

CITIZENSHIP IN THE AGE OF GLOBALISATION

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The mass migration phenomenon calls into question the meaning of citizenship status in contemporary constitutional democracies as it represents a quest for a kind of global solidarity. This article explores the transformation of the concept of status civitatis from a European comparative perspective. The emerging role of citizenship in today political communities will be examined through the legislations concerning the recognition and protection of social rights of non citizens since: whilst on the one hand they are tied to citizenship through a nexus of principle, on the other hand they entail individual legal rights recognised under case law as having universal status. Relevant provisions of Italian, Spanish, French, Belgian and Dutch laws will be analysed with a view of sketching a map of problems and (possible) solutions. The comparison among European legal systems is, at the end, put to the test of theories that suggest moving beyond the idea of citizenship as a solution to the human rights/universal rights dialectic.

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I. PRELIMINARY REMARKS: UNIVERSALISM AND CITIZENSHIP

In delineating the characteristics of totalitarian regimes in the wake of the Second World War, Hannah Arendt identified the use of instruments to deprive people of their citizenship as one of the hallmarks of the totalitarian State. Forced migrations, mass expulsions and systematic exclusion from the *status civitatis* were used as instruments in order to strip individuals of all legal protection and to relegate them to a condition of absolute weakness. In *The Origins of Totalitarianism* the question of “stateless people” – i.e. those individuals excluded from the protection of human rights on the grounds that they fall beyond the pale of mechanisms regulating the membership of organised political

communities¹— is regarded as the major drama of the Twentieth Century.

The German philosopher regards the lack of a “place in the world” in which rights are recognised and protected as a “misfortune”. By removing the individual from his social existence, the stateless status substantiates the exclusion from the rest of humanity. Ultimately, being part of a community represents a vehicle for the recognition of human dignity.

Turning this perspective on its head, within a constitutional experience far off in cultural and chronological terms, it is the recognition of the *status civitatis* that paves the way for the movement beyond a political regime characterised by the systematic violation of human rights. Thus in South Africa the destruction of *apartheid* was achieved through the recognition of “one single South African citizenship”, overcoming the racist connotations underlying the concept of citizen as a privilege of the whites and identifying a standard of equality in the *status civitatis*.²

Once again, the protection granted by citizenship provides more than the mere recognition of fundamental rights since it represents the *condicio sine qua non* for their actual guarantee.

In other words, what lawyers define as citizenship³ is the status that guarantees the individual legal protection.

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¹ “Not the loss of specific rights, but the loss of a community willing and able to guarantee any right has been the misfortune that has struck an increasing number of people”. With these words Hannah Arendt in *The Origins of Totalitarianism* (in Italian: Turin, 2004, 412) described the condition of statements people deprived of citizenship on political grounds during the inter-war period.

² See Klaaren, J. “Constitutional Citizenship in South Africa.” *I. Con.* 8 (2010): 94 ff. and Dugard, J. *International Law: A Southern African Perspective*. 3^a ed. Kenwyn (SA), 2005.

³ Citizenship has been studied from two different perspectives: as a bond of the individual's membership of a given political community and as a bundle of legal rights and duties granted to the individual in his capacity as a member of the same community. Under the first conception, citizenship is understood as a legal relationship; under the second on the other hand, it is understood as a status, the recognition of which represents the prerequisite for the enjoyment of rights and the conferral of duties. There have been broad debates in the academic literature regarding the legal nature of citizenship, which have ended up accepting the status theory as a “meeting point” between the various theories (see, among Italian scholars, Romanelli Grimaldi, C. “Cittadinanza.” *Enc. giur.* vol. VII. Roma: Treccani, 1988: 2, Amirante, C. “Cittadinanza (teoria generale).” *Enc. giur.* vol. VII. Roma: Treccani, 1988: 1 ff. and Luciani, M. “Cittadini e stranieri come titolari di diritti fondamentali.” *Rivista critica del diritto privato* (1992): 203 especially since democratic constitutionalism has consolidated “citizenship as a founding and fundamental element of the whole political-legal constitution”. Within the history of thought, the concept under discussion has in any case attracted contributions from various disciplinary traditions. In particular, whilst the idea that citizenship is the manifestation of a legal relationship has been at the centre of reflections carried out essentially by lawyers, the status of citizens and hence the overall bundle of fundamental legal rights guaranteed to those who are fully fledged members of a

During the age of Globalisation, the mass migrations towards the economically most developed countries reveal an increasing demand for access to Western citizenship rights, demonstrating that the universal nature of human rights is a mere declaration of principle in the absence of a framework dedicated to upholding them.⁴

In this context, national legal systems often appear to be disoriented: they grant certain citizenship rights to non-citizens, and at the same time, they choose not to pave the way to the full membership.

As a result, the phenomenon of migration set in motion and sustained by economic Globalisation produces the progressive transformation of citizenship in both legal and political terms. On one hand, the recognition of certain citizenship rights, at least those considered as human rights, also to non-citizens sets off the divergence between formal and substantial status of citizen. On the other, the political community continues to be represented only by “formal citizens”.

The human rights/citizens’ rights dialectic represents the driving force for the transformation mentioned above and, at times, leads to original syntheses that are not without their ambiguity.

This article is aimed at exploring the transformation of citizenship through the progressive emergence of pressing social needs from non-citizens, who seek protection

community has also interested philosophers and legal sociologists see Bosniak, L. “Varieties of Citizenship.” *Fordham L. Rev.* 75 (2006-2007): 2449 ff.; among Italian legal literature, Zolo, D. “Cittadinanza. Storia di un concetto teorico-politico.” *Filosofia politica* (2000): 5 and Zincone, G. “Cittadinanza: trasformazioni in corso.” *Filosofia politica* (2000): 71. The contribution of the different disciplines to the issue of the *status civitatis* has in any case been carried out along parallel tracks, and not without generating some difficulties, especially in more recent discussions. Accordingly, some have frequently underestimated the force of the bond of belonging, discerning the end of citizenship in the crisis in the elements of the classical theory of the State (people, territory and sovereignty): Vertova, F.P. “Cittadinanza liberale, identità collettive, diritti sociali.” *La cittadinanza. Appartenenza, identità, diritti.* Ed. D. Zolo Roma-Bari, 1994: 167, Appiah, K.A. “Global Citizenship.” *Fordham L. Rev.* 75 (2006-2007): 2375 ff and Baccelli, L. “Cittadinanza e appartenenza.” *La cittadinanza. Appartenenza, identità, diritti.* Ed. D. Zolo. cit.: 129. Others have displayed a tendency to overlap the idea of citizenship with citizenship rights, and end up identifying rights in general *tout court* with the legal entitlements recognised within the sole ambit of the relationship of subjection of the individual to the legal order (disregarding, as Ferrajoli cautions, the legal concept of person: see Ferrajoli, L. “Dai diritti del cittadino ai diritti della persona.” *La cittadinanza. Appartenenza, identità, diritti.* Ed. D. Zolo. cit.: 263-265).

⁴ The “drive towards justice” is discussed by Allegretti, U. “Costituzione e diritti cosmopolitici.” *Democrazia, diritti, costituzione*, Ed. G. Gozzi. Bologna: Il Mulino, 1997: 181. See also Baldassarre, A. “Globalizzazione e internazionalizzazione delle decisioni.” *Ripensare lo Stato.* Ed. S. Labriola. Milano: Giuffrè, 2002. 86-87. The author asserts that “rights are worthless unless they are incorporated into an institutional fabric ... in the global world rights are extrapolated from their context and introduced into a universe, the global universe, that is completely de-institutionalised: rights are to a certain extent guaranteed at the individual State level, whilst proclamations on international level are something that is completely unreliable”.

from the Western countries welfare systems. The analysis will be carried out on the terrain of social rights since: whilst on the one hand they are tied to citizenship through a nexus of principle, on the other hand they entail individual legal rights recognised under case law as having universal status.⁵

Accordingly, the Article proceeds as follows: section 2 examines different legal frameworks regarding social rights of non-citizens, with a view of identifying model of protection for every right considered. The following rights will in particular be examined: the right to social welfare provision (sec. 2.1) and the right to work (sec. 2.2). Section 3 deals with the status of those non-citizens who remain unlawfully in the State's territory (therefore becoming illegal immigrants). Section 4 analyses the different theories that try to move beyond the idea of citizenship, either conceiving a cosmopolitan one or imagining a global institutions in charge of a global systems of guarantees. Finally, section 5 discusses the implications of these theories with a view of putting legislations concerning non-citizens' rights to the test of "cosmopolitanism" and "globalism".

II. THE RIGHTS OF FOREIGNERS FROM A COMPARATIVE PERSPECTIVE: SOCIAL RIGHTS AS A MEASURE OF THE HUMAN RIGHTS/UNIVERSAL RIGHTS DIALECTIC

Turning our focus towards national legal systems we may note the ambiguity or, sometimes, the inconsistency of solutions chosen by European lawmakers in order to reconcile the universal nature of rights with the national dimension to citizenship.

Indeed, European States appear to operate in completely the opposite direction compared to the policies conducted in the field economic relations. In this case the legislators undertake a competitions to attract legal persons, mainly by lowering tax burdens.

Conversely, with regard to immigrants, lawmakers are willing to avoid the "rights shopping" phenomenon: people from the poorest part of the world trying to entry in these nations with the purpose to enjoy social protection they would never have the chance to benefit from in their home countries.

⁵ See European Court of Human Rights judgments in *Gaygusuz v. Austria* of 31 August 1996 and *Koua Poirrez v. France* of 30 September 2003. See also Italian Constitutional Court judgment no. 306/2008. On this matter see from a general perspective Hare, I. "Social rights as fundamental human rights." *Social and labour rights in a global context: international and comparative perspectives*. Ed. B. Hepple. Cambridge: Cambridge University Press, 2002: 176 ff.

As a consequence, European States show a careful approach in recognizing social rights to non-citizens.

II.1 THE RIGHT OF ACCESS TO WELFARE

The right of access to welfare is usually subject to the lawful status of the person's presence in a country. Accordingly, in the United Kingdom the law regulating entry into the country⁶ stipulates as one of the conditions required in order to obtain a residence permit the prerequisite of economic self-sufficiency, which expressly includes the waiver of the access to the social welfare services guaranteed out of public funds. Accordingly, this condition is met even when it is the country of origin of the immigrant which pays social welfare payments that the latter requires. In other words, foreigners are more likely to be accepted when they declare that they no longer need to receive social welfare.⁷

Other countries on continental Europe operate along similar lines. For example, both Belgium and Holland subject the issue of a residence permit to a prior declaration of financial self-sufficiency, understood as the ability to provide for board and lodging without being a burden on public assistance.⁸

Notwithstanding this, certain social rights are granted insofar as associated with the status of a regular worker or where they are conditional on the existence of a situation of need. Accordingly, Belgium grants legally resident foreigners the right to social security benefits and healthcare.⁹ Similarly, in Holland, foreigners who are legally resident and who hold a residence permit may request social security benefits.¹⁰

⁶ In relation to immigration policy, see Meyers, E. "Immigration policies in Britain." *International Immigration Policy: A Theoretical and Comparative Analysis*. Ed. E. Meyers. New York: Palgrave Macmillan, 2004: 78 ff.

⁷ See Cohen, S. "Modern migrants and new slaves. How the UK welfare state denies well-being, enforces immigration control and creates slavery." in *Reconciling migrants' well-being and the public interest. Welfare state, firms and citizenship in transition*. Strasbourg: Ed. du Conseil de l'Europe, 2008: 63 ff.

⁸ Besides, Article 20 of the Dutch Constitution expressly reserves the right to social security benefits to its own citizens.

⁹ On this point see the Italian Law of 15 December 1980, as amended, on the status of migrant foreigners.

¹⁰ See in particular section 11(1) and (2) of the Aliens Act 2000. There are two types of residence permit: either fixed term or permanent. The former is issued to any immigrant who requests it and who: possesses a valid temporary permission to stay issued for the same reason for which he applied for a residence permit; possesses valid travel documents; does not constitute a danger to public and national security; has sufficient means on which to live and does not work in breach of the Foreign

Sometimes on the other hand lawmakers create short-sighted solutions.

In Italy the consolidated law on immigration formally guarantees social rights to legally resident foreigners under conditions of equality with Italian citizens¹¹.

In recent years, the Parliament decided to subject payment of income support, economic benefits and other social security provisions to the possession of specific residence documents¹² (namely the residence card and the residence permit of duration not lower than one year¹³) the issue of which requires a certain income. On the contrary, an application for a social security benefit presupposes a lack of income. In this way, the failure to meet a prerequisite (that provided in general terms for the award of social security benefits) necessarily implies that it will be impossible to satisfy the other (that required in order to obtain the issue of a residence card or residence permit). In essence, precisely due to the lack of appropriate income preconditions, foreigners in need of assistance cannot obtain the residence documents provided for under Article 80(19) of Italian Law no. 388/2000.

Various challenges have been brought before the Constitutional Court against the provision, seeking to establish its incompatibility with the Constitution due to violation of Articles 3, 10 and 117. In judgment no. 306/2008,¹⁴ the Court ruled unconstitutional Article 80(19) of Italian Law no. 388/2000, insofar as it provided that the carer's allowance could not be paid to foreigners who did not meet the prerequisites for the issue of a residence card. According to the Court, the provision

National Employment Act; and complies with the restrictions related to the purpose for which he obtained the temporary permission to stay. Permanent residence permits are issued to immigrants who have been living in Holland for at least five consecutive years (the term was increased from 3 to 5 years within the ambit of anti-terrorism measures) and who are not subject to any statutory preclusion. In particular, the person must not be a foreigner who: does not have the means necessary to support himself and his family; represents a threat to national security; has made false statements to the competent authorities; has been convicted of an offence punished by a custodial sentence not shorter than 3 years; or only has a temporary residence permit at the time of the application (section 21). The procedure must be completed within six months (which may be extended by a further six months should the competent authorities consider that further checks on the individual are to be carried out); cf. Section 42. For a general overview of Dutch migratory policy, see Meyers, E. "Immigration Policies of the Netherlands." *International Immigration Policy: A Theoretical and comparative Analysis*. New York: Palgrave Macmillan, 2004: 85 ff.

¹¹ See Legislative Decree, no. 286 of 25 July 1998.

¹² Cf. Article 80(19) of Italian Law no. 388 of 31 December 2000 (Finance Law for 2001).

¹³ All foreigners who – albeit lawfully present – hold a different residence permit are not eligible for benefits. On this point see in general Corsi, C. "Prestazioni sociali e cittadinanza." *Diritto, immigrazione e cittadinanza*, (2009): 38 ff.

¹⁴ Italian Constitutional Court, judgment no. 306 of 29 July 2008.

was inherently unreasonable since it withheld a social security benefit, in contrast with the principle of reasonableness laid down under Article 3(1), precisely from the foreigners in greatest need of social assistance.¹⁵

Accordingly, the Constitutional Court embraces the principle by which Parliament may subject the provision of specific benefits to possession by the foreigner of a legal entitlement to reside in Italy capable of demonstrating its non-temporary nature, provided that this is not unreasonable; nevertheless, once the right of residence under the conditions provided for by law has been established, it is not possible to discriminate against foreigners by setting special limits on the exercise of fundamental human rights that are by contrast guaranteed to citizens.

Although the provision cited above was ruled unconstitutional, Italian law still contains other rules characterised by similar features. Accordingly, it is suspected that Article 80(5) of Italian Law no. 388/2000 is unconstitutional because it limits income support for nuclear families with at least three children to applicants with Italian or Community citizenship.¹⁶ Similarly, the provisions contained in Article 81(32) of Italian Law no. 133 of 6 February 2008 also appear to stand in opposition to the Constitutional Court's

¹⁵ It also violates the right to healthcare, "understood also as the right to the possible cures and, as in this case, partial cures to impairments brought about by not insignificant illnesses", recognised under Articles 32 and 38 of the Italian Constitution and, in its capacity as a universal right, by Article 2. The failure to guarantee the right to healthcare also amounts to a violation of Article 10(1) of the Constitution, since the generally recognised norms of international law certainly include those prohibiting discrimination against foreigners lawfully resident in the country, guaranteeing their fundamental rights "independently of their membership of particular political bodies"; see judgment no. 306/2008, point 10. The same finding in case law is also reiterated in decision no. 11/2009 in which the Court ruled the provision concerned unconstitutional also insofar as it precluded the possibility for incapacity benefit to be paid to non-Community foreigners solely because they do not meet the income prerequisites laid down for the residence card and for the EC residence permit for long-term residents; see Brunelli, G. "Welfare e immigrazione: le declinazioni dell'eguaglianza." *Le istituzioni del federalismo* (2008): 541 ff.

¹⁶ Corsi, C. "Prestazioni sociali e cittadinanza." *Diritto, immigrazione e cittadinanza*. cit.: 40. According to the author, in the same way Italian Law no. 266 of 23 December 2005 also raised various doubts as to its constitutionality, since Article 1(330)-(334) awarded each child born in 2005 a payment equal to one thousand Euros. These payments may be received only by a resident parent (or guardian) with Italian or Community citizenship (and with a family income lower than fifty thousand Euros). Again, different grounds for unconstitutionality appear to arise also with reference to Article 19(18) of Italian Law no. 2 of 28 January 2009, converting Decree-Law no. 185 of 25 November 2008, which grants less well-off citizens the reimbursement of expenses for the care of newly born children up to three months of age. On these issues see also the critical approach adopted concerning the choices made by Parliament of Turatto, G. "La tematica dei cittadini stranieri in riferimento all'accesso alle prestazioni non contributive a dieci anni di distanza dall'approvazione della legge 40/1998." *Rivista giuridica del lavoro e della previdenza sociale* (2008): 496 ff, especially 497. The author reflects in particular on the interpretative differences between the ordinary courts regarding the possibility of extending the award of social security benefits, irrespective of the requirement of citizenship.

view¹⁷ since it reserves eligibility for the issue of a “retail card” [*“carta acquisti”*], intended for the purchase of goods and services by individuals belonging to the weaker classes of the population, only to residents with Italian citizenship.

II.2. THE RIGHT TO WORK

The legislation governing the right to work is practically everywhere based on a form of authorisation to enter a country on employment grounds, the existence of which represents a necessary requisite for the receipt of social security benefits. Accordingly, the Spanish law on *Seguridad social* excludes both illegal immigrants (*inmigrante ilegal*) as well as legal immigrants who work without an employment permit (*autorización para trabajar*) from access to the Spanish social security system, since they are not recognised as taxpayers.¹⁸ Therefore, equal treatment of Spanish and foreign citizens is limited to cases in which the foreigner is a legal immigrant.

An employment permit [*autorisation de travail*] is required under French law as well in order to obtain a residence permit. The competent authorities examine the employment situation within the professional and geographical context requested and, where they discover an excess of supply compared to the demand for work, they will refuse to authorise entry as an employee worker. Recently, the *Hortefeux* law¹⁹ intervened in this area, making provision for “exceptional leave to reside” in France to foreigners who have received – and can demonstrate – a promise of employment in relation to a sector or geographical area specified as falling under those which require workers.²⁰

In Italy the concept of a “residence contract” [*contratto di soggiorno*] was introduced by Law no. 189/2002, that is a special right of entry and of residence in Italy qualified by the existence of an employment contract or a special right of entry and residence

¹⁷ Converting Italian Decree-Law no. 112 of 25 June 2008.

¹⁸ Cf. the Spanish Law on Foreigners (*Ley de Extranjería*) 8/2000. See also SÁNCHEZ-URÁN AZAÑA, Y. “Derecho a la protección social como factor de integración del inmigrante: la dialéctica universalidad/ciudadanía.” *Revista del Ministerio de Trabajo y Asuntos Sociales* (2006): 267 ff, especially 284.

¹⁹ French Law no. 2007-1631 of 20 November 2007 on immigration, integration and asylum (*relative à la maîtrise de l’immigration, à l’intégration et à l’asile*).

²⁰ However, the list drawn up in the judgment of 18 January 2008 includes only thirty employment sectors, of which only six cover the entire country. It relates moreover to jobs with a medium to high level of specialisation and qualification, and for this reason are *de facto* not very accessible to non-Community immigrants. On these problem areas and the preference for Community workers, see Lochak, D., Fouteau, C. *Immigrés sous contrôle*, Paris: Le Cavalier bleu éditions, 2008: 106-115.

into Italy conditional on the existence of a contract of employment. The formalities necessary for receipt of clearance to work must be carried out by the employer, who must present an application for a residence contract along with the documentation specifying the foreigner's accommodation arrangements. Once a residence permit to work as an employee has been obtained, the loss of the position will constitute grounds for revocation where the foreigner has not found any other employment following the expiration of the permit's residual period of validity.²¹

The connection between entry, work and rights established under the legal systems cited above raises various problematic issues. In particular, the requirement that the contact between worker and employer be established prior to entry into the country contributes to excluding from this category of immigrants precisely the weakest individuals originating from particularly backward countries without adequate qualifications to offer on the European employment market.²² In this way, these people are relegated to the margins of the process of integration and, as a matter of fact, risk not being able to find any concrete way out of their irregular status, whether original or supervening (due to the absence of the "foothold" consisting in their status as an employee).

Moreover, by associating the regular nature of the presence in the country with the status as an employee, instruments such as the residence contract betrays the existence of a kind of weakness within this legislation. In fact, institutes of this kind establish a contractual relationship that risks being tilted in favour of the employer, since the lawful nature of the foreigner's presence in Italy depends on the latter holding on to the job, albeit not necessarily in the short term.

²¹ As far as the residence entitlement is concerned on the other hand, the administrative courts have clarified that the foreigner no longer has the right to renewal of his residence permit where he finds work after the permit has expired, having previously lost his original job. The administrative official must in fact re-examine the application and verify the reliability and adequacy of the new employment situation. On this issue, see the judgment of the Regional Administrative Court for Umbria no. 790 of 7 November 2002. *Foro Amministrativo TAR* (2002): 3655.

²² See further Stuppini, A. *Le tasse degli immigrati*. Bologna: Il Mulino, 2009: 412. In this regard it is important to emphasise that the academic literature considers "that it is not arbitrary to exclude the right to work of non-Community citizens with no residence permit or card from constitutional protection" since – according to the interpretation adopted for some time by the Constitutional Court – Parliament is free to differentiate, subject to the requirement of reasonableness, between the enjoyment of constitutional rights of Italian citizens and foreigners within the limits of the special circumstances of the foreigner's status. Similarly, legislation aimed at assuring "priority" for national workers in access to the labour market would be unconstitutional.

Therefore, the availability of a job translates into a concrete opportunity for access to citizenship only for those who are able to hold on to their job on an ongoing basis, given the coincidence between the duration of the residence permit and that of the relative contract, or who are otherwise able to limit breaks of involuntary joblessness to very short intervals.

Within a context in which the flexibilisation and “casualisation” of employment relationships appear to be the norm also for citizens, it is clear how difficult it is for a foreigner to meet the various conditions required by the law.

The situation of immigrant workers with no residence permit appears to be even more problematic. In fact, the legislation does not deal expressly with their status and, therefore, precludes them as a matter of principle from the protection available for regular workers, except as regards insurance against accidents. Yet the legislation governing such matters under discussion should be inspired by the broadest protection for foreign workers, also for the purposes of limiting a dangerous form of “unfair competition” set in motion by the lower cost of illegal immigrant labour. In other words, equality of access to welfare should take account of the weak situation of a foreigner who works illegally.

On the other hand, this weakness originates from the uncertainty in the contractual position of legal immigrants, which proves to be “impaired” since many legal systems do not recognise the validity of *de facto* legal relations established with employers.²³ In

²³ In this regard, it is necessary to recall Italian Law no. 222 of 9 October 2002 converting Decree-Law no. 195 of 9 September 2002 laying down urgent measures to legalise the irregular employment of non-Community citizens. The legislative initiative has the intention of encouraging the transformation of formerly clandestine employment into lawful employment in order to permit the regularisation of the individual and the consequent recognition of the rights associated with the worker’s status as an employee. A contribution in this area was also made by judgment no. 78 of 2005, which ruled Article 1(8)(c) of the Decree-Law unconstitutional due to violation of Article 3(1) of the Constitution. The provision prohibited the regularisation of the employment position of a foreigner accused of one of the offences falling under Articles 380 and 381 of the Italian Code of Criminal Procedure for which arrest is provided for where caught *in flagrante*. According to the Constitutional Court, under Italian law a report of a criminal offence is an act that proves nothing regarding the awareness or dangerousness of the individual indicated by the party making the statement as the author of the acts. It only obliges the competent bodies to ascertain whether the conditions are met for the initiation of a criminal prosecution. The provision under review unreasonably associates with the criminal statement the consequence of the rejection of the application for regularisation and the issue of an expulsion order against the foreigner accused. In the opinion of the Constitutional Court, the provision appears to be even more unreasonable in cases in which an untrue statement is made in order to pursue selfish ends of the party making the statement and consideration is given to the situation of undue subjection in which non-Community workers live under the terms of the law.

fact, with the exception of French law,²⁴ the European legal systems are deficient in expressly providing the intangible nature of the pecuniary rights of the foreign worker – including the case in which the employment relationship is void due to the lack of a residence permit. For this reason, uncertainties and difference within case law remain, to the detriment of the efficacy of the protection of workers' (fundamental) rights.²⁵

III. THE STATUS OF ILLEGAL IMMIGRANTS

The status as an illegal immigrant normally precludes the recognition of social rights, with the exception of the right to health in cases involving serious danger to life and personal safety.

French law makes the award of social security and benefits as well as rights under the national health service subject to the requirement that the individual is lawfully resident or present in France. Provision to this effect is made by Article 186 of the Family and Social Action Code (*Code de l'action sociale et des familles, CASF*) and Articles L 161 et seq of the Social Security Code [*Code de la sécurité sociale*], as amended by the Law of 24 August 1993, which expressly obliges the public administration to verify the status of the foreigner with reference to the validity of his residence permit. Legal residence in France is similarly the minimum prerequisite in order to obtain insurance against illness or in order to receive benefits such as maternity pay, incapacity benefit or, again, an old-age pension under conditions of parity with French citizens.²⁶

Article L251-1 *CASF* provides that the state Medical Assistance body (*Aide Médicale d'État, AME*) shall guarantee medical assistance to those who cannot benefit from sickness/health insurance. This public healthcare system has been put in place in order to protect the health of illegal immigrants. However, starting from the reform of *CASF* enacted in 2003, *AME* is accessible only for those who are able to establish that they have resided in France for at least three months and that they do not have sufficient financial resources to bear their healthcare costs on their own.

²⁴ See Article L374-1 of the French Social Security Code [*Code de la Sécurité sociale*].

²⁵ Campilongo, S. "Il diritto alla tutela giurisdizionale del lavoratore straniero privo del permesso di soggiorno: due decisioni a confronto." *Diritto, immigrazione, cittadinanza* (2008): 79 ff.

²⁶ On these points see Loschak, D., Fouteau, C. *Immigrés sous contrôle*. cit. : 133 ff.

Foreigners who are not covered by *AME* – and who, as illegal immigrants, do not benefit from universal sickness insurance (*maladie universelle, CMU*) – receive treatment from the health service only in emergencies, or only when the failure to provide treatment could result in their death or lead to a serious and permanent deterioration in their health.²⁷

The same underlying inconsistency is present under German law. Foreigners with no residence permit have the right to certain social security benefits under the terms of the *Asylbewerberleistungsgesetz* (German Law on benefits for asylum seekers), which however do not receive full financial coverage from the State. In particular, the benefits relate to healthcare including treatment against illnesses and assistance during pregnancy and childbirth. However, in a country in which illegal immigration is punished as a criminal offence,²⁸ those with no right of residence prefer not to receive medical treatment because the public body charged with providing the service is required to request the personal data in order to obtain partial reimbursement; at the same time, if the official responsible for carrying out this procedure becomes aware of the fact that the foreigner is an illegal immigrant, he is required to inform the competent authorities, the Bureau for Foreigners [*Ausländerbehörde*].

Similarly, as far as compulsory school education is concerned, the federal states – which have jurisdiction over such matters – have accepted the “federal model”, namely that under which state schools are under an obligation to inform the competent authorities regarding any situation of irregularity involving children ascertained upon

²⁷ The situation is different for the *étranger malade*, namely a foreigner who suffers from a serious illness for which he cannot receive adequate treatment in his country of origin; in this case he will benefit from a “private life and family” permit which permits him to use the health service and receive medical treatment. In recent years, the conditions for access for *étrangers malades* have suffered the same fate as other cases of free assistance to immigrants, becoming gradually more impracticable; see on this point Lochak, D., Fouteau, C. *Immigrés sous contrôle*. cit.: 134.

²⁸ The entry and residence of non-Community citizens are governed by the German Law on Residence (*Aufenthaltsgesetz*) enacted on 30 July 2004, Article 95 of which punishes illegal immigration. That Article provides for the imprisonment of illegal immigrants for between one and three years as well as a pecuniary fine (*Geldstrafe*). A sentence of one year is specified for the first illegal entry, whilst repeat offenders, i.e. immigrants to who have already been expelled and “enter into or reside again in Germany”, are punishable with up to three years. Sentences of up to three years are also provided for foreigners who “use or provide false information for the purposes of procuring a residence permits for themselves or for others”. Moreover, non-Community citizens, including those lawfully resident, will automatically be expelled if they are convicted with a definitive sentence to three years imprisonment, or two years for drug dealing or public order offences.

registration.²⁹ A duty to report – rigorously objected to in the academic literature which has argued that the protection of public order does not fall under the education and pedagogical tasks of schools³⁰ – is imposed on directors. On the other hand, private schools are not under any duty to make a report to the competent authorities. In fact, every school may decide whether to accept the registration of illegal minors. For this reason, school education is reserved with increasing frequency to private schools, essentially depriving the right to universal education of any content since they are accessible only to immigrants with higher incomes.

It therefore appears that the other European legal systems have taken care to prevent immigration from degenerating into a form of rights shopping, or of immigration with a view merely to obtaining socio-economic benefits. Therefore, the tension between universalism and citizenship is reflected in legislation inspired by a “prudent” openness, with results that are often scarcely consistent.

IV. HYPOTHESES FOR MOVING BEYOND CITIZENSHIP

The academic literature for its part presents the dichotomy between universalism and citizenship with much less ambiguity and places different and irreconcilable versions of the role of citizenship in the age of Globalisation in opposition to one another.

There is no doubt that the decline of the nation state, due to the processes involving the internationalisation of political and economic relations, has resulted in a certain weakening of the logic of belonging³¹ and paved the way for a “secular” idea of citizenship.

Accordingly, within more recent studies, the historical and cultural link fades, and ceases to represent the principal element qualifying the idea of citizenship. National identity is to be redefined on bases other than those strictly ethnic-cultural.³²

The idea is spreading that there may be “multiple loyalties” in every state,

²⁹ There is however an important exception for the State of Bavaria in which the education of all minors, whether lawfully or unlawfully resident, is compulsory and is therefore public and free.

³⁰ Kluth, W. *Situation juridique des migrants en situation irrégulière en Allemagne. Octroi et limitation de l'accès aux droits sociaux*. cit., 101. On this point see also Sinn, A., Kreienbrink, A. and H.D. von Loeffelholz. *Illegal resident third-country nationals in Germany. Policy approaches, profile and social situation*. Research Study. European Migration Network, 2005.

³¹ Costa, P. “La cittadinanza: un tentativo di ricostruzione “archeologica”.” *La cittadinanza. Appartenenza, identità, diritti*. Ed. D Zolo. cit.: 88.

³² See Goodin, R.E. “What Is So Special About Our Fellow Countryman?.” *Ethics* 98 (1988): 4 ss.

corresponding to different cultural, linguistic and religious differences that characterise the population, above all due to migratory phenomena.³³ At the same time, the concept concerned expresses a trend towards the inclusion of different members of society with a view to resolving tensions and conflicts within modern pluralist democracies. It is precisely the integrationist and emancipatory function of citizenship that means that any merely ethno-cultural connotation of belonging must be rejected.³⁴ From a theoretical point of view, the possibility to extend entitlement to rights associated with the status of citizenship also to foreign immigrants should not encounter the insurmountable obstacle of the necessary overlap between *demos* and *ethos*.

The emancipation from the concept of belonging of the most strictly historical and cultural elements is however anything but certain.

The Communitarians³⁵ – whilst not generally sharing these rigidly genealogical visions – interpret citizenship in the light of the concept of belonging to the same “historical community of destiny”,³⁶ or to a specific form of political organisation that represents the constitutive element of the identity of its citizens.

Privileging the idea of the citizen as a member of a particular nation or a particular collectivity that shares the same *ethos*, makes it difficult to imagine an expansion of

³³ See Bauman, Z. “The Fate of Humanity in the Post- Trinitarian World.” *Journal of Human Rights* (2002): 285 ff. See also Aron, R. “Is Multinational Citizenship Possible?” *Social Research* 41 (1974): 4 ss.

³⁴ As noted by Baccelli, “even Aristotle considered the ethnic definition of citizenship to be ‘popular and rough’”. Baccelli, L. “Cittadinanza e appartenenza.” *La cittadinanza. Appartenenza, identità, diritti*. Ed. D Zolo. cit.: 155. See also Aristotele. “Politica.” *Opere*. III. By Aristotele. cit.: 72 ff. By the same token, all arguments claiming that citizenship should be founded on bonds of a genealogical or biological nature, logical premises for xenophobic or racist policies that unleash intolerance and aggression towards foreigners or anyone who is different, have easily been dismissed on a theoretical level. On these points see Zolo, D. *Il principato democratico. Per una teoria realistica della democrazia*. Milano: La Feltrinelli, 1992: 58 ff.: the author emphasises that these conventions are in reality the product of insecurity and of the fear of the threat represented by the “other”, identified as the enemy.

³⁵ The positions within the academic literature associated with this school of thought differ in several respects above all as regards the idea of community embraced. For a detailed account, see Ferrari, G.F. “Relazione conclusiva del Convegno dell’Associazione italiana dei costituzionalisti, Lo statuto costituzionale del non cittadino.” Cagliari, 17-18 October 2009, on pages 8 and 9 of the paper, available online at www.associazionedeicostituzionalisti.it. The Communitarians reject the theories of rights founded on methodological individualism, namely on an atomistic conception of the individual agent who interacts with the world irrespective of any reference to specific historical and social contexts. In this sense, they stand in opposition to the theories of Nozick, Dworkin and Rawls (see below). Social atomism has the objective of constructing an objective and universally applicable model of justice, regarding which the historical-cultural specificities of the community are of no relevance. From the Communitarian perspective, this approach has not resolved the problem of inequality, but has in fact accentuated and overturned it within the question of the marginalisation of minority groups.

³⁶ For a critical perspective on this definition, see Habermas, J. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge, Mass: MIT Press, 1996.

citizenship rights since they clearly imply a link between the individual and the State characterised by cultural, historical and traditional elements.

On the contrary, the Communitarians address the question under discussion by invoking identity values as a defence against dynamics of “contamination” of globalised societies.³⁷ The boundary for exclusion is defined by the idea of a homeland and common identity and is assured by the right to limit entry into the country in order to conserve the elements of identity that classify membership of the community.³⁸ In other words, within the different positions adopted by scholars belonging to this cultural tradition, the rediscovery of cultural identities as well as the valorisation of the sense of belonging to ethnic communities play the predominant role of preserving the community itself and of resisting the centrifugal forces that characterise contemporary political communities.

A stance that is highly critical of these positions is adopted by the authors who promote acceptance of a concept of citizenship as an ongoing “construction” of cohabitation that is capable of disregarding the historical and cultural bond of belonging.³⁹ Under this schema – which has the benefit of taking account of the processes involving the erosion of state sovereignty and showing itself to be sensitive to the positive fact of the existence of international declarations on human rights – the circuit of belonging is not based on pre-existing cultural and ethic givens, but is permanently reasserted based on participation in that continent socio-political organisation, rather than on the sharing of a collective identity to be preserved and perpetuated.⁴⁰ Moreover, the state community is not closed, but is sensitive and open

³⁷ On these aspects, see again Ferrari, G.F. “Relazione conclusiva.” cit.: on page 8 of the paper.

³⁸ Thus Walzer, M. *Spheres of Justice*, New York: Basic Books: 42 ff, justifies the regularisation of immigration by the need to preserve the cultural identity of the host society. Indeed, the author asserts that in cases involving workers accepted into the country and who are lawfully resident, the rules requiring their exclusion from citizenship should be tempered and take account of requirements of a distributive nature, especially at p. 60.

³⁹ See Köchler, H. “Il concetto di nazione e la questione del nazionalismo. Lo «stato-nazione» tradizionale e una «comunità-stato» multiculturale.” *Cittadinanza e diritti nelle società multiculturali*. Ed. T. Bonazzi, M. Dunne. Bologna: Il Mulino, 1994: 63.

⁴⁰ This approach is supported by Benhabib, S. *The Rights of Others. Aliens, Residents and Citizens*, Cambridge: Cambridge University Press. tr. it. *I diritti degli altri. Stranieri, residenti, cittadini*. Milano: Raffaello Cortina, 2006. With regard to the issue of cohabitation between different cultures, which is partially different from the perspective of interest here, W. Kymilka on the other hand proposes the multicultural model of citizenship, under which cultural identity is protected not as a function of the perpetuation of the group, but as a free individual choice to share; see Kymilka, W. *Multicultural Citizenship. A Liberal Theory of Minority Rights*. Bologna: Il Mulino, 1999 (Italian translation).

to dialogue with supranational and international bodies and institutions. In this sense, contemporary citizenship is increasingly defined not only through democratic dialectics, but also thanks to penetration by higher legal orders.

Discussion of the possibility of extending entitlement to citizenship rights to foreigners suggests a further perspective for reflection. More specifically, it is necessary to understand whether this operation cannot be carried out by overcoming the concept of national citizenship in favour of a kind of cosmopolitan citizenship.

Scholars who construct cosmopolitan theories consider that reflections on citizenship – which is conceptualised in accordance with the classical tradition within the horizon of the nation state – are destined to end up since they limit themselves to identifying and classifying the relations entailing the provision of protection and guarantees to which citizens are entitled by virtue of their membership in a specific legal order.⁴¹

Naturally there will be a risk of distorting the concept of citizenship, or better of transforming its content to such an extent as to render the use of the category radically inappropriate.⁴² However, since it is necessarily based on one of the constituent elements of the idea of the State – at least following natural law doctrine which classifies the State in terms of people, territory and sovereignty – the substantive definition of citizenship cannot disregard the change in these elements and, at the same time, the transformation of the State itself.⁴³ Therefore, to ignore the existence of a dimension of the individual's membership of the “global” community – unlimited in the *status civitatis* – does not appear to be a viable option. Another alternative is to attempt to classify this form of belonging, clearly defining its content and boundaries, and moving beyond mere rhetoric over the globalisation of rights.

Italian constitutional literature has pursued the path of research into rights cosmopolitanism, identifying its basis in the very text of the Constitution through the recourse “to a substantive criterion for interpreting norms that refers to a system of

⁴¹ To be precise, these are arguments that are not original at all and which, on the contrary, have important theoretical references both in Kantian cosmopolitanism as well as Kelsenian monism; see respectively Kant, I. *Zum ewigen Frieden*. Königsberg: F. Nicolovius, 1795-96 (Italian translation, Milan, 1968).

⁴² See Bosniak, L. “Constitutional Citizenship Through the Prism of Alienage.” *Immigr. & Nat'lity L. Rev.* 23 (2002): 409 ff. and Id. “Universal Citizenship and The Problem of Alienage.” *Nw. U. L. Rev.* 94 (1999-2000): 963 ff. see also Zincone, G. “Cittadinanza: trasformazioni in corso.” cit.: 73.

⁴³ Amirante, C. “Cittadinanza (teoria generale).” *Enc. giur.* vol. VII. Roma: Treccani, 2003: 5.

'culture' and the conferral of socially elaborated 'meaning'.⁴⁴ The complex interpretative operation based on non-referential legal reasoning leads to the recognition that the cosmopolitan nature only of civil rights, specifying on the other hand "a nexus of principle between citizenship"⁴⁵ and economic and social rights which is however not insuperable. In other words, pursuant to Article 11, the State undertakes to contribute "through a national effort and collaboration with other countries to satisfy the right of individuals as such to work, education and social assistance".⁴⁶ In other words, the boundary is permeable, naturally provided that a connection is established between the foreigner and the accepting State.

The attempt to join up the idea of citizenship in a modern sense, or rather to reconstruct a "new" meaning for this idea that is totally detached from membership of a particular national community, has also been made by political philosophy, independently of the study of positive constitutional law.

According to this literature, the political community around which bonds of belonging are developed is global civil society.⁴⁷ Within this context, rights must be recognised to citizens of the world, transcending national borders. Following this reasoning, the bounds bonds of belonging are dissolved into a more comprehensive

⁴⁴ Allegretti, U. "Costituzione e diritti cosmopolitici." *Democrazia, diritti, costituzione*. Ed. G. Gozzi. cit.: 174. This theory is based on the argument inferred from a "strong reading" of Article 11. The provision concerned is argued to enshrine international cohabitation within a context of peace and justice, as one of the principles that contribute to identifying the general ends of the constitutional order. In fact, since the fulfilment of these objectives can lead to limitations on sovereignty, in derogation from the fundamental principle expressed under Article 1 of the Constitution, they present themselves as "supreme and primary values for orientation" capable of contributing to the identification of the general ends of the constitutional State. And one of the pilasters of a legal order that achieves peace and justice between peoples is represented precisely by human rights. From this point of view, "the people would not necessarily be a uniform element, but would end up being comprised of various layers of individuals, all endowed with equal basis legal status and who then differentiate themselves through other relations". However, from the cosmopolitan perspective "it is not possible for States to achieve the ends of happiness and the personal development of citizens without sharing the goals of the improvement of the conditions of other peoples", p. 179.

⁴⁵ Although they form part of the inviolable core of fundamental rights.

⁴⁶ Allegretti, U. "Costituzione e diritti cosmopolitici." cit.: 192.

⁴⁷ See Dahrendorf, R. *The Modern Social Conflict*. New York: Weidenfeld & Nicolson, 1988: 57 ff. The author argues, with regard to fundamental rights, that it is fundamental to start by constructing a civilised society of citizens at home. But as long as it is contained within national borders, it will also be accompanied by stances, policies and rules of exclusion that violate the basic principles of civil society. The historical task of creating a civil society will be concluded only when there are citizenship rights for all human beings. Therefore, he concludes by saying "We need a world civil society".

synthesis, which must necessarily leave aside particular identities, or better must presuppose a “critical reappraisal of local identities”.⁴⁸

Besides, by virtue of a kind of reflex of synergy, cosmopolitan citizenship completes the protection of rights, above all where the nation states are no longer able to guarantee their full realisation.

It could be argued that cosmopolitanism necessarily counterbalances the idea of citizenship since it represents the surmounting of national loyalties. Yet not all theorists of rights cosmopolitanism arrive at this conclusion. The tension between legal globalisation and the localisms of state citizenships could lead to a genuinely different result. In particular, the synergy between the international legal order and national legal systems could unleash an expansive force that at the same time embraces citizenship rights. They would enjoy not only an additional channel for protection, consisting in the international courts, but also a “reinforced” ideological foundation that constitutes a bulwark against any attempt at disownment.⁴⁹

This change in the meaning of citizenship in the contemporary sense is not shared by commentators who argue that the concept in question has been superseded and who herald the arrival of a really cosmopolitan conception of rights.⁵⁰ Especially where it intends to associate itself with the need to promote its emancipatory dimension – through the generalised protection of social rights – a theory of rights should apply irrespective of the concept of citizenship. This concept no longer represents a condition for inclusion and equality, but “the last privilege of status”⁵¹ and, therefore, a factor of exclusion and inequality. Citizenship rights are, almost by definition, not universal because they are anchored to the idea of membership of a particular state

⁴⁸ Pariotti, E. *La giustizia oltre lo Stato*. Turino: Giappichelli, 2004: 29.

⁴⁹ This argument is supported by Held and Turner; see respectively Held, D. “Citizenship and Autonomy.” *Political Theory and the Modern State*. By D. Held. Stanford: Stanford University Press, 1989 cit., *passim* and Turner, B.S. “Contemporary Problems in the Theory of Citizenship.” *Citizenship and Social Theory*. By B.S. Turner. London: SAGE Publications, 1993: 14 ff. The idea of the individual as a world citizen is not considered utopian by Veca, S. “Cittadinanza.” cit.: 57, who observes in relation to the civil society of world citizens that “is it possible to think in a non-pathetic or fatuous manner of a fraternity or solidarity between people from the same group?[...] this is certainly difficult [...] but it does not seem to me to be particularly brilliant in this case, as in others, to adopt the inflationary strategy of translating difficult things into impossible things”.

⁵⁰ See Appiah, K.A. *Global Citizenship*, cit.: 2375 ff and Ferrajoli, L. “Dai diritti del cittadino ai diritti della persona.” *La cittadinanza. Appartenenza, identità, diritti*, Ed. D. Zolo. cit.: 263 f., writes: “we cannot [...] level down human rights to citizenship rights whilst at the same time still claiming that citizenship is based on a fight for rights and for democracy in the name of the universalism of both”, p. 288.

⁵¹ See again Ferrajoli, L. “Dai diritti del cittadino ai diritti della persona.” cit.: 288.

community. Precisely the question of the relationship between (universal) human rights and citizenship rights throws into doubt the idea of citizenship as equality and as emancipation, above all when confronted with processes of globalisation and the extraordinary impulse which these processes exercise on migratory flows.

Under the cosmopolitan perspective, the root of inequalities lies in the inability for a very large number of citizens from economically disadvantaged countries to obtain recognition of and protection for their fundamental rights, especially their social rights. Interpreting human rights as citizenship rights means denying universalism, generating a “great *apartheid* that excludes their guarantee to the vast majority of humankind”.⁵² Consequently, citizenship should be defined starting from the values of human dignity and solidarity, manifested on a universal scale.

Supporters of the cosmopolitan nature of rights do not necessarily preconceive the establishment of a global legal order. On the contrary, they rely on the expression “global civil society” in order to express a sense of belonging to the global community which may be the case irrespective of the existence of one single legal/political subject on a world scale.

The approach which prefers adopting the idea of the world state as a reference paradigm is in part different. In this case, it would be more correct to speak of institutional cosmopolitanism⁵³ or, if we prefer, globalism. This recent school of thought contemplates the establishment of a single world legal order which strives to establish itself as the political institution for global governance. In other words, world society is not only able to express a common belonging, but translates into the establishment of a political and legal subject that sustains the fate of the entire world.

⁵² See Ferrajoli, L. “Dai diritti del cittadino ai diritti della persona.” cit.: 289. On these points see also Balibar, E. *Per Althusser*. Roma: Manifestolibri, 1991: 7 ff. (Italian translation: *Le frontiere della democrazia*, Rome, 1993). Conversely, there are others within the academic literature who consider that the assertion of the model of aristocratic world government is not so much to be attributed to processes involving the globalisation of financial relations, but derives “from the great processes of decolonialisation... [which] generate a delay in development between the different socio-economic areas, interacting with the difficulties in effectively establishing democratic models (and here the new globalised economy certainly amplifies and accelerates the phenomenon but is not, at least not in principle, its cause)”. Cf. Rimoli, F. “Universalizzazione dei diritti fondamentali e globalismo giuridico: qualche considerazione critica.” cit.: 17.

⁵³ On this point see Trujillo, I. *Giustizia globale. Le nuove frontiere dell'eguaglianza*. Bologna: Il Mulino, 2007: 170-171; the author prefers to speak of legal cosmopolitanism in order to differentiate it from so-called moral cosmopolitanism, that is valid irrespective of the establishment of a “republican form embracing the whole world”.

Within this context, the guarantee of rights would be assured – similar to what occurs in the individual state situations – by the existence of a world political and legal apparatus. National citizenships would dissolve into world citizenship and, consequently, it would no longer make any sense to talk about the rights of non-citizens since they would end up effectively coinciding with human rights guaranteed on a worldwide scale.

The critique of the theories of rights cited above, taken together with the tendency to go beyond the state-citizenship-rights nexus, is testament to the impracticable nature of the solutions proposed within the ambit of this doctrine. Above all with reference to social rights, the crisis within welfare systems is in fact argued to demonstrate the difficulty in guaranteeing services in the first place to citizens, namely to those who are embraced by the bond of rights and duties which give substance to the individual's membership of the State.⁵⁴ Therefore, it would be even more complex to theorise the cosmopolitan nature of this kind of individual legal rights.⁵⁵

In this regard, it has been argued polemically that, far from representing the strained and unnatural outcome to legal globalisation, the overcoming of a state-centric conceptualisation of rights is in reality the result of the “constitutional component of democracy”. More specifically, the argument is based on the consideration of the original limitation on state sovereignty which occurred when the democratic constitutional order recognised human rights as the ultimate foundation for legitimacy. In this way, it is back to constitutional democracy itself that the overcoming of the tendency to “nationalise” fundamental rights is to be traced.⁵⁶

⁵⁴ On this matter, see Amirante, C. “Cittadinanza (teoria generale).” cit.: 11-12. The author associates the difficulties encountered by welfare systems also with the financial crisis of the State, a consequence of the “race to the bottom in the fiscal sector” unleashed by competitive dynamics between states. In an attempt to render their own economic systems more attractive, states tend to reduce taxation, resulting moreover in a kind of fiscal dumping on the weakest members of society. The author also asserts that the reduction in welfare benefits “induces citizens (and in particular an increasingly broad group that is marginalised and socially excluded) to consider themselves increasingly detached from those duties that are the quintessence of citizenship in social terms and from a solidarity point of view” (p. 7).

⁵⁵ On this matter, Ferrajoli, L. *Principia iuris*. Roma: Laterza, 2007: 536 ff, observes that these arguments against rights cosmopolitanism, in particular social rights, draw on a practical impossibility from which they also infer the theoretical unsustainability. In other words, they do not explain whether the impracticability of protection “without borders” of these rights is the consequence or the confirmation of the conceptual inconsistency of the theory that they seek to refute.

⁵⁶ Pariotti, E. *La giustizia oltre lo Stato: forme e problemi*. Torino: Giappichelli, 2004: 43.

An alternative way of dealing with the question of the universal basis for rights is offered by those theories which, having collected the most fruitful premises from the cosmopolitan reflection, propose establishing translational distributive justice. Transferring the instruments for analysis from the local to the global perspective, the scholars who sign up to this school of thought consider that conceptualising solidarity from a global perspective imposes on the economically most advanced states the responsibility to act through distributive policies on a global scale in order to ensure protection for the individual legal rights recognised as universal. There is a symmetry within these reconstructions, suggested already by Rawls,⁵⁷ between the principle of equality between individuals and that of equality between peoples.

Within the ambit of models of international redistributive justice, a more refined elaboration is offered by those who, inverting the terms of discussion, prefer to reflect on the duties that each individual has towards the members of this own community. However, these duties cannot be defined in isolation from international duties, namely the obligations which the individual has towards “non members”.⁵⁸

The discussions of constitutional experts also consider the argument of global public duties to be the starting point for a justification of the recognition of rights beyond national borders.⁵⁹ Indeed, from the perspective of positive lawyers, this conceptual

⁵⁷ In fact, the argument recalls Rawls’ theory of justice where the philosopher acknowledges a duty of assistance for richer societies in favour of the poorest. However, in this case the achievement of global justice is incorporated into the more general theory of peace between peoples and is therefore conditional on the objective of guaranteeing the international order; see Rawls, J. *The Law of Peoples with “The Idea of Public Reason Revisited”*. Cambridge, Mass.: Cambridge University Press, 1999. It must be emphasised that these arguments have also been put forward by philosophers who, starting from Rawlsian principles of justice, link up the problem of global justice with that of weak subjects in contemporary States and, in doing so, presuppose an ethic of care that is sensitive to all possible manifestations of social justice; see Nussbaum, M.C. *Frontiers of Justice: Disability, Nationality, Species Membership*. Cambridge: The Belknap Press, 2006: 30 ff and 230 ff .

⁵⁸ See. Pariotti, E *La giustizia oltre lo Stato*. cit.: 18 and, in relation to the position within the literature that argues in favour of the definition of domestic duties starting from international duties, Shue, H. “The Burdens of Justice.” *The Journal of Philosophy* (1983): 603 ff. Again with regard to the duties of material assistance applying on global scale, see the original argument of Nussbaum, M.C. “Duties of Justices, Duties of Material Aid. Cicero’s Problematic Legacy.” *Journal of Political Philosophy* 8 (2000): 176 ff.

⁵⁹ Spadaro, A. “Una vecchia storia: togliere ai ricchi per dare ai poveri? (Cenni per una teoria della globalizzazione non dei “diritti”, ma dei “doveri”).” *Global Law v. Local Law. Problemi della globalizzazione giuridica*. Eds. C. Amato and G. Ponzanelli. Torino: Giappichelli, 2006: 287 ff. The author defines “blatantly utopian” any theory of the globalisation of rights that does not start from a definition of global duties and, more specifically, emphasises that “the problem of fundamental rights within the context of globalisation is not so much that of legal-normative provision [there is no lack of declarations of rights, at times detailed and in any case normally sufficient to constitute a “support” in the practical identification of specific rights], as much as their efficacy”.

premise translates into the proposal to incorporate these “world duties” into specific constitutional provisions, as a means of furthering the solidarity vocation of the legal order. However, with specific reference to Italian law, some commentators suggest – based on provisions already contained in the Constitution – that Article 11 of the Constitution should be read in such a way as to justify the existence of a principle of international distributive justice. In particular, according to this interpretation, insofar as the provision concerned permits “limitations on sovereignty necessary to allow for a legal order that ensures peace and *justice between nations*”, it is claimed to introduce the legal obligation to comply with the resolutions of international organisations issued for these purposes.⁶⁰

In all cases, the supporters of global distributive justice recognise in the latter a kind of “antidote” to citizenship in the sense that the activation of redistributive mechanisms on a planetary scale should operate to compensate the unequal distribution of living standards (and therefore of citizenship rights).⁶¹

V. THE PARADIGM OF THE INCLUSIVE VOCATION OF THE *STATUS CIVITATIS* AS A STARTING POINT FOR REDEFINING CITIZENSHIP IN THE AGE OF GLOBALISATION

All the above theories propose moving beyond the idea of citizenship and, therefore, of “scrapping”⁶² the conceptual instruments used by constitutionalism and political philosophy in inquiries into rights.

However, they naturally move within the horizon of a theoretical perspective, and do not generally speaking propose a response or solution to the problems and dilemmas generated by the processes of globalisation in progress. For this reason they normally leave positive lawyers dissatisfied. Yet, as perceived in the more circumspect

⁶⁰ See again Spadaro, A. “Una vecchia storia: togliere ai ricchi per dare ai poveri?(Cenni per una teoria della globalizzazione non dei “diritti”, ma dei “doveri”).” cit.: 327. However, the author warns that “on the interpretative level this formula [...] must be ‘combined’ with many other constitutional provisions, not least those imposing restrictions in budgetary matters (Article 81), risking to give rise to the notorious and delicate disputes typical of *constitutional balancing*”.

⁶¹ The economic literature has also dealt with this issue, highlighting the need for considerations of an ethical nature to orient economic policy choices, above all in relation to the treatment that developed countries reserve to the developing world. See *inter alia* Stiglitz, J.E. *Globalization and Its Discontents*. New York: W.W. Norton, 2002.

⁶² The expression is used by Veca, S. *Della lealtà civile: saggi e messaggi nella bottiglia*. Milano: Feltrinelli, 1998: 79 ff. On this issue see also Id. *Sull’idea di giustizia globale. Scritti del Centro di filosofia sociale, University of Pavia*, available online at www-1.unipv.it/deontica/opere/veca/etica.htm.

literature, the reflection on these arguments constitutes an indispensable aid since it is capable of orienting the “ways of looking”⁶³ at the problems and open questions. It is by relying on this conceptual framework and, at the same time, on the possibility of theoretical inquiry offered by these perspectives that it is possible to reorient discussion on citizenship and rights in the age of globalisation.

If, as Bobbio argued, the problem of human rights is no longer their foundation, but their actual implementation and protection,⁶⁴ it is appropriate not to abandon the most proper instrument to this end, namely the *status civitatis*. It is rather the conceptual horizon sketched out by the principles of the universal nature of human rights that can actually guide the process of “reorientation” of the meaning and content of contemporary citizenship.

At present, legal systems appear to be far indeed from accepting this perspective.

The extension of “citizenship rights” has in fact been interpreted as a kind of antidote to the problems posed by globalisation. Confronted with global inequalities which drive increasingly large masses of people to reach Western countries, the host States decide to recognise certain citizenship rights in order to resolve social tensions and, at times, also possible identity conflicts. Nevertheless, this is a solution which takes on the features almost of an emergency, since it generally occurs within a legislative framework that strongly discourages stable immigration, promoting on the other hand temporary immigration.

Thus, for example, Italy, Germany and France establish a close relationship between the residence permit, an employment contract and access to social security benefits. Although the loss of one's job does not automatically mean the revocation of the authorisation to remain in the country – since this is moreover expressly prohibited under the international conventions applying to such matters – the absence of a welfare system for foreigners that is capable of guaranteeing their reintegration into the employment market *de facto* favours the occurrence of irregularities.⁶⁵ The model embraced by European legal systems is in fact that under which welfare benefits are

⁶³ Veca, S. *Della lealtà civile: saggi e messaggi nella bottiglia*. cit.: 78.

⁶⁴ Bobbio, N. *L'età dei diritti*. Torino: Einaudi, 1992: 45 ff.

⁶⁵ See Zanfrini, L., W. Kluth. *Les politiques relatives aux migrants irréguliers*. Strasbourg: Council of Europe Publishing, 2008.

presented with a compensatory goal and do not as a rule become instruments within a process of integration and, therefore, for the acquisition of citizenship.

On the contrary it would be desirable to recover the idea of citizenship, albeit by redefining it in such a way as to valorise the “open process” aspect in the ongoing construction of cohabitation.⁶⁶ This implies the parallel abandonment of the conceptual framework which seeks to identify the idea of citizenship with the *a priori* designation of those who participate in the socio-political community with full rights and, therefore, as the outcome of a process carried out once and for all.

From this perspective, the recognition of social rights could present itself as an “embryonic” form of *status civitatis*, starting from which everyone may embark upon a *path towards citizenship*. It is therefore in the relationship between effective participation in the host community and the entitlement to rights that the universalist vocation of the constitutional State may find its own dimension.

⁶⁶ The idea of citizenship as an ongoing process for the construction of social cohabitation owes a debt to the theory of communicative democracy formulated by Habermas; see Habermas, J. *Etica del discorso* (1983), Rome-Bari: Laterza, 1985. On these issues, see the reflections by Ferrari, G.F. “Relazione conclusiva.” cit.: 13.