration is facilitated by the use of the same language, the acceptance of the same national and republican principles, but also by equal access to the same school system which particularly fosters foreigners’ “assimilation” to the French ideology³⁰¹. However, as noticed by Sale, this republican model works as long as the right to citizenship is supported by social policies in favor of society’s weaker groups. In fact,

²⁹¹ Ivi, footnote 140, p. 18 (translated).

²⁹² Égalité, nationalité, laïcité.

²⁹³ Men are born and remain free and equal in rights. Art. 1 of the Declaration of the Rights of Man and of the Citizens of 1789.

²⁹⁴ Art. 1 of the 1958 French Constitution:

France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.

²⁹⁵ Art. 2 of the 1958 Constitution is completely dedicated to national symbols, such as language, the flag, national anthem, the motto of the Republic and the principle of sovereignty as government of the people, by the people and for the people. It is interesting to notice the difference with Italy, which only dedicates art. 12 of the Constitution to national flag’s colours, while art. 2 recognizes fundamental rights of human beings.

²⁹⁶ Haut Conseil à l’intégration, already cited. Footnote 141, p. 19.

²⁹⁷ Principle entrenched in art. 1 of the 1958 Constitution, see footnote 290.

²⁹⁸ Literally translated from the 1991 report.

²⁹⁹ Law 228 of 2004.

³⁰⁰ Law no. 2006-126 of July 2006 relative à l’immigration et à l’intégration.

³⁰¹ Giovanni Sale, article cited in footnote 10.

the main paradox of the French integration model is the increasing discrepancy between the declared right of equality and factual inequalities observed: the phenomenon of ghettoization in the *banlieues* of second or third foreigners' generations was already mentioned by HCI in 1991 and reconfirmed by the last Report of 2011. These formal citizens in practical terms do not hold the positive attributes of citizenship³⁰²; due to their ethnic origins and social class these people always feel out of place or "excluded from the inside": their marginalized condition is particularly evident with respect to employment³⁰³. In the light of this marginalization, recent terrorist attacks perpetrated by French citizens with foreign origins reflect the current disaggregation of individual identities: albeit being French, they are convinced of being "more Muslim than Muslims themselves", thus rejecting their parents' identities, compromised by those Republican values which contributed to their ghettoization³⁰⁴.

In terms of evolution of Immigration Law, we can say that during the *Trente Glorieuses* period immigration was poorly regulated, following the economic principle of *laissez-faire*. However, from the end of 1970s, several Immigration Law's amendments took place in a fragmentary and incoherent way, characterized by the continuous effort to balance between needs of foreigners' stable settlement and public order. Legislative provisions mainly focused on two issues: the fight against illegal immigration and control of migration flows on one hand and, on the other, rules on regular stay and integration of foreign communities. In the light of these two driving motives and of the current crisis of French model integration, the Val-d'Oise Deputy, Aurélien Taché, transmitted to the Prime Minister 72 proposals for a new policy of integration³⁰⁵ based on three pillars: French language learning, civic values courses and career guidance. However, even if Government awareness on the issue increasingly grew over years, the 72 Proposals for a new policy of integration have been rejected; the content of the program will have to be modified in order to become more "concrete, robust and planned throughout a longer term"³⁰⁶.

3.2.1 Foreigners' rights in French Constitution

In the constitutional text of the Fifth Republic, the image of foreigners is the main missing element³⁰⁷; the only article naming the foreigner is art. 53-1, para. 2 when establishing the right of asylum to "any foreigner who is persecuted for his action in pursuit of freedom"³⁰⁸. Apart from this case, nor the rest of the 1958 Constitution, nor the 1789

³⁰² R. Castel, *La discrimination négative: le déficit de citoyenneté des jeunes de banlieue*, *Annales, Histoire, sciences sociales*, 4/2006, p. 783.

³⁰³ Elena Valentina Zonca, *Cittadinanza sociale e diritti degli stranieri. Profili comparatistici*, Quaderni Giuridici del Dipartimento di Scienze Politiche e Sociali dell'Università di Trieste, CEDAM, San Giuliano Milanese, 2016, p. 62.

³⁰⁴ Olivier Roy, «L'Islam è un pretesto», in *Internazionale*, 27 November 2015, p. 48.

³⁰⁵ Aurélien Taché, *Député du Val-d'Oise, 72 Propositions pour une politique ambitieuse d'intégration des étrangers arrivant en France*, rapport at Premier Ministre, February 2018.

³⁰⁶ Louis Couvelaire, *Gouvernement Philippe*, article from *Le Monde* of the 5 June 2018, retrieved at: www.lemonde.fr [accessed the 2 February 2019].

³⁰⁷ Danièle Lochak, *Les discriminations frappant les étrangers sont-elles licites?*, *Droit social*, no. 1 of 1990, p. 76 et seq.

³⁰⁸ English translation prepared under the joint responsibility of the Press, Information and Communication Directorate of the Ministry of Foreign Affairs and the European Affairs Department of the National Assembly.

Declaration of the Rights of Man and of the Citizen and not even the *Préambule* to the 1946 Constitution make mention of the term *étranger*. Nonetheless, some general provisions could be also applied to foreigners: a first example is art. 1 of the 1789 Declaration, stating that “Men are born and remain free and equal in rights”; a second case is art. 66-1 of the 1958 Constitution which affirms that “Nul ne peut être condamné à la peine de mort³⁰⁹”. Moreover, other normative dispositions explicitly only concern citizens, thus generating incongruities in their interpretation: this is the case of art. 34 of the 1958 Constitution which gives the Parliament the power to pass Statutes only concerning “civic rights and the fundamental guarantees granted to citizens for the exercise of their public liberties”. The same ambiguity stems from constitutional arrangements establishing the principle of equality, since they indistinctly refer to “all French”, “all citizens”, “everyone”, “each”, “every man”, “all workers”, without identifying a common discerning criterion³¹⁰. This constitutional block³¹¹ is characterized by a patchy text, devoid of precise indications on foreigners’ constitutional condition. According to some legal scholars³¹², the use of universalist expressions, such as those included in the 1948 *Préambule*, cannot lead to the conclusion that foreigners are excluded from the enjoyment of rights enshrined in constitutional texts; instead, their particular formulation seems more conferring a general scope to these principles. On the contrary, a second legal approach affirms that Constitutional provisions do not affect the irreducible specificity of foreigners’ conditions³¹³.

Given the silence of constitutional texts, French juridical condition of foreigners has always been managed through administrative circulars; as a consequence, Immigration Law resulted in a sort of “*infra-droit*³¹⁴” or “half-law” until the adoption of first laws regulating immigration matters. In this context the Constitutional Council played a major role in defining the constitutional status of resident aliens. More precisely, the Constitutional Council had a crucial impact on Constitution’s development: during years, the Council could enshrine in national legislation subjective positions linked to aliens’ status, especially through fundamental decisions on Immigration Law’s amendments. In this way, the Constitutional Council somehow succeeded in filling constitutional gaps³¹⁵. The two main decisions of the Council are decision no. 89-269 DC of 1990³¹⁶ and decision no. 93-325 of 1993³¹⁷. The former decision extended the constitutional principle of equality to foreigners: in the specific case, the Council judged a legal provision which subordinated the lending of an “*allocation supplémentaire de solidarité*” for foreigners to a reciprocity condition; this law was

³⁰⁹ No one shall be condemned to death penalty.

³¹⁰ Several constitutional sources establish the principle of equality, in particular: articles 1, 6 and 13 of the 1789 Declaration of the Rights of Man and of the Citizens; paras. 1, 3, 11, 12, 13, 16 and 18 of the 1946 Constitution *Préambule*; articles 1, 2 and 3 of the 1958 Constitution.

³¹¹ The constitutional block brings together all those texts with constitutional status used by the French Constitutional Council as reference for the constitutional review. These texts are the 1958 Constitution, the 1789 Declaration, principles included in the 1948 Constitution’s *Préambule* and the *Principes ayant valeur constitutionnelle*.

³¹² Danièle Lochak, *Étrangers: de quel droit?*, Paris, 1985, p. 95.

³¹³ Franck Moderne(1991), *Les bénéficiaires ou titulaires des droits fondamentaux*, Rapport français au colloqui d’AIX-en-Provence, in *Annuaire internationale de justice constitutionnelle*, p. 262.

³¹⁴ Michel Borgetto, *Égalité, solidarité...Équité?*, Le *Préambule* de la Constitution de 1946, Paris, 1966, p. 241.

³¹⁵ Elena Valentina Zonca, op. Cit. Footnote 154, p. 66.

³¹⁶ Cons. Cont., déc. No. 89-269 DC of the 22 January 1990, *Loi portant diverses dispositions relatives à la sécurité sociale et à la santé*.

³¹⁷ Cons. Const., déc. No. 93-325 DC of the 13 August 1993, *Loi relative à la maîtrise de l’immigration et aux conditions d’entrée, d’accueil et de séjour des étrangers en France*.

considered as conflicting with the constitutional principle of equality, thus affirming the illegality of allowing social welfare access only according to nationality. The latter decision, instead, affirmed that foreigners were entitled to constitutional freedom and rights³¹⁸: on one hand, juridical positions, such as individual freedom, freedom of marriage, protection of private life and the right of appeal, are granted to all foreigners, independently from legality of their stay; on the other, those rights like the right of family reunification and right to social protection are only recognized under the condition of permanent residence in France.

This said, foreigners are entitled to freedom of thought and expression, based on article 10 of the 1789 Declaration: “No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law”. By the use of the term “no one” or “*nul*”, the text implies that this freedom is not limited to citizens only³¹⁹. The same applies to the “free communication of thoughts and opinions”, considered by art. 11³²⁰ of the same Declaration as “one of the most precious of the rights of man”. Nonetheless, the use of the word citizen poses an interpretative problem; legal scholars prefer to think that the revolutionary text referred indistinctly to both human beings and citizens. Within the context of foreigners’ expression of political opinions, concerns have been raised: in general terms, freedom of expression regarding political opinions only finds its limits in necessities of public order, which are traditionally stricter when concerning aliens rather than citizens³²¹. As noticed by Lochak, substantial restrictions were imposed on freedom of the press: on one hand, a director in charge of a periodic publication needed to have French nationality³²²; on the other, foreign publications were subjected to a common law³²³ exemption regime: the Interior Minister could prohibit the circulation, distribution and the selling of journals and periodical publications written in a foreign language or even foreign publications written in French³²⁴. The latter provision has been recently repealed through article 1 of the *décret* no. 2004-1044 of the 4 October 2004.

Finally, with respect to collective freedoms, such as freedom of assembly and association, a similar analysis will be developed. Broadly speaking, any provision included in the 1881 law and in the 1935 *décret-loi* ruling on the matter provided for restrictions regarding foreigners’ collective freedoms; Lochak³²⁵ argues that the only threat to their situation is the possibility of expulsion resulting from serious disorders or unacceptable

³¹⁸ *Libertés et droits de valeur constitutionnelle*.

³¹⁹ Franck Moderne, footnote 314, p. 279.

³²⁰ The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.

³²¹ Danièle Lochak. Les droits des étrangers: entre égalité et discrimination, in *Immigration et intégration*, L’état des savoirs, Editions La Découverte pp. 310-319, 1999, Submitted on 29 Mar 2018. Retrievable at: <https://hal-univ-paris10.archives-ouvertes.fr/hal-01750296/document> [accessed the 7 February 2019].

³²² Loi n° 49-956 du 16 juillet 1949 sur les publications destinées à la jeunesse, art. 4, para. 2, no. 1, as amended by Loi n°2011-525 du 17 mai 2011 - art. 46.

³²³ *Droit commun*.

³²⁴ Loi du 29 juillet 1881 sur la liberté de la presse, art. 14, paras. 1 and 2, as amended by décret-loi 6 May 1939, art. 1.

³²⁵ *Ivi*, footnote 321.

interferences in domestic political affairs. Thus, it should be reminded that until 1981³²⁶ foreigners' freedom of association was not recognized under the same conditions provided for French citizens: according to the previous 1901 law, associations of aliens were put under the strict control of the Interior Minister.

In Conclusion, the principle of equal treatment between foreigners and citizens has been resolved in an imperfect way by French legislation³²⁷. Since the Constitution is silent on this matter, the Constitutional Council has imposed the complete respect of fundamental rights; this recognition, however, does not follow from a formal declaration, but only from a jurisprudential interpretation: the link between rights and the Constitutional text grounds on a weak connection which could be invalidated by a constitutional revision. However, despite the recognition of the individual sphere of autonomy, extended to both foreigners and citizens, it remains to be seen to what extent French legislation recognizes to foreigners a freedom of participation in State's affairs.

3.2.2 Electoral Rights

Generally speaking, the issue of electoral rights in France is primarily related to concepts of citizenship and nationality. The French political and legal discourse on electoral rights for foreigners started in 1793, when art. 4 of the "*Constitution montagnarde*" affirmed that all men born and living in France and all foreigners who lived for at least one year in France were allowed to exercise French citizens' rights³²⁸. Unfortunately, the 1793 Constitution never entered into force. Before, the 1789 Declaration affirmed, in art. 6, that:

Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. [...] All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations.

In addition to this, art. 3 of the 1958 Constitution confirms: "National sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum³²⁹" and "*all French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided by statute*³³⁰". This means that Constitutional provisions currently reject the idea of a right to vote based on permanent residence: the right to vote and being elected is only enjoyed by nationals. However, after the Maastricht Treaty, EU citizens can participate to local elections following five years of

³²⁶ Loi n° 81-909 du 9 octobre 1981 modifiant la loi du 1er juillet 1901 relative au contrat d'association en ce qui concerne les associations dirigées en droit et en fait par des étrangers.

³²⁷ Vincent Tchen (1998), *Le droit des étrangers*, Flammarion, France, p. 64.

³²⁸ Art. 4 of the 1793 Constitution:

- Tout homme né et domicilié en France, âgé de vingt et un ans accomplis ;
- Tout étranger âgé de vingt et un ans accomplis, qui, domicilié en France depuis une année - Y vit de son travail
- Ou acquiert une propriété - Ou épouse une Française - Ou adopte un enfant - Ou nourrit un vieillard ;
- Tout étranger enfin, qui sera jugé par le Corps législatif avoir bien mérité de l'humanité
- Est admis à l'exercice des Droits de citoyen français.

³²⁹ 1958 French Constitution, art. 3 para. 1.

³³⁰ 1958 French Constitution, art. 3 para. 4.

residence in the French territory, under the reciprocity clause³³¹. As we will see, the law receiving the European norm opened a fundamental breach in French legal system.

In recent history, there are remarkable attempts for introducing TCNs' local voting rights: first, the 1981 Mitterrand's proposal on granting the right to vote to all aliens living in the French territory for at least five years³³²; secondly, the 2000 draft law³³³ on parliamentary initiative which, after the first lecture in both the National Assembly and the Senate, is still at the second Assembly's lecture³³⁴; thirdly, the 60 proposals of François Holland who, during the 2012 election campaign, supported the local vote for alien residents.

In favor of clarity, I will try to separate The French "Trinity"³³⁵ and explain in other paragraphs the double concept of citizenship and nationality, while dedicating this part to descriptions of constitutional concerns pertaining aliens' right to vote. Therefore, starting from these premises, I will now address three main issues concerning electoral rights for foreigners: the definition of "political elections", constitutional principles behind the disenfranchisement of aliens, and the thorny effects of the Maastricht Treaty on French legislation.

3.2.2.1 Definition of political elections

Given that the right to vote only pertains to the status of citizen when the suffrage expresses national will, it still remains to be determined in what cases we are referring to political elections in the French case. Generally speaking, political elections should contribute to the decision-making process and expression of the will of the political body. Moreover, as we have seen, the citizen or the national is often considered by the Constitutional text as the fundamental component of the political body. Therefore, only the French citizen, or the French national, is entitled to participate to political elections. On the other hand, non-political elections are all those suffrages that do not represent expression of the national will and hence, are indistinctly open to nationals and aliens.

The Constitutional Council frequently expressed decisions which contributed to the definition of the term "*politiques*". In order of importance, general elections, such as presidential or parliamentary elections, are considered without doubt political elections. It should be then added the referendum, both legislative and constituent (*constituant*)³³⁶. These three forms of suffrage allows citizens and nationals to directly participate in the decision-

³³¹ Art. 88-3 of the 1958 Constitution.

³³² In 1981, the presidential candidate François Mitterrand includes within his 110 proposal for the election, the right to vote for foreigners (no. 80); once elected his proposal will be hampered by all political parties. He will then try to raise again the issue in his *Lettre à tous les Français* in 1988, which will never be heard by French political groups.

³³³ Proposition de loi constitutionnelle n° 329 (1999-2000) visant à accorder le droit de vote et d'éligibilité aux élections municipales aux étrangers non ressortissants de l'Union européenne résidant en France.

³³⁴ After the 2000 approval of the National Assembly, the draft law remained at the first lecture of the Senate for eleven years; then, when the 2011 elections established the left majority in the Senate, the draft law was finally approved and sent to the second lecture of the Assembly. According to the website of the *Assemblée Nationale* (updated to July 2017), the draft law is still submitted to the *Commission des lois constitutionnelles, de la législation et de l'administration générale de la République*.

³³⁵ Citizenship, Nationality and political rights.

³³⁶ Following art. 3, para. 1 of the 1958 Constitution.

making process³³⁷, thus establishing restrictions based on nationality for their enjoyment. In confirmation of this interpretation we can cite the Council decision no. 82-146 DC of the 18 November 1982, point 7:

*“La qualité de citoyen ouvre le droit de vote et l'éligibilité dans des conditions identiques à tous ceux qui n'en sont pas exclus pour une raison d'âge, d'incapacité ou de nationalité, ou pour une raison tendant à préserver la liberté de l'électeur ou l'indépendance de l'élu ; que ces principes de valeur constitutionnelle s'opposent à toute division par catégories des électeurs ou des éligibles ; qu'il en est ainsi pour tout **suffrage politique**, notamment pour l'élection des conseillers municipaux³³⁸”*. (emphasis added)

From the just mentioned decision, we also derive that municipal elections too are political elections: this consequence is confirmed by decision no. 87-227 DC of the 7 July 1987³³⁹ and by the aforementioned decision no. 92-308 DC of 9 April 1992. In the first case, the Council implicitly recognized the political character of municipal elections when affirming that, by virtue of art. 24, para. 3 of the Constitution, the Senate provides the representation of Republic territorial authorities. In this sense, the second decision is more clear: given the fact that the Senate participate to national sovereignty; considering also that the Senate represents local authorities and is elected by an electorate which emanates from local authorities; and taking into account the fact that the election of municipal councilors affects senators' elections; keeping all these arguments in mind, the only possible consequence is that even municipal elections are political elections³⁴⁰.

On the contrary, the right to participate in non-political elections is not so restricted; in these cases, where national will is not at stake, the law does not consider individuals as citizens, but rather as workers, students or insured persons, according to the context: all these status are not affected by the fact of being an alien. An example is decision no. 81-130 DC of the 30 October 1981, regarding the eligibility of foreign students to university councils, without the reciprocity clause. Following points 7 and 8 of the decision, the law³⁴¹ allowing foreign students to participate and be elected in university councils was not in contrast with the Constitutional text.

More interesting considerations affecting elections' categorization are those provided by the Constitutional Council with respect to European elections. First of all, decision no. 76-71 DC of the 30 December 1976 analyzed elections of the Parliament of the European Communities and affirmed that this assembly was not part of the institutional order of the French Republic. More precisely, in point 4, the Council affirms that the direct universal suffrage for the assembly does not create sovereignty; following the reasoning expressed at the beginning of the subparagraph, this means that in the Council's view, this kind of

³³⁷ Articles 3 and 24 of the 1958 Constitution and Loi relative à l'élection du Président de la République au suffrage universel direct, adopté par le referendum du 28 octobre 1962.

³³⁸ Point 7 of the Council decision no. 82-146 DC of the 18 November 1982.

³³⁹ Franck Moderne, footnote 314, p. 275.

³⁴⁰ In the light of the following subparagraph, the breach created by the Maastricht Treaty has a particular relevance, creating a short-circuit: the right to vote for political elections has been granted to non-nationals, while nationals and citizens were still recognized as the fundamental basis of political body and of national sovereignty.

³⁴¹ Loi portant abrogation de la loi n° 80-564 du 21 juillet 1980 modifiant les articles 13, 14 et 15 de la loi d'orientation de l'enseignement supérieur du 12 novembre 1968 et portant modification des articles 14 et 15 de ladite loi.

elections were not political. And in fact, subsequent decision no. 92-308 DC of the 9 April 1992, while arguing, on one hand, that foreigners' right to vote for French municipal elections was in contrast with the Constitution, on the other considered in compliance with the Constitutional text the same foreigners' voting rights for European Parliament elections³⁴². This conclusion was mainly due to the fact that the Council treated the European Parliament as an institution answering to its own juridical system, which, although integrated with member States' systems, was separated from the French one. Therefore, the EU Parliament was defined as an assembly that did not possess sovereignty. I will argue here that this affirmation indirectly links EU Parliament elections to the category of non-political elections, thus permitting the extension of electoral rights to resident aliens.

3.2.2.2 The Treaty of Maastricht and the constitutional revision

The considerable difficulties and juridical debates following the ratification of the Treaty of Maastricht in 1992 characterize France compared to most other European Countries: three Constitutional Council's decisions³⁴³, one revision of the constitution³⁴⁴ and one referendum³⁴⁵ were needed in order to make effective the Treaty in French legislation³⁴⁶. Therefore, EU citizens are currently allowed to vote and to stand for municipal elections and elections of the European Parliament. More precisely, for electoral rights, the EU citizen has to:

- Be at least 18 when applying for a French electoral list;
- Live in France;
- Be a national of a European Union member;
- Be entitled to political and civil rights³⁴⁷.

The right to vote for municipal elections was introduced in the Constitution with the Constitutional law no. 92-554 of the 25 July 1992, which, in art. 5, added art. 88-3 to the 1958 Constitution:

*Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither exercise the office of mayor or deputy mayor nor participate in the designation of Senate electors or in the election of senators. An institutional Act passed in identical terms by the two assemblies shall determine the manner of implementation of this article.*³⁴⁸.

³⁴² Point no. 33 of Decision no. 92-308 DC of 9 April 1992.

³⁴³ Decision no. 92-308 DC of 9 April 1992, Decision no. 92-312 DC of 2 September 1992, Decision no. 92-313 DC of the 23 September 1992.

³⁴⁴ Loi constitutionnelle n° 92-554 du 25 juin 1992 ajoutant à la Constitution un titre : "Des Communautés européennes et de l'Union européenne"

³⁴⁵ French referendum of the 20 September 1992 on the approval of the Treaty of Maastricht ratification.

³⁴⁶ Delpérée Francis, Pena-Gaia Annabelle(1994), Les droits politiques des étrangers, Annuaire international de justice constitutionnelle. Révision de la Constitution et justice constitutionnelle – Les droits constitutionnels des étrangers. pp. 296-308.

³⁴⁷ République Française, Service Public, retrieved at: <https://www.service-public.fr/particuliers/vosdroits/F1937> [accessed the 8 February 2019].

³⁴⁸ Sous réserve de réciprocité et selon les modalités prévues par le traité sur l'Union européenne signé le 7 février 1992, le droit de vote et d'éligibilité aux élections municipales peut être accordé aux seuls citoyens de

This “new” constitutional article is linked to two Council decisions: those of the 9 April and 2 September 1992. In the former decision, points no. 26 and 27 of the text explain the reasoning according to which art. 8B, para. 1 of the Maastricht Treaty³⁴⁹ was defined in contrast with French legislation: considering that local collectivities participate in the election of the Senate, and also that the Senate exercise national sovereignty expressed only by French nationals through voting (Const. Art. 3), the EU citizens’ right to vote in municipal elections was incompatible with the Constitution. For this reason, the Parliament had to approve the constitutional revision law introducing art. 88-3. The other decision, instead, was more linked to the fact that, even after the introduction of art. 88-3, the legislator still found conflicts with the Constitutional text. For this reason, the Council delivered another opinion as to remove any doubt³⁵⁰. In point no. 26 of the 2 September decision, the Council confirms: [...] *les dispositions de la première phrase de l'article 88-3, en vertu desquelles [...] le droit de vote et d'éligibilité aux élections municipales "peut être accordé" aux seuls citoyens de l'Union résidant en France, ont pour effet de lever l'obstacle d'ordre constitutionnel qui existait à la reconnaissance de principe du droit dont s'agit [...]*³⁵¹. In fact, as later specified in points 27 and 28, the application of art. 88-3 was demanded to an organic law which should have respected requirements provided by the Maastricht Treaty, and not those mentioned by French legislation. This means that the Constitutional Council explicitly recognized that art. 88-3 established a right to vote for foreigners that was not in conflict with the Constitutional text completely separating French legislation from European legislation.

Hence, differently from Italy, local voting for EU citizens has been introduced in the legislation with a constitutional law³⁵², thus setting a legislative precedent for future arrangements. Therefore, following this reasoning, a future TCNs’ right to vote can only be introduced in national legislation with a constitutional law, as for the draft constitutional law of 2000. In particular, the possible revision of the Constitution may be applied in two ways:

- a) Adding a new article on the basis of art. 88-3, thus granting municipal vote according to the reciprocity clause and prohibiting the access to the charge of mayor or deputy and the election of senators;
- b) Directly amending art. 3 of the Constitution, as to no longer grant political rights only to French nationals; this second possibility, however, seems more unlikely, due, on one hand, to its fundamental position in the Constitution and, on the other, to the fact that it is only for municipal elections³⁵³.

The current Proposition de loi constitutionnelle no. 329 (1999-2000) envisages, in art. 1, an additional article 72-1, formulated as follows:

l’Union résidant en France. Ces citoyens ne peuvent exercer les fonctions de maire ou d’adjoint ni participer à la désignation des électeurs sénatoriaux et à l’élection des sénateurs. Une loi organique votée dans les mêmes termes par les deux assemblées détermine les conditions d’application du présent article.

³⁴⁹ The article that established the EU citizens’ right to vote in municipal elections of other member States.

³⁵⁰ Justin Kissangoula (2001), *La constitution française et les étrangers: recherches sur les titulaires des droits et libertés de la constitution sociale*, Paris, L.G.D.J. p. 245.

³⁵¹ Dispositions of the first phrase of art. 88-3, according to which the right to vote and to stand in municipal elections “may be granted” only to EU citizens residing in France, have the effect of overcoming the constitutional impediment to the recognition of this right.

³⁵² Loi constitutionnelle n°93-952 du 27 juillet 1993 - art. 3 JORF 28 juillet 1993.

³⁵³ Institut Montaigne, Droit de vote des étrangers, 2019, retrieved at:

<https://www.institutmontaigne.org/primaire-de-la-gauche/droit-de-vote-des-etrangers> [accessed the 8 February 2019].

*Le droit de vote et d'éligibilité aux élections municipales peut être accordé aux étrangers non ressortissants de l'Union européenne résidant en France. Ils ne peuvent exercer les fonctions de maire ou d'adjoint, ni participer à la désignation des électeurs sénatoriaux et à l'élection des sénateurs. Une loi organique détermine les conditions d'application du présent article*³⁵⁴.

Thus just adding a new article in the Constitution.

3.2.3 Consultative Bodies

As already mentioned in the introduction to this chapter, contrarily to Italy, France did not set up nor national or regional consultative bodies for foreigners. However, during years, French Municipalities proved to be increasingly active in the matter, autonomously establishing these bodies by virtue of French legal norms.

Broadly speaking, foreigners' access to local participatory democracy can only be developed if actions in this sense are allowed by French legislation. Art. 7 of the *Charte de l'environnement*³⁵⁵ provides that:

*Everyone has the right, in the conditions and to the extent provided in law, to access environmental information held by public bodies and to participate in public decision that affect the environment*³⁵⁶.

Theoretically, foreigners should have access to a wide range of consultative processes; in reality, instead, they are excluded from the main democratic processes³⁵⁷ for the fact of not being part of the community territory³⁵⁸.

At the Municipal level, foreigners are allowed to participate in Municipal affairs through two groups of arrangements: the first group includes all those councils that are not specifically designed for aliens, but still allow their participation; the second group, instead, is formed by *Conseils consultatifs des étrangers* established in several Municipalities, first and foremost Strasbourg³⁵⁹ and Paris, in an autonomous way, following ordinary legislation's provisions.

³⁵⁴ The right to vote and be elected in municipal elections shall be granted to third-country nationals residing in France. They cannot exercise the functions of mayor or deputy, nor participate to the appointment of senatorial electors and to elections of senators. An organic law voted by both assemblies will determine implementation requirements for this article.

³⁵⁵ The *Charte de l'environnement de 2004* is part of the constitutional block.

³⁵⁶ Translation from <https://www.linguee.com/french-english/translation/charte+de+l%27environnement+de+2004.html> [accessed 9 February 2019].

³⁵⁷ Such as municipal elections and referendums.

³⁵⁸ Benjamin Audoye (2010), *Les étrangers et la démocratie locale participative: les exemples français*, Regards sur le droit des étrangers, Toulouse, Presses de l'Université Toulouse 1 Capitole. P. 61-85. Retrievable at: <https://books.openedition.org/putc/1104?lang=it> [accessed the 9 February 2019].

³⁵⁹ The Strasbourg Municipality was a pioneer in this matter. In 1993 the first CCE was established in this city; it was then suspended between 2001 and 2008 by the right wing legislature and finally resettled in 2009 by the left wing legislature. In 2010 the CCE changed its name in "*Conseil des résidents étrangers*" (CRE), and it is currently divided in two chambers: one dedicated to foreigners' associations and the other reserved to resident aliens. See: <http://www.cre.strasbourg.eu> [accessed the 9 February 2019].

With respect to the first group, two categories of consultative councils will be considered: the *commission consultative des services publics locaux* (consultative commission of local public services) and the *conseils de quartier* (district councils). The former commission is officially created by article L.1413-1 of the General Code of Territorial Collectivities³⁶⁰: the commission has to be set up in Municipalities with specific demographic characteristics and allows local community to be informed and consulted on public services operated by the State or third parties. Among its members, besides institutional representatives³⁶¹, there are also representatives of local associations: this aspect allows representatives of foreign associations, or even foreigners representing local associations involved in the matter, to participate to commission's activities. However, local associations shall be appointed by the deliberative assembly; thus, foreigner associations' participation completely depends on the final decision of the public power³⁶². On the other hand, art. L. 2143-1 of the 2002 law³⁶³ amending the C.G.C.T. introduces a new municipal arrangement: the *conseil de quartier*. Following the additional division of Municipalities with more than 80°000 inhabitants in districts, the law establishes that each district shall have its district council, whose composition and operation will be defined by the municipal council. This said, *les conseils de quartiers* can send proposals to the major on issues concerning their district or the city as a whole; they are also allowed to elaborate, put in action or evaluate municipal actions related to their district. These councils too are opened to some local associations, and the participation of foreigners as representatives of aliens' organizations is always subjected to the municipal council's decision.

The second group of consultative bodies at the municipal level is explicitly related to resident aliens' participation: I am talking about the *Conseils consultatifs des étrangers* (CCE) or foreigners' consultative Councils. These particular councils find their legislative ground in art. 2143-2 of the C.G.C.T., according to which the municipal council has the power to create consultative committees on any problem concerning the Municipality in its parts or as a whole³⁶⁴. Members of committees shall be all those individuals that cannot be elected in the municipal council, namely representatives of local associations. Moreover, the major: establishes the committee composition and the length of its mandate, which cannot exceed that of the municipal council; can consult the committee on any question or project concerning member associations' areas of activity; he can eventually receive committee's proposals intervening on issues of municipal interest pertaining to associations' activities. On the basis of the present article, the CCE saw the light of the day. However, their special set up still depends on municipal willingness to let foreigners' associations express their voice and to what extent; in fact, sometimes foreign residents' council are often suspended during municipal legislatures that do not support resident aliens' participation in the local decision process.

³⁶⁰ Code général des collectivités territoriales (C.G.C.T.), article L1413-1, Modifié par Ordonnance n°2016-1562 du 21 novembre 2016 - art. 31.

³⁶¹ *La commission consultative des services publics locaux est présidée par le maire ou par le président de l'EPCI. Elle comprend aussi des membres de l'organe délibérant, désignés dans le respect du principe de la représentation proportionnelle.* Édile, L'information juridique des collectivités locales, at: <http://edile.fr/la-commission-consultative-des-services-publics-locaux/> [accessed the 9 February 2019].

³⁶² Yves Vincent (2004), *Les étrangers et la démocratie locale*, Études offertes à J.-C. Helen, Litec, p. 535.

³⁶³ Loi n° 2002-276 du 27 février 2002 relative à la démocratie de proximité.

³⁶⁴ *Le conseil municipal peut créer des comités consultatifs sur tout problème d'intérêt communal concernant tout ou partie du territoire de la commune.*

Furthermore, I think that it is worth to mention the experiments of seven Municipalities between 1980s and 1990s which allowed foreigners to vote. In 1983, Marc Wolf, major of the Mons-en-Barœul Municipality, includes, within his electoral program, the election of associated foreign counsellors. Then, in 1985, 566 foreign people on the 800 potential voters elected three foreigners who could participate to the municipal council of their city. These three foreigners' representatives participated to council assemblies and were allowed to intervene, but were forbidden to vote in plenary meetings³⁶⁵. The figure of the Associated Counsellor will be taken up by other six cities: Amiens in 1987, Cerizay in 1989, Les Ulis, Longjumeau et Vandœuvre-lès- Nancy in 1990, Portes-lès-Valence en 1992³⁶⁶. These decisions will be later opposed by the right and extreme right wing and finally, administrative courts obliged aforementioned municipalities to limit associated counsellors' possibility to intervene only during the interruption of the council assembly. This decision will bring to the end the innovative experience of French municipalities³⁶⁷.

3.2.4 Citizenship

From a juridical point of view, the term citizen in the French legal system conceals more than it reveals. In the Constitutional text, term citizenship is often assimilated to that of nationality; however, even if the Constitution is, first of all, an institutional framework, nationality is not *per se* a constitutional subject³⁶⁸. In fact, in the 1958 Constitution, art. 3, para. 4 postulates:

All French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided by statute.

And as for the rest, nationality is just one of those cases under law competence, listed in art. 34. From these few considerations, the Constitutional Council derives the general principle that nationality is only the condition for the expression of voting rights³⁶⁹. The present conclusion derives from the connection between art. 3 of the Declaration of the Rights of Man and of the Citizens and art. 3, para. 1 of the 1958 Constitution: the former affirms that “the principle of all sovereignty resides essentially in the nation”, while the latter confirms that “national sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum”. In this sense, only French nationals are electors, and they represent national sovereignty. The link between nationals and citizens also follows from the decision of the 9 May 1990³⁷⁰ when the text reminds, in point 13, that the Constitution “ne connaît que le peuple français, composé de tous les citoyens français sans distinction d'origine, de race ou de religion”. Therefore, the *peuple* is formed by citizens who are, at the same time, nationals. Hence, the Constitutional Council associated the political

³⁶⁵ Bernard Delemotte (2007), *Le droit de vote des étrangers en France. Historique et état des lieux*, Centre d'information et d'études sur les migrations internationale, Migrations Société, no. 114, p. 211.

³⁶⁶ CHEVALLIER, Jacques (sous la direction de) ; BAYALA, Augustin (avec la collaboration de) (1996), *Étranger et citoyen: les immigrés et la démocratie locale*, Paris : Éd. L'Harmattan ; Amiens : Éd. Licorne, pp. 81-136.

³⁶⁷ Bernard Delemotte, footnote 367.

³⁶⁸ Rémy Schwartz, Conseil Constitutionnel, Constitution et nationalité, Nouveaux Cahiers du Conseil Constitutionnel n°39, Dossier: La Constitution et le droit des personnes et de la famille, Avril 2013, p. 1.

³⁶⁹ Rémy Schwartz, Conseil Constitutionnel, footnote 370.

³⁷⁰ Décision n° 91-290 DC du 9 mai 1991, Loi portant statut de la collectivité territoriale de Corse.

community to the juridical community, although, as remarked by Lochak³⁷¹, “even if all citizens are nationals, it does not mean that all nationals are citizens”. Nationality, and thus citizenship, demonstrate the commitment and loyalty to the State. Bearing this in mind, and considering the effects of the Treaty of Maastricht, it is possible to understand the scope of the innovation brought into national legislation by EU residents’ right to vote and the establishment of a European citizenship. Just to give an example of how the new EU citizenship shook the legal system, at the time part of legal scholars interpreted the status of EU citizen as additional to that of French citizen: since the Treaty did not abolish the plurality of nationalities, the EU citizenship has to be interpreted as the *citoyenneté de superposition* mentioned art. 77 of the constitution, and relative to Nouvelle-Calédonie³⁷², in the way of not being integrated to the French citizenship, but only creating a separated status³⁷³.

Coming back to the legislative discourse on citizenship, France grants French citizens by both means of *ius sanguinis* and *ius soli*; as for the Italian case, the primary way to become French is being a child to French citizens. Secondly, similarly to Italy, simple *ius soli* is envisaged for:

- ⇒ Children born in the French territory to unknown or stateless parents, or even to parents that cannot transmit their citizenship³⁷⁴;
- ⇒ Children born to unknown parents and of which no other citizenship can be proved³⁷⁵;
- ⇒ Foreigners born in France to foreign parents who, once came of age, have lived in France for at least five years from the age of 11³⁷⁶. The acquisition of citizenship is also allowed earlier if the person concerned submits a declaration of willingness at the age of 16-17 in an autonomous way or through his parents if he is 13-16; in the latter case, the five years residence period shall run from the age of 8 years old³⁷⁷.

Lastly, a third kind of *ius soli* is established by the Code Civil: the double *ius soli*. According to this principle, foreigners born in France to foreign parents of which at least one born in France³⁷⁸ or in a former colony before independence³⁷⁹ become French citizens.

What this *ius soli* cases have in common is the automatic nature of citizenship acquisition: contrarily to Italy, the beneficiary of the provision is not required to submit a formal declaration of willingness, except when the concerned person is still under age. This means that citizenship is automatically acquired at birth in case of double *ius soli*, while acquired once of age in the case of simple *ius soli*. Nonetheless, the automatic acquisition has

³⁷¹ Danièle Lochak (1991), *La citoyenneté: un concept juridique flou*, Dominique Colas ; Claude Emeri ; Jacques Zylbeberg, *Citoyenneté et Nationalité, Perspective en France et au Québec*, P.U.F., 1991, p. 180.

³⁷² Following the constitutional text, the Loi organique du 19 mars 1999 no. 99-209 regulated the introduction of the *citoyenneté de la Nouvelle-Calédonie*, which was added to that of France.

³⁷³ Henry Labayle (1992), *Vers une citoyenneté européenne? Le point de vue du droit communautaire*, LPA, no. 76, p. 27.

³⁷⁴ *Code Civil*, articles 19 and 19-1, para.1.

³⁷⁵ *Code Civil*, articles 19-2 and 58.

³⁷⁶ C.C., art. 21-7.

³⁷⁷ C.C., art. 21-11.

³⁷⁸ C.C., art. 19-3.

³⁷⁹ Loi no. 93-33 of the 22 July 1993, art. 44.

been cyclically introduced in national legislation and then dropped and, in this last circumstance, substituted by the need for a formal declaration of willingness. Therefore, as suggested by Fabianelli³⁸⁰, the automatic acquisition does not have a neutral value: removals of the automaticity principle precisely ground on feelings of diffidence towards potential citizens who could have not really recognized the importance of the status. Indeed, the restoration of the norm should at least represent a renovated openness in favor of new citizens' inclusion in the French nation.

With respect to naturalization, instead, both TCNs and second-country nationals can request the French citizenship if they have resided in the Country during a five years period preceding the application³⁸¹. The residence period is reduced to two years if the applicant has completed two years of higher education in France and obtained a French diploma or has rendered important services to the country by virtue of his abilities and talents³⁸². However, the great relevance attributed to the linguistic cultural assimilation inspired art. 21-24 of the *Code Civil*, affirming that: “*nul ne peut être naturalisé s'il ne justifie de son assimilation à la communauté française, notamment par une connaissance suffisante, selon sa condition, de la langue, de l'histoire, de la culture et de la société françaises [...]*”³⁸³.

³⁸⁰ Sara Fabianelli, Le radici dello ius soli: il criterio territoriale di acquisto della cittadinanza negli ordinamenti di Italia e Francia, *Rivista AIC*, no. 3 of 2017, p. 5.

³⁸¹ C.C., art. 21-17.

³⁸² C.C., art. 21-18.

³⁸³ C.C., art. 21-24, as amended by Law no. 2011-672 of the 16 June 2011 - art. 2.

Conclusion

At this point, it will be useful to remind the main steps followed from the first to the last chapter. In the first chapter, the theoretical framework on foreigners' participation was outlined: I firstly described the link between political participation of migrants and democratic legitimacy, thus analyzing separately individual participation, strictly related to voting rights and citizenship, and group participation concerning consultative bodies; then, I discussed the role of political participation in the integration process and lastly, I described the Institutional approach and listed the Political Opportunity Structure's factors relevant to this thesis.

In the second chapter, instead, I examined supranational standards for migrants' rights, thus vertically comparing UN Conventions and Covenants (CERD, ICCPR and ICRMW), the Council of Europe Treaties (ECHR, Convention on the Participation of Foreigners in Public Life at Local Level, Convention on Nationality) and EU actions in the field of migration. The comparison showed an international context which has not the binding legal force to introduce voting rights for foreigners; instead, its main value resides in the establishment of fundamental universal principles and rights pertaining to every individual and human being, hence allowing personhood to replace nationhood at the supra-national level. The international legal context sets fundamental rights' standards that are enforceable without any consideration of citizenship. A special reference, indeed, should be made on EU approach to resident aliens' rights; in fact, although furthering the legal distinction between EU citizens and Third-Country Nationals on the basis of EU immigration law, the European Union has also developed a soft policy system supporting local participation of TCNs as a mean of integration. Indeed, European complexities are summarized in three main issues covering EU law and policies: first, the conflictual relationship between European institutions and Member States on matters of competence covering the area of immigration. This first dispute between the Commission and Member States paved the way for the second complexity, that is the production of an intricate mixture of both law and soft-policy tools. Lastly, a third contradiction worth mention: the institutional, legal and discursive difference between policies addressed to EU citizens and those concerned with TCNs.

The last chapter worth more space for final considerations. The comparison between Italy and France also implied a comparison between two different national constitutional cultures. Both Countries have been studied in terms of: constitutional definition of foreigners' rights; current electoral rights for resident aliens; existence of consultative bodies for

foreigners at the local level; citizenship and naturalization laws. With respect to Italy, we first found a constitutional text emphasizing personhood as the essential requirement for the enjoyment of fundamental rights; secondly, we noticed that an ordinary law was sufficient to introduce EU citizens' local voting rights in the legal system and that, according to the principle of national sovereignty, EU citizens are only allowed to vote in municipal elections; thirdly, I analyzed the independent actions put in place by regions and municipalities enfranchising TCNs and their effects; then, I described the current consultative bodies established at each territorial level, stressing the lack of efficiency in their organization; finally, I outlined Italian laws regulating acquisition and transmission of Italian citizenship, which are mainly based on the *ius sanguinis* notion. France, instead, primarily grounds its constitution on the principle of nationality, which is strictly related to enjoyment of political rights. Therefore, we saw that EU citizens' right to vote had to be introduced in the French legal system with a complex constitutional law. Moreover, given the distinction between political and non-political elections, this right was accorded only because of its external nature, being linked to the separated European legal system. With regard to consultative bodies, municipal foreigners' councils have been established in an ineffective way. Finally, from the citizenship law's analysis, we found a Country focusing on different *ius soli* provisions.

To sum up, a possible disenfranchisement of foreign residents could follow those arrangements put in place by the two Countries in order to introduce EU citizens' local voting right in their legal system: on one hand, Italy simply approved an ordinary law, while France had to amend its Constitution, thus reviewing one of its fundamental principles. In the same way, a possible law introducing TCNs local voting rights will probably need more legal efforts in France than in Italy. I think this fact is only in theory justified by the personhood principle enshrined in Italian Constitution. Constitutional principles are, however, compensated by citizenship and naturalization law: France developed two forms of automatic *ius soli* besides regular *ius sanguinis* and, with respect to naturalization, the residence period required is of five years; this means that, even if a constitutional law recognizing voting rights for TCN is more unlikely, resident aliens are, in theory, facilitated in acquiring nationality and citizenship. Italy, instead, is still tied to a bloodline vision of citizenship: the primary route to be a citizen is outlined by the *ius sanguinis*; *ius soli* is just a residual category. Naturalization is even more difficult: the required residence period is of ten years.

With respect to consultative bodies, instead, I found confirms of the MIPEX analysis: in terms of implementation of consultative bodies for migrants, Italy is slightly more active than France. In fact, Italy, at least, established several consultative bodies at the national, regional and local level, while France only has local consultative bodies. In both context, local authorities played a major role in increasing foreigners' possibilities to participate in the local decision-making process. However, in both cases these bodies are not completely effective. In fact, representatives of aliens' associations have to be appointed by local authorities in both systems, thus remitting the decision on to local powers' discretion. Although innovative, these tools are not sufficient in enhancing resident aliens' participation in the public life.

At the state of the art we are still far from a possible extension of voting rights to resident aliens. In fact, on one hand, although both Countries are characterized by different forms of local participation, either of them succeeded in setting up bodies with effective powers, especially because associations' members are often appointed by local authorities. Moreover, France and Italy always had a restrictive approach to migration, only concerned with illegal migrants and control of the entries, and not really focused on factors implementing the integration process. Therefore, what really lacks in both Countries is the political will to extend voting rights to TCNs.

In general terms, the vertical comparison showed the current increasing tendency to delegate powers to the international and regional level: among the three supra-national institutions the EU is the one which could actively intervene in the issue of TCNs' rights. We saw that States still try to retain these powers, especially in the migration field. The outlined conflictual relation between the two levels has crucial implications in the national legal system. In fact, the horizontal comparison described how each individual constitutional structure reacted differently to external provisions, in accordance to each constitutional culture and principles.

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SUMMARY

“Everyone who is affected by a decision has a right to participate in making it”³⁸⁴. On this principle, not lacking in contradictions, Robert Dahl based his concept of democracies’ legitimacy. Therefore, reformulating the statement, the core substantive principle of democracy is that *“those subject to the law should have a voice in its formulation”³⁸⁵*. In modern democracies, the most direct means of participating in the decision-making process still is the right to vote; this precious right, often obtained after tough political struggles, during the years has come to identify the national status of citizens. Following this reasoning, in practical terms democracies eventually rooted their legitimacy in citizens’ political expressions and decisions.

Nonetheless, unexpected phenomena shook legitimacy’s roots: faster economic, financial and political globalization, increased migration flows and, with respect to this thesis, the development of a European integration process. All these contexts affected contemporary democratic systems: nation states are now formed of fragmented populations, not solely composed of citizens, but also including well settled communities of “non-nationals” who contribute to the economic life of the Country. In spite of their contribution, new members of the national political community are bound by laws over which they have no direct control, as they are not citizens. Consequently, with new demands and necessities, democratic legitimation must be founded on more inclusive principles in order to cope with the legitimacy deficit of modern institutions.

Democracies might solve this problem by three different arrangements: a first option envisages the facilitation of newcomers’ naturalization through more permissive laws on citizenship acquisition; alternatively, a State could also extend voting rights at the local level to resident aliens, as already happened in the case of the European Union; finally, a third possible choice considers the setting up of innovative forms of participation, explicitly designed for foreign residents, such as local or national consultative bodies. This said, the tool chosen by each State reflects the peculiarity of national constitutional culture; indeed, national approach to foreigners’ participation to the public life strictly depends on two factors, namely values and structure of constitutional debates around the matter and migration law and policies affecting noncitizen population.

³⁸⁴ Robert Dahl, *Democracy and its Critics*, New Haven: Yale University Press, 1989, p. 108.

³⁸⁵ Cristina M. Rodrigues, *Noncitizen voting and the extraconstitutional construction of the polity*, Oxford University Press and New York University School of Law, *ICON*, vol. 8, no. 1, 2010, p. 30-49.

Through this text I made an attempt to analyze the current available possibilities for resident aliens' political participation in their receiving Country through an institutional approach: in the first chapter I primarily outlined the main theoretical frameworks and interpretations relating to this issue and its effects on modern democracies; then, in chapters 2 and 3 I developed a vertical and horizontal evaluation of the so called "Political Opportunity Structure" to which migrants are subjected. More precisely, the second chapter assess the international legal system under which foreigners are right holders independently from their nationality; this brought to a comparison between the UN system, the Council of Europe system and the European Union system. The choice of the last two systems is moved by the last chapter horizontal comparison between France and Italy. In fact, both Countries are part of the same transnational institutions which, as we will see, also affected resident aliens' status and rights. France and Italy will be studied under the following indicators: foreigners' rights in the Constitutional text; electoral rights available for resident aliens; presence of national, regional and local consultative bodies; and, eventually, citizenship and naturalization laws. In this way, I will try to develop a comparison between French Political Opportunity Structure and Italian Political Opportunity Structure. This kind of approach is not meant to evaluate the real effectiveness of both systems, but only to show that, even with the same supranational backgrounds and with similar levels of immigrants' integration, the Political Opportunity Structure for foreigners available in the two Countries differs according to their particular constitutional culture and history.

The two level comparison will help to show the two paradoxes of our post-national era: first, the opposition between national sovereignty and universal human rights; secondly, the contrast between the concepts of identity and rights.

At this point, it will be useful to remind the main steps followed from the first to the last chapter. In the first chapter, the theoretical framework on foreigners' participation was outlined: I firstly described the link between political participation of migrants and democratic legitimacy, thus analyzing separately individual participation, strictly related to voting rights and citizenship, and group participation concerning consultative bodies; then, I discussed the role of political participation in the integration process and lastly, I described the Institutional approach and listed the Political Opportunity Structure's factors relevant to this thesis.

In the second chapter, instead, I examined supranational standards for migrants' rights, thus vertically comparing UN Conventions and Covenants (CERD, ICCPR and ICRMW), the Council of Europe Treaties (ECHR, Convention on the Participation of Foreigners in Public Life at Local Level, Convention on Nationality) and EU actions in the field of migration. The

comparison showed an international context which has not the binding legal force to introduce voting rights for foreigners; instead, its main value resides in the establishment of fundamental universal principles and rights pertaining to every individual and human being, hence allowing personhood to replace nationhood at the supra-national level. The international legal context sets fundamental rights' standards that are enforceable without any consideration of citizenship. A special reference, indeed, should be made on EU approach to resident aliens' rights; in fact, although furthering the legal distinction between EU citizens and Third-Country Nationals on the basis of EU immigration law, the European Union has also developed a soft policy system supporting local participation of TCNs as a mean of integration. Indeed, European complexities are summarized in three main issues covering EU law and policies: first, the conflictual relationship between European institutions and Member States on matters of competence covering the area of immigration. This first dispute between the Commission and Member States paved the way for the second complexity, that is the production of an intricate mixture of both law and soft-policy tools. Lastly, a third contradiction worth mention: the institutional, legal and discursive difference between policies addressed to EU citizens and those concerned with TCNs.

The last chapter worth more space for final considerations. The comparison between Italy and France also implied a comparison between two different national constitutional cultures. Both Countries have been studied in terms of: constitutional definition of foreigners' rights; current electoral rights for resident aliens; existence of consultative bodies for foreigners at the local level; citizenship and naturalization laws. With respect to Italy, we first found a constitutional text emphasizing personhood as the essential requirement for the enjoyment of fundamental rights; secondly, we noticed that an ordinary law was sufficient to introduce EU citizens' local voting rights in the legal system and that, according to the principle of national sovereignty, EU citizens are only allowed to vote in municipal elections; thirdly, I analyzed the independent actions put in place by regions and municipalities enfranchising TCNs and their effects; then, I described the current consultative bodies established at each territorial level, stressing the lack of efficiency in their organization; finally, I outlined Italian laws regulating acquisition and transmission of Italian citizenship, which are mainly based on the *ius sanguinis* notion. France, instead, primarily grounds its constitution on the principle of nationality, which is strictly related to enjoyment of political rights. Therefore, we saw that EU citizens' right to vote had to be introduced in the French legal system with a complex constitutional law. Moreover, given the distinction between political and non-political elections, this right was accorded only because of its external nature, being linked to the separated European legal system. With regard to consultative

bodies, municipal foreigners' councils have been established in an ineffective way. Finally, from the citizenship law's analysis, we found a Country focusing on different *ius soli* provisions.

To sum up, a possible disenfranchisement of foreign residents could follow those arrangements put in place by the two Countries in order to introduce EU citizens' local voting right in their legal system: on one hand, Italy simply approved an ordinary law, while France had to amend its Constitution, thus reviewing one of its fundamental principles. In the same way, a possible law introducing TCNs local voting rights will probably need more legal efforts in France than in Italy. I think this fact is only in theory justified by the personhood principle enshrined in Italian Constitution. Constitutional principles are, however, compensated by citizenship and naturalization law: France developed two forms of automatic *ius soli* besides regular *ius sanguinis* and, with respect to naturalization, the residence period required is of five years; this means that, even if a constitutional law recognizing voting rights for TCN is more unlikely, resident aliens are, in theory, facilitated in acquiring nationality and citizenship. Italy, instead, is still tied to a bloodline vision of citizenship: the primary route to be a citizen is outlined by the *ius sanguinis*; *ius soli* is just a residual category. Naturalization is even more difficult: the required residence period is of ten years.

With respect to consultative bodies, instead, I found confirms of the MIPEX analysis: in terms of implementation of consultative bodies for migrants, Italy is slightly more active than France. In fact, Italy, at least, established several consultative bodies at the national, regional and local level, while France only has local consultative bodies. In both context, local authorities played a major role in increasing foreigners' possibilities to participate in the local decision-making process. However, in both cases these bodies are not completely effective. In fact, representatives of aliens' associations have to be appointed by local authorities in both systems, thus remitting the decision on to local powers' discretion. Although innovative, these tools are not sufficient in enhancing resident aliens' participation in the public life.

At the state of the art we are still far from a possible extension of voting rights to resident aliens. In fact, on one hand, although both Countries are characterized by different forms of local participation, either of them succeeded in setting up bodies with effective powers, especially because associations' members are often appointed by local authorities. Moreover, France and Italy always had a restrictive approach to migration, only concerned with illegal migrants and control of the entries, and not really focused on factors

implementing the integration process. Therefore, what really lacks in both Countries is the political will to extend voting rights to TCNs.

In general terms, the vertical comparison showed the current increasing tendency to delegate powers to the international and regional level: among the three supra-national institutions the EU is the one which could actively intervene in the issue of TCNs' rights. We saw that States still try to retain these powers, especially in the migration field. The outlined conflictual relation between the two levels has crucial implications in the national legal system. In fact, the horizontal comparison described how each individual constitutional structure reacted differently to external provisions, in accordance to each constitutional culture and principles.