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EUROPEAN LEGAL INTEGRATION: THE NEW ITALIAN SCHOLARSHIP

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Orsetta Giolo and Michele Pifferi

Integration or Exclusion: Migrants in the European Union and United States
An Historical-Philosophical Approach

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European Legal Integration: The New Italian Scholarship (ELINIS)

This Working Paper is part of the ELINIS project: *European Legal Integration: The New Italian Scholarship* – Second Series. The project was launched in 2006 on the following premise. Even the most cursory examination of the major scientific literature in the field of European Integration, whether in English, French, German and even Spanish points to a dearth of references to Italian scholarship. In part the barrier is linguistic. If Italian scholars do not publish in English or French or German, they simply will not be read. In part, it is because of a certain image of Italian scholarship which ascribes to it a rigidity in the articulation of research questions, methodology employed and the presentation of research, a perception of rigidity which acts as an additional barrier even to those for whom Italian as such is not an obstacle. The ELINIS project, like its predecessor – the New German Scholarship (JMWP 3/2003) – is not simply about recent Italian research, though it is that too. It is also new in the substantive sense and helps explode some of the old stereotypes and demonstrates the freshness, creativity and indispensability of Italian legal scholarship in the field of European integration, an indispensability already familiar to those working in, say, Public International law.

The ELINIS project challenged some of the traditional conventions of academic organization. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions to ELINIS were not limited to scholars in the field of “European Law.” Such a restriction would impose a debilitating limitation. In Italy as elsewhere, the expanding reach of European legal integration has forced scholars from other legal disciplines such as labor law, or administrative law etc. to meet the normative challenge and “reprocess” both precepts of their discipline as well as European law itself. Put differently, the field of “European Law” can no longer be limited to scholars whose primary interest is in the Institutions and legal order of the European Union.

The Second Series followed the same procedures with noticeable success of which this Paper is an illustration.

ELINIS was the result of a particularly felicitous cooperation between the Faculty of Law at the University of Trento – already distinguished for its non-parochial approach to legal scholarship and education and the Jean Monnet Center at NYU. Many contributed to the successful completion of ELINIS. The geniality and patience of Professor Roberto Toniatti and Dr Marco Dani were, however, the leaven which made this intellectual dough rise.

The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

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Integration or Exclusion: Migrants in the European Union and United States An Historical-Philosophical Approach

By Orsetta Giolo* and Michele Pifferi**

Abstract

The history of migration policy in Europe and United States between the late XIX and the early XX century offers several issues of comparison with the current EU regulation. The paper analyzes, with a historical-philosophical approach, these two experiences with the main focus on the rights of migrants, whose extension has been determined by the legislations of both leaving and incoming countries, where the inclusion or exclusion strategies have been influenced by the opposite visions of the *jus migrandi*.

After World War II the progress of human rights towards a full recognition both in state constitutions and in international treaties seemed to have achieved once and for all an un-negotiable and uncompressible standard. In the EU area the human rights legislation plays a crucial role, but at the same time the effort to create a new European identity has reinforced an exclusion process of migrants and a denial of their rights. New (or old?) political fears have once again moved the frontiers of the human rights back and EU citizenship risks to become the strategy of legal discrimination against migrants.

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I. Introduction

I. 1. The Constant Factors in Immigration Policies: Identity, Sovereignty, Rights

The legislation in the countries both of emigration and of immigration is doubtlessly a transversal issue that influences the three main factors in migration as proposed by Ravenstein: ‘push’, ‘pull’ and ‘means’¹. In the European migration towards America between 1870s and 1920s they have also been determined by the legal arguments for or against aliens in the country of destination as well as leavers in the European States. The idea of *jus migrandi* changed in different periods, thus producing contrasting kinds of immigration or emigration laws; their underlying criteria shifted, in the New World, between the assurance of a quick naturalization or of a full citizenship and the complete exclusion from the enjoyment of civil rights, and, in the Old World, between the police laws and the social laws. As one of the most important cultural features of a nation, the legislation reflected the collective opinion about this topic, but, at the same time, wanted to steer public belief and to direct the waves of migrants. As in a constant game of mirrors, the building of a national identity was always connected with the model of legislation concerning immigration or emigration, in a social process involving racial traits, religious traditions, language peculiarities.

As it is well known, the immigration of foreign people has played an essential role in the formation of the American identity: in the early times, America was a land of choice for men coming from all European countries, a land of freedom where the idea of the universal nature of mankind and the doctrine of natural rights allowed new settlers to easily become American citizens; then, after the beginning of a gradual exclusion policy in the 1880s, the immigrants were necessary to classify the “inners” as against the “aliens”. They were considered by the nativist movement as a mass of undesirable persons because they were not White Anglo-Saxon Protestants; precisely this identification by contraposition revealed the effort to draw a line between the old immigration and the new one, to design a new national identity with the aim to legitimate the discrimination against new comers². But, at the same time, emigration was a key-

¹ See E. G. RAVENSTEIN, “The Laws of Migration”, *Journal of the Statistical Society of London*, vol. 48, 2, 1885, pp. 181-184, and the interpretation of this essay given by ROGER DANIELS, *Coming to America. A History of Immigration and Ethnicity in American Life*, 2nd ed., New York, Perennial, 2002, pp. 16-22.

² See e.g. R. J. VECOLI, “The Significance of Immigration in the Formation of an American Identity”, *The History Teacher*, 30, 1, Nov. 1996, pp. 9-27.

factor also in building the identity of the leaving nations; in Italy, for instance, the high number of emigrants during the second half of the XIX century contributed to strengthen the sense of belonging to the same people, gradually projecting out of Italy more than in the mother country the ties with the national political unity just reached in 1861³. Moreover, it's important to consider the link between Italian emigration and colonial expansion: the emigration was seen as a natural unstoppable occurrence which could not be prohibited or prevented by State legislation, but which could become a huge resource if controlled and ordered by law towards the destinations of colonialism.

A similar process is now taking place in EU, where the formation of a European identity is urged by the fear of foreign people considered too different to integrate. The enlarged borders of the Union have changed the image of the European citizenship and thus shifted the line of immigration further, but the arrival of non-EU immigrant is still considered as a cultural and economic problem; once again, as happened in the United States more than one hundred years ago, the identity of a political subject is built not on the sharing of the values of a people who lives 'inside', but on the exclusion and the criminalization of the foreigners⁴. And, as usually happens, the law risks to guarantee the status of someone and to deny the rights of others: as far as immigration policy is concerned, in a difficult balance between individual human rights, rights of citizenship, sovereignty of each member State and power of the European Institutions, it seems as though we are witnessing again to the wavering tendency of inclusion or exclusion of migrants according to political or economic opportunities⁵.

The history of migration policy in Europe and United States between the late XIX and the early XX century offers several issues of comparison with the current EU regulation. Unlike the present building of an European citizenship, which mostly seems to rest upon a juridical

³ About this artificial creation of an Italian consciousness by emigrants only out of the homeland from where they leaved or escaped, see D. GABACCIA, *Emigranti. Le diaspore degli italiani dal Medio Evo ad oggi*, Torino, Einaudi, 2003, pp. 33-67. It's also important to consider that up to World War I only a small number of Italians became naturalized American citizens with the right to vote, because their main aim was getting back home, and only in the 1920s did a cultural and generation gap break out between the Italian parents who wanted their sons to follow the 'old way' and the sons who strongly desired to become Good Americans (see R. J. VECOLI, "L'arrivo negli Stati Uniti", in *Verso l'America*, Roma, Donzelli, 2005, pp. 109-143, in particular 130-135, and M. SANFILIPPO, "Tipologie dell'emigrazione di massa", in *Idem*, pp. 47-64).

⁴ See D. BIGO, "Criminalization of "Migrants": the Side Effect of the Will to Control the Frontiers and the Sovereign Illusion", in B. Bogusz, R. Cholewinski, A. Cygan, E. Szyszczak (ed. by), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden/Boston, Martinus Nijhoff Publishers, 2004, pp. 61-91.

⁵ See e.g. R. CHOLEWINSKI, "The EU *Aquis* on Irregular Migration: Reinforcing Security at the Expense of Rights", *European Journal of Migration and Law*, 2, 2000, pp. 361-400.

character, the early American citizenship was mainly founded on a free individual choice, on a cultural identity not strictly defined by the law. Even if the language of citizenship then became a restriction strategy against undesirable aliens, and «citizenship – in its construction as a barrier to territorial rights and, more generally, as a marker of the legitimacy of claims – has operated in American history as a gesture of refusal, exclusion, and rejection directed against immigrants»⁶, this notion was described more by an ethnic, racial and cultural identity opposed to ‘alienage’ than by a legal formal membership⁷.

In our historical and philosophical approach, we try to analyze these two experiences with the main focus on the rights of migrants, whose extension has been determined by both leaving and incoming countries legislations. Inclusion or exclusion strategies have been influenced by the opposite visions of the *jus migrandi* and have been shaped by the conflicting case laws of different State, National or Federal Courts. The U.S. two-faced policy was constantly on the brink of immigrationist or restrictionist approach which was supported by nativist issues as opposed to the economic appraisal of the business community⁸, whereas the European rules on emigration were turning from protectionism to liberalism to the creation of a system of welfare relief for citizens abroad. Of course, the historical course has not been a constant progress towards the protection of the migrants’ human rights, but the line has often been interrupted or withdrawn from guarantees to penalties, from welcoming to compulsory deportation. Wage struggles, religious conflicts, racial or political fears have always been the grounds for this ‘elastic’ legislation and the international movement towards equal treatment of human beings has proceeded by fits and starts. Its course is uncompleted yet, and the present European conflict between universalistic tendencies and nationalist claims has a precedent in the American history in the 1900s as a «laboratory of the globalism-localism»⁹.

After World War II the progress of human rights towards a full recognition both in state constitutions and in international treaties seemed to have achieved once and for all an un-

⁶ See K. M. PARKER, “State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts”, *Law and History Review*, 19, 3, 2001, pp. 583-643 (quotation p. 639).

⁷ As has recently been written, «American approaches to citizenship have long reflected a preoccupation with forms of discrimination that focus on race more than nationality» (E. F. COHEN, “Carved from the Inside Out”, in C. M. Swain (ed.), *Debating Immigration*, New York, Cambridge University Press, 2007, p. 40).

⁸ On this double ground of the U.S. immigration policy see A. R. ZOLBERG, “The Archaeology of ‘Remote Control’”, in A. Fahrmeir, O. Faron, P. Weil (ed.), *Migration Control in the North Atlantic World. The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period*, New York, Berghahn Books, 2003, pp. 195-222.

⁹ See N. URBINATI, “La lega e Carlo Marx”, *La Repubblica*, 04/24/08, p. 1.

negotiable and uncompressible standard. The fulfilment of human rights' theories into law looked like the definitive stage of a legal progress towards a system without any discrimination in the enjoyment of the fundamental rights of the individual. In the EU area the human rights legislation plays a crucial role, but at the same time the effort to create a new European identity has reinforced an exclusion process of migrants and a denial of their rights but at the same time the effort to create a new European identity has reinforced an exclusion process of migrants and a denial of their rights. New (or old?) political fears have once again moved the frontiers of the human rights back and EU citizenship risks to become the new strategy of legal discrimination.

It is now necessary to suggest new categories and new legal notions to further clarify the break-up between past and present as far as holding and enjoyment of human rights is concerned¹⁰. This way only will allow us not to waste juridical and political conquests from 1948 onwards and we will be able to avoid the new absolutism of political power – well-off western majorities – on a national and international level¹¹. The State borders, their management, the tension between right and sovereignty, the concepts of citizenship and alien are the routes of “old maps”, as Seyla Benhabib writes: we are travelling in a profoundly different world using old and inadequate means, if not counter-productive, which badly need revisited:

II. Right of citizenship, right to citizenship

II. 1. Citizenship and its new dimension ‘exclusively’ juridical. The European experience

Immigration finds it hard to get recognized as a “philosophical” question and remains at the borders of the new modern theories of justice, to start with a *A Theory of Justice* and *The Law of Peoples* by John Rawls¹². The action of immigration seems to send us back to issues which are typically economical and political, when operating, in reality, as a radical criticism of the modern philosophical and juridical notions. Among these, citizenship, as a category which is both

¹⁰ See E. BALIBAR, *Nous, citoyens d'Europe? Les frontières, l'Etat, le peuple*, Paris, La Découverte, 2001.

¹¹ For the notion of a “neo-absolutistic political approach” see G. AZZARITI, “Politica e processi”, *Giur. Cost.*, 1/2004, p. 843. See also M. BOVERO, “La libertà e i diritti di libertà”, in Id. (ed.), *Quale libertà*, Roma-Bari, Laterza, 2004; E. DOLCINI, “Leggi penali ad personam, riserva di legge e principio costituzionale d'eguaglianza”, *Rivista italiana di diritto processuale penale*, 2004, 1, pp. 50-70; A. CAPUTO, “Prime note sulle modifiche alle norme penali del testo unico sull'immigrazione”, *Questione Giustizia*, 2005, 2, pp. 245-263.

¹² S. BENHABIB, *Rights of Others. Aliens, Residents and Citizens*, Cambridge, Cambridge University Press, 2004.

juridical (relating to the ownership of rights) and philosophical-political (relating to allegiances) undergoes a process of reconsideration and repositioning as its present inclusive force raises serious doubts¹³.

Nowadays, the European Union operates on these themes as on a very interesting workshop for several reasons. Above all, the European experience might offer the opportunity to re-establish a new paradigm of citizenship, mostly anchored to the rights and gauged on the sole juridical dimension, relegating the issue of membership to other fields and limiting today's exclusive bearing of national citizenships. A kind of citizenship which is built on rights rather than on national-cultural traits might contribute to the realization of a greater inclusivity of all men and women who reside in Europe, attributing a superior value to the subjects' equal stay (durable or temporary) on a territory rather than to identities.

Taking this new citizenship project "seriously", migrants could become the juridical European reference community thanks to their being subjects who move across borders¹⁴. Indeed, the peculiarity of the European territory emerges from the specificity of the criteria used for its identification: the identification of European external borders is strictly linked to the crossing of its internal borders. It is the "free movement area", the right to freedom of movement within national borders that gives meanings and substance to the new "European legal area" and makes migrants into active subjects, an integral part (if not constitutive) of the integration process¹⁵. In that sense, the free movement area allows a reconsideration of the relationship between subjects, States and territory not in terms of sedentariness but of movement, redefining

¹³ For a more detailed discussion on recent debates, see among others, R. BAUBÖCK, *Transnational Citizenship: Membership and Rights in International Migration*, Aldershot-Brookfield, Edward Elgar, 1994; Id., (ed.), *From Aliens to Citizens: Redefining the Status of Immigrants in Europe*, Aldershot, Avebury, 1994; J. H. CARENS, "Aliens and Citizens: The Case for Open Borders", *Review of Politics*, 49, 1987, 2, pp. 251-273; A. GUTMANN, "The Challenge of Multiculturalism in Political Ethics", *Philosophy and Public Affairs*, 22, 1993, 3, pp. 171-204; D. HELD, *Political Theory and the Modern State*, Stanford, Stanford University Press, 1989; W. KYMLICKA, *Multicultural Citizenship*, Oxford, Oxford University Press, 1995; D. MILLER, "The Ethical Significance of Nationality", *Ethics*, 98, 1988, 4, pp. 647-662; I. M. YOUNG, *Justice and Politics of Difference*, Princeton, Princeton University Press, 1990; A. FAHRMEIR, *Citizenship. The Raise and Fall of a Modern Concept*, New Haven, Yale University Press, 2007, notably pp. 202-232; D. ZOLO (ed.), *La cittadinanza. Appartenenza, identità, diritti*, Laterza, Roma-Bari, 1994.

¹⁴ In this sense see also Francesca Rigo, who starting from a re-reading of some classics of the juridical philosophy (among others, Kelsen and Jellinek) redefines the relationship between citizenship-State-territoriality (F. RIGO, *Europa di confine*, Roma, Meltemi, 2007, pp. 95 ss).

¹⁵ Regarding the meaning of the expression "European legal area", Marc Augé writes that it is clear that the notion of frontier is involved here, but also that, if we make an abstraction from this notion of frontier, it is a hardly localized institutional and legal set; this would depend on the very meaning of the term "area" used instead of "place" which would be even more abstract and applicable indifferently to an extension, a distance between two objects or two points or temporal dimensions. M. AUGÉ, *Non Lieux*, Seuil, Paris, 1992.

citizenship starting from crossing borders – both internal and external – more than abiding them and centering it mainly on the protection that men and women who move, stay, change residence and work need rather than on the pretences of the few “permanent” individuals.

So, the European experience might offer a solution to the inclusion-exclusion dilemma which unavoidably binds citizenship and immigration. It is around this thorny question that the main tensions regarding modern liberal democracies polarize, starting from the conflictual relationship between rights and national sovereignty¹⁶.

The inclusion-exclusion dilemma, linked to the debate on citizenship, has so far been tackled adopting different perspectives, some based upon the theories of “domestic” justice and the right to the “territory” of native community¹⁷, others more in tune with the universalistic theories of global justice¹⁸. Nevertheless, many issues remain unraveled, possibly because, as Joseph H. Carens has it:

«talk about citizenship sometimes presupposes, as a background assumption, an idealized (and misleading) conception of the nation-state as an administratively centralized, culturally homogeneous form of political community in which citizenship is treated primarily as a legal status that is universal, equal, and democratic».¹⁹

But «this picture of citizenship is inadequate in many respects».²⁰

As a matter of fact, the typically juridical issues remain unsolved, and they often result in antinomies or gaps internal either to the national juridical systems or the relations between national systems and international laws. In particular there are two controversial juridical issues:

¹⁶ Seyla Behnabib underlines how, from a philosophical point of view, transnational migrations bring to the fore the constitutive dilemma which is at the heart of liberal democracies that is the one between the claims of sovereign right to self-determination and the adherence to the universal principles of human rights (see *Introduction* in BENHABIB, *The Rights of Others, Aliens, Residents, Citizens*).

¹⁷ On “domestic” distributive justice see M. WALZER, *Spheres of Justice: A Defense of Pluralism and Equality*, New York, Basic Books, 1983; on the relationship between justice and belonging see Y. TAMIR, *Liberal Nationalism*, Princeton, Princeton University Press, 1993 and D. MILLER, *On Nationality*, Oxford, Clarendon Press, 1995.

¹⁸ For a cosmopolitan approach see C. R. BEITZ, *Political Theory and International Relations*, Princeton University Press, Princeton, 1979; Id., “Cosmopolitan Ideals and National Sentiment”, *The Journal of Philosophy*, 80, 10, 1983, pp. 591-600; TH. W. POGGE (ed.), *Global Justice*, London, Blackwell, 2001. See also E. PARIOTTI, *La giustizia oltre lo Stato: forme e problemi*, Torino, Giappichelli, 2004; H. F. CHANG, “The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory”, *Cornell International Law Journal*, 41, 1, 2008, pp. 1-25.

¹⁹ On J. H. CARENS, *Culture, Citizenship and Community*, Oxford, Oxford University Press, 2000, p. 161.

²⁰ *Ibidem*.

first, the restrictive regulation to the entry of migrants into the receiving states make access to citizenship a lot more difficult – therefore to the status of citizens – producing that differentiation of subjects which is so strongly opposed to the principle of equality of human beings; second, the failure to recognize the right to immigrate thwarts the applicability and protection of the right to emigrate as already stated by the international law.

II. 2. Citizenship as Legal Sum of Discriminations

The condition of migrants has become the issue of historical, anthropological, sociological and juridical studies. Most of these studies focuses on the analysis of the migrants' condition of life in a given territory, of the processes of criminalization and marginalization they suffer as well as the regulation which governs the entry, stay, work, family reunion and expulsion of the migrants themselves. Even though we can find an incredible number of sociological analyses, the field of juridical studies about immigration involves specific subjects as private, criminal, procedural law together with some aspects of labor, international and constitutional law.

The philosophical-juridical approach, which settles, interprets, criticizes the law taking as its starting point the law itself, does not seem to take a particular interest into the migration phenomenon. Nor does it seem to take a particular interest in the debate on its juridical value and above all in the production of a legislation on this very topic. The philosophical-juridical analysis is absent from the latest debates, whereas the philosophical-political approach – mainly concerned with the theories of citizenship – is more widely adopted in Europe rather than in the US. As Elizabeth F. Cohen writes, only recently has the problem of defining a global approach to the theme of immigration been taken into consideration, as well as self-questioning on the reasons which lie at the basis of the modern national policies, and rationality and fairness of the various legislations²¹.

²¹ «Despite its lengthy history as an immigrant-receiving nation, the United States has as yet failed to produce a well-articulated public philosophy of immigration. Many European nations, most of which have been the recipient of large-scale immigration for less than half a century, seem as well or even better equipped than the United States to answer these questions through a coherent public philosophy of immigration» (COHEN, “Carved from the Inside Out”, pp. 32-45, at p. 32). See also M. J. PFEFFER, “The Underpinning of Immigration and the Limits of Immigration Policy”, *Cornell International Law Journal*, 41, 1, 2008, pp. 83-100.

Immigration, as a phenomenon to be regulated and *normalisé*²², seems to invest in particular the stability of democratic assets, welfare State (in Europe), labor market (in America), or else it refers, as was stated before, to the more general terms of justice (distributive²³, domestic²⁴, global²⁵). In both cases the attempt is at finding an ethical or theoretical ground to the existing western regulation concerning immigration, based on considerations and arguments at times “consequentialist” and at times “sufficientist”.²⁶

Immigration is often described as an exclusively political issue, with heavy economic repercussions, whereas law as a regulation tool, moves into the management of the whole process only in a second time once the political choice has been done. Therefore, the right of immigration is completely subjected to the existing political-economic logics, and has not so far been released from the so called tyranny of the political majorities neither on a national basis nor on a regional-international one.

The motivations for such a subjection can be found in the latent but permanent tension which still characterizes the relation between the regulation of human rights and the sovereignty of the States. The progressive internationalization of the protection of human rights has strongly eroded governmental sovereignty and the control of immigration seems to undermine one of the last taboos of sovereignty itself that is the “management of borders”, which was as much as other aspects of public and private life a government privilege – freedom of thought, *in primis* – in reference to which the State has seen its own power of intervention and control diminished.

The management of national (or regional) borders recalls the policies of access to citizenship, as, it appears that by allowing or not legal entry into a certain territory (by easing it or else by forbidding it) new possibilities are defined for migrants to acquire citizenship in the

²² So M. FOUCAULT, *Securité, territoire, population. Cours au Collège de France (1977-1978)*, Paris, Gallimard, 2004.

²³ WALZER, *Sphere of Justice*.

²⁴ D. MILLER, “Against Global Egalitarianism”, *The Journal of Ethics*, 9, 2005, pp. 55-79; Id., *Social Justice*, Oxford, Clarendon Press, 1976. S. MACEDO, “The Moral Dilemma of U. S. Immigration Policy. Open Borders Versus Social Justice?”, in C.M. SWAN (ed.), *Debating Immigration*, Cambridge, Cambridge University Press, pp. 63-81.

²⁵ T. W. POGGE, *World Poverty and Human Rights. Cosmopolitan Responsibilities and Reforms*, Cambridge, Polity Press, 2002; S. CANEY, *Justice Beyond Borders A Global Political Theory*, Oxford, O.U.P., 2005.

²⁶ For a review of the international debate on the themes of justice see I. TRUJILLO PEREZ, *Giustizia globale. Le nuove frontiere dell'eguaglianza*, Bologna, il Mulino, 2007. Specifically, we will deal with the consequentialist arguments later on; for the sufficientist theses see H. FRANKFURT, “Equality as a Moral Ideal”, *Ethics*, 98, 1987, pp. 21-43; C. R. BEITZ, “Does Global Inequality Matter?”, in T. W. POGGE (ed.), *Global Justice*, cit., pp. 106-122. On the doctrine of *prioritarism*, near the one on *sufficiency*, see Y. BENBAJI, “Sufficiency or Priority?”, *European Journal of Philosophy*, 14, 3, 2006, pp. 327-348; D. PARFIT, “Equality or Priority”, in M. CLAYTON, A. WILIAMS (eds.), *The Ideal of Equality*, London, MacMillan, 2000, pp. 81-125.

receiving states. The increasing number of migrants generally defined as “illegal” or “sans papiers” is due to the adoption of strongly restrictive policies concerning legal entry in the receiving states and, as a consequence, even in those countries where the acquisition of citizenship is relatively simple, as in the United States, access to the status of citizen has become increasingly more difficult because of the restrictions imposed to the legal means of entry.

There are few legal philosophers who have tried to redefine and reconfigure the status of person and citizen starting from the legal philosophy and legal theory, in the attempt to overcome the present discriminatory burden of national citizenship, in the light of the present international regulation concerning human rights²⁷

As the matter of fact, it is the juridical concept of citizenship which must be modified, as the context in which this category operates has changed as well as the effects it produces. If at the times of the French Revolution the very condition of being a citizen became the emblem for the abolition of inequality of rights and the declaration of the *égalité en droits*, today the opposite applies. The impossibility for migrants to be easily granted the so called worthy citizenships (i.e. western-europeans) determines their exclusion from the enjoyment of numerous human rights, together with their marginalization, stigmatization, criminalization.

The difference between what was legally admissible before the adoption of the international covenants of human rights and what is on the contrary legally admissible now, emerges even more clearly if we take into consideration the legal condition of migrants at the turn of the XX century and we compare it with today's. For instance we can think of the experience at Ellis Island, weighing it against the one at the Temporary Holding Centers (THC) which have been growing on the European shores over the last years. If the route through Ellis Island, which has now become the symbol of North American immigration could be considered a political and juridical lawful treatment, we certainly cannot maintain that in the same way the

²⁷ See in particular the thesis of the philosopher Luigi Ferrajoli on the need and the mandatoriness (deriving from the international legislation on human rights) of the overcoming of national citizenship so that to guarantee the equal protection of rights to all human beings. These theses are contained in his works “Dai diritti del cittadino ai diritti della persona”, in D. ZOLO (ed.), *La cittadinanza. Appartenenza, identità, diritti*, Roma-Bari, Laterza, 1994, pp. 263-292; *Diritti fondamentali. Un dibattito teorico*, Laterza, Roma-Bari, 2008; *Principia Juris*, voll. 1-2, Roma-Bari, Laterza, 2007. On the formulation of a new possible form of citizenship, the so called residence citizenship see also, for the Italian debate, from a philosophical and juridical point of view B. PASTORE, *Per un'ermeneutica dei diritti umani*, Torino, Giappichelli, 2003 and from a philosophical and political point of view G. E. RUSCONI, *Se cessassimo di essere una nazione. Tra etnodemocrazie regionali e cittadinanza europea*, Bologna, il Mulino, 1993, p. 174 e ss. The theses proposed by Ferrajoli are often charged with being a political and juridical utopia, and are relegated to the rank of mere humanitarian and pacifist aspirations and as such hardly realistic and not feasible.

THC along the coasts and access routes to Fortress Europe are juridically legitimate²⁸. They can be considered legitimate politically, if we stick to the pre-constitutional concept of politics, but they certainly cannot be considered legitimate juridically. Ellis Island was a New York island employed as mandatory stop for migrants into America: in those buildings migrants from the world over were checked, interrogated, detained, arrested, admitted to the American territory or expelled²⁹.

On the European coasts, migrants end up for various reasons in the THC were they are detained, checked, separated, and from which they are normally expelled³⁰. It is worth underlying that THC, according to the European inspection commissions, are often places where squalor and violence determine the conditions of life of whoever is a “guest” in these structures: the Association of Juridical Studies on Immigration, based in Italy, has defined them as “non-right places”³¹. As a matter of fact, after what Hannah Arendt wrote on internment camps³², it is difficult to pretend that these Centers are not a place of forced confinement, an «area of exception», an «area of difference within the same sovereign space», just because they have changed their name and have enclosed in “temporariness” the dimension of their exceptionality³³.

If we limit our research to the sociological data, to the mere observation of facts, we can claim that between Ellis Island and THC nothing has changed. On the contrary, what seems to be radically changed resides in the possibility of the persons detained in the THC to enjoy rights sanctioned by laws as opposed to the migrants at the beginning of the XX century who enjoyed none.

Certainly, we are talking about a legal difference, not a political one. The loathing for whoever is considered “alien” has deep and remote roots, and the political debate has drawn

²⁸ On the migrants’ living conditions inside the Italian Temporary Holding Centres see M. ROVELLI, *Lager italiani*, Milano, RCS, 2006 and Amnesty International, *Invisibili. Minori migranti detenuti all'arrivo in Italia*, Torino, EGA, 2006. The “Rapporto della Commissione del Ministero dell'Interno sui Centri per gli immigrati” is in *I diritti dell'uomo. Cronache e battaglie*, n. 1, 2007, pp. 97-114. See above “Introduction”, p. 2.

²⁹ About the individual health inspection undergone at Ellis Island by immigrants after their arrival in the United States, see, e.g., A. M. KRAUT, *Silent Travelers. Germs, Genes, and the “Immigrant Menace”*, Baltimore, The Johns Hopkins University Press, 1994, pp. 50-77. Further information on the link www.ellisland.org

³⁰ See the interesting essay written by Helmut Dietrich on the building of refugee camps for people seeking for political asylum in the new eastern European borders, where the refugees must respect an internal exile, “Campi profughi ai nuovi confini esterni. Come si allarga l'Europa”, in S. MEZZADRA (ed.), *I confini della libertà. Per un'analisi politica delle migrazioni contemporanee*, Roma, DeriveApprodi, 2004, pp. 109-121.

³¹ ASGI, GIURISTI DEMOCRATICI, *Per una riforma della normativa in tema di immigrazione*, <http://files.giuristidemocratici.it/Zfiles/20051219031710.pdf>.

³² H. ARENDT, *The Origins of Totalitarianism*, Orlando, A Harvest Book, Harcourt Brace & Company, 1976, p. 437.

³³ RIGO, *Europa di confine*, p. 206.

from this more or less latent feeling of refusal the “alien” – for culture, religion, color, language – to consolidate majorities, divert public opinion, gain consensus³⁴. Such a radical change has been produced not by politics, which by its own definition is subject to the changing moods of the majority, but by law which has sanctioned the break up between the two eras. When the international treaties and the national constitutions declared the differences of race, religion, sex and nationality as irrelevant, they also qualified the past regulations and experiences as unrepeatable and non admissible today. It appears that affirming that law and not politics have produced a radical change is as asserting a paradox: indeed, what is law without politics and without the work of a lawmaker who devises, draws up and ultimately issues laws?

Our aim is to emphasize the choice politics has made as compared to the past: when rigid constitutions were adopted, protection of human rights became an international issue. Politics chose to subdue its total decisional faculty to law and to those norms which have declared the sphere of primary and fundamental interests typical of all human rights as unbreakable. What pertains to the sphere of “undecidability” is nothing more than the field where politics has no power, if we except the implementation of protection and guarantee³⁵.

The difference between past immigration and present immigration lies in the “boosting” of human rights into internal and international legislations and in the different meaning which law attributes to the notion of citizen and of alien. Unfortunately, when talking about immigration, it seems that this break up never occurred. Past migrants as well as today’s suffer the same vexations, run the same risks, undergo the same hardships.

The identification of citizenship as last discrimination legally relevant suggests some reflections. The discriminatory force of the status of the citizen concerns not only persons but also citizenships themselves. On the basis of its ability to provide a major or minor standard of protection, it will be possible to qualify a citizenship as worthy or not. It is clear that nowadays “worthy” citizenship is the one offered by Western countries and the identification between rich countries and worthy citizenship nourishes the feeling of injustice which oppresses those who belong “by chance” to other nations. Is only the rich entitled to hold rights? Are rights tools in the hands of those who already enjoy a privileged position?³⁶ Citizenship also means retrieving

³⁴ A. SAYAD, “La doppia pena del migrante”, *Aut Aut*, 275, 1996, pp. 8-16; Id., *La double absence*, Paris, Seuil, 1999.

³⁵ FERRAJOLI, *Principia iuris*, vol. 2, pp. 44 ss.

³⁶ See S. ZIZEK, *Contro i diritti umani*, Milano, Il saggiatore, 2005.

those ancient forms of discrimination that right had already refused. Racial, cultural, sexual, political, religious and linguistic belonging up to a few decades ago was a lawful criterion for the different treatment of people. Subsequently, with the proclamation of human rights as unbreakable rights, starting with the Declaration of 1948 and their acknowledgement in national Constitutions, the legally recognized discriminations were slowly declared illegal because of their incompatibility with the principles sanctioned in the new international covenants and above all with the principle of the equality of people, despite their belonging.³⁷

This is the reason why citizenship appears as the last legal status determining discriminations. It is for its discriminatory character that citizenship seems to attract the old forms of discrimination, in an attempt to contain them, to give them a new collocation and a new recognition of a legal character. As a matter of fact, if the attribution of citizenship is strongly connotated in terms of cultural membership, it remains, even in an implied way, related to cultural, religious and linguistic belonging. Whoever is excluded from citizenship will necessarily be “different”, not only for nationality but also for culture, religion and language. These differences tend to join and gather round the idea of the “alien”, who in their turn become the bearers of all differences. «The racism has been an important element of immigration policy», writes Mark Tushnet.³⁸

It is true that never before has the importance of national identity as a value to be protected been claimed to this extent, indicating the respect of this national identity as the inalienable condition for the acquisition of a citizenship.³⁹ Thus the rhetoric on human rights has given way to the rhetoric on religious and cultural identity, on habits and traditions.⁴⁰ Our “own habits” have become, in the eyes of public opinion, “goods” worthy of political and legal acknowledgement and protection, even to the detriment of the right of others. Therefore, “our Christianity” (i.e. Italian) must be protected even by preventing the building of places of worship

³⁷ See the Universal Declaration of Human Rights (1948), art. 2: «Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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».

³⁸ M. TURSHNET, “Immigration policy in liberal political theory”, in W.F. Schwartz (ed.), *Justice in immigration*, Cambridge, Cambridge University Press, 1995, p. 147-157.

³⁹ On the problems linked with the revendication of identity (national, cultural and religious) see K.A. APPIAH, *The ethics of identity*, Oxford, Princeton University Press, 2005; A. GUTMANN, *Identity in democracy*, Oxford, Princeton University Press, 2003; A. SEN, *Identity and Violence*, London, Penguin, 2006;

⁴⁰ Race, ethnic belonging, religion, nationality, language are used by numerous states as criteria for the determination of the access to a territory. for a criticism on the adoption of these criteria and their legitimacy see J.H. CARENS, “Immigration, welfare, and justice”, in W.F. SCHWARTZ (ed.), *Justice in immigration*, p. 5.

for the Muslims, or by imposing the crucifix in school rooms, in the same way as our “laity” (i.e. French) must be defended by not wearing religious symbols.

National governments, in conformity with the dominant public opinion, issue laws which are totally detrimental of human rights towards those subjects who, as migrants, already find themselves in difficult conditions, would more strongly need guarantees for their rights, and would end up worsening their situation of marginalization and subjugation⁴¹. As we are reluctant to admit that this different treatment is based on mean and less than dignified feelings, we do not establish that these discriminations apply to blacks, Asians, Muslims, Rumanian, on the contrary we prefer to affirm that discrimination is based on a juridical principle, that of citizenship.⁴² The final result will necessarily be the same: those people will be necessarily be discriminated. It becomes necessarily true that citizenship also works as discriminating factor on a cultural, ethnic and linguistic basis revealing that the defense of national identity is nothing more that the disguise of a racist feeling attempting to obtain a juridical recognition as well as political⁴³.

Now, when this relationship between right and belonging exists, so that the allocation of rights depends on belonging to a given political community (i.e. citizenship) then the rights depend on membership⁴⁴. Would it be possible to overturn this relation? Rather should not the obligation of building this relation of dependence between right and belonging exist yet, so that the former prevail on the latter? As has already been stated in international law rights are attributed to single persons apart from their national belonging. National belonging, that is, cannot determine the enjoyment of rights any more. It is established by law the obligation to separate rights from identities. This implies that being a person must prevail on being a citizen. It cannot be denied that nowadays the opposite applies. Being a citizen prevails on being a person,

⁴¹ On this topic, see E. SANTORO, “La fine della biopolitica e il controllo delle migrazioni: il carcere strumento della dittatura democratica della classe soddisfatta”, in P. CUTITTA, F. VASSALLO PALEOLOGO (eds.), *Migrazioni, frontiere, diritti*, Napoli, Edizioni Scientifiche Italiane, 2006, pp. 293-321, in particular at pp. 313-314.

⁴² Paradigmatic is the case of the taking of fingerprints of Roma children ruled through some injunctions of the Italian Prime Minister (Ordinanze n. 3676 for Lazio, n. 3677 for Lombardia and n. 3678 for Campania, *Gazzetta Ufficiale della Repubblica italiana* n. 127, 31.05.2008). Concerning these injunctions the European Parliament, some European Commissioners, UNICEF, the Secretary of the Council of Europe and the Commissioner for the human rights of the Council of Europe have condemned these acts and denounced the racist inspiration which derives from them. See the proposal of resolution of the European Parliament in <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B6-2008-0348+0+DOC+XML+V0//EN>

⁴³ On the contrary, see above (pp. 9 ss), the explicit reference to the race and the cultural identity as a sufficient reason to exclude some persons to the American citizenship.

⁴⁴ On the relationships between racism and nationalism see E. BALIBAR, I. WALLERSTEIN, *Race, nation classe. Les identités ambiguës*, La Découverte, Paris, 1988 and V. SCALIA, *Migranti, devianti, cittadini. Uno studio sui processi di esclusione*, Milano, FrancoAngeli, 2005, pp. 50 ss.

as individual rights depend on their citizenship, as if the order of the words in the Declaration of 1789 had been subverted: the *Déclaration des droits de l'homme et du citoyen* has now become the *Déclaraton de droits du citoyen e de l'homme*. So, it is necessary to reaffirm the supremacy of the human being on the citizen, in obedience with the idea of 1789 and the international legal obligation which has sprung from it. In reaffirming the supremacy of the human being upon the citizen we will not even need to untie the Gordian knot of the conflict between right and belonging which characterizes citizenship, as national belonging will not be relevant in order to enjoy the rights.

Emphasizing the condition of the “person” would determine a sort of new belonging, which, by the way, would coincide with the most ancient and perceptible belonging: to be a human being. This concept, as a criterion for the attribution of rights, would allow us to eliminate the rule that has always been a part of the discourse on citizenship and draws on the strong link which medieval culture found between subject and organized social group⁴⁵: this is the rule that has always determined the “inside” or “outside”, the “us” and “them”, the “similar” and “different”. On the other hand, as Luigi Ferrajoli reminds us:

«uguaglianza e garanzia dei diritti non sono soltanto condizioni necessarie, ma sono la sola cosa che si richiede alla formazione di identità collettive che si vogliono fondate sul valore della tolleranza anziché sulle reciproche esclusioni generate dalle identità etniche o nazionali, o religiose o linguistiche»⁴⁶.

So, we should redefine the legal concept of “citizen” and, as a consequence, we should redefine the legal concept of “alien”. If it is politically possible to maintain that there are diverse cultural and national belongings from which the acknowledgement of the persons as belonging or not to one political community (thus as citizens or foreigners), it is not legally plausible nor is it conceivable to maintain the existence of the “alien before the rights”.

⁴⁵ P. COSTA, *Civitas. Storia della cittadinanza in Europa*. vol. 1. *Dalla civiltà comunale al Settecento*, Roma-Bari, Laterza, 1999, p. XX.

⁴⁶ FERRAJOLI, *Diritti fondamentali*, p 156.

II. 3. No one is illegal: no one is alien

Subjects “wear” their frontier.⁴⁷ In the era of diffuse mobility human beings move, travel taking their frontier with them: migrants, even though residing in a given European or American territory, maintain the original citizenship, taking their difference with them, a sort of difference-exclusion in the enjoyment of rights⁴⁸. Paradoxically, people travel but they are not followed by their rights: rights stop at borders, not state borders, but legal ones. These legal borders are defined by national belongings, by citizenships⁴⁹. The juridical notion of alien is not legally as clear as it can intuitively be in terms of belonging or not to a given political and cultural community. As far as Europe is concerned the notion of alien has become even more complex with the invention of the European citizenship, since at first the difference was between EU citizens and extra EU citizens, avoiding a uniform regulation for the status of EU citizens, as there are different regulations if we talk of citizens from countries of the “old” Europe or countries only recently admitted to the Union, or else from countries about to enter the Union.⁵⁰ For the time being, several different forms of citizenship can be distinguished and, correlatively, several forms of strangeness.⁵¹ Similarly, in the United States, the American Bill of Rights does not reflect an identifiable theory of the rights of aliens: as we explain afterwards, resident aliens constitutional status has thus been judicially constructed.⁵²

Although the idea of alien as a legal category has met with great fortune over the last years thanks to its recovery in both political and legal language, it seems worth to consider its legitimacy, especially if we think that with transnational acknowledgement of human rights the

⁴⁷ See F. VASSALLO PALEOLOGO, “Frontiere interne, cittadinanza negata ed esclusione degli immigrati” and DAL LAGO “Fronti e frontiere. Note sulla militarizzazione della contiguità”, in P. CUTITTA, F. VASSALLO PALEOLOGO (eds.), *Migrazioni, frontiere, diritti*, Napoli, Edizioni Scientifiche Italiane, 2006, pp. 217-244 and pp. 201-213.

⁴⁸ The “difference-exclusion” notion is used by Letizia Gianformaggio, as opponent to two different notions of difference: “difference-merit” and “difference-peculiarity”; see L. GIANFORMAGGIO, *Eguaglianza, donne e diritto*, (ed. by A. Facchi, C. Faralli, T. Pitch), Bologna, il Mulino, 2005, pp. 52 ss.

⁴⁹ See S. MEZZADRA, *Diritto di fuga. Migrazioni, cittadinanza, globalizzazione*, Verona, Ombre corte, 2006, pp. 57 ss.

⁵⁰ Many problems have arisen after the entry of Romania in the European Union: some states have adopted transient regimes ad hoc for the entry of neo-community citizens. See Italian administrative regulation: Circolare amministrativa congiunta, 28 dicembre 2006, Ministero dell'Interno e Ministero della solidarietà sociale.

⁵¹ On the different statuses the European legislations have instituted on the theme of immigration (aliens, workers, citizens, humans) see the analysis of S. PERES, “Aliens, Workers, Citizens or Humans? Models for Community Immigration Law”, in E. GUILD, C. HARLOW (eds.), *Implementing Amsterdam. Immigration and Asylum Rights in EC Law*, Oxford, Hart Publishing, 2002, pp. 291-308.

⁵² R. RUBIO-MARIN, *Immigration as a Democratic Challenge. Citizenship and Inclusion in Germany and the United States*, Cambridge, Cambridge University Press, 2000, p. 131; see G. L. NEUMAN, “Immigration and Judicial Review in the Federal Republic of Germany”, *Journal of International Law and Politics*, 23, 1, 1990, pp. 35-86.

traditional concept of alien has still further changed. Now, related to fundamental human rights, there is no relation of belonging or non-belonging to a legal system. Indeed there is a group of international regulations which recognizes all human beings as holders of rights and in relation to these regulations it is not possible to discriminate between subjects holding different rights.⁵³ We are all human beings, we all hold the same rights, no one is excluded, no one is an alien in relation to international law⁵⁴. Thus we cannot be “aliens before the rights”.

As a further consequence the same juridical notion of alien should cease to exist. We become aliens only in relation to a citizenship different from ours but we cannot be aliens to mankind: if enjoying rights is separated from citizenship, it becomes devoid as a productive category for the attribution of fundamental legal situations. Otherwise, we will constantly find the same tension towards differentiation-exclusion which is still recognizable in present national legislations on immigration.

The radical change of paradigm introduced by the internationalization of the fundamental rights has already had some meaningful consequence in the definition of citizenship in the European and Americans contexts. The European citizenship, the status of complementary and additional citizen which the citizens of member states are entitled to, is one based not on belonging but on its juridical definition, as these European cultural, political and religious identities are too different, to the extent that a European identity does not share the same principles. Yet one cannot maintain that this type of citizenship is less pregnant and meaningful than national ones – above in perspective – given the growing relevance of the European juridical system and above all seen the role that human rights play in its legitimization and foundation (thanks to the European Convention and Charter of Nice)⁵⁵. On the other hand, the American citizenship itself springs not from a given identity, but from residing within a certain

⁵³ We must underline, after all, that both in Europe and in the United States many fundamental rights are already recognized to all human beings, regardless their citizenship. See RUBIO-MARIN, *Immigration as a Democratic Challenge*, p. 132.

⁵⁴ On the notion of the human rights “without borders” as they mark the separation of rights from the past when no other territory than that of the States was recognized and because the intrinsic boundlessness of their content and their task, as they want to symbolize and preside a sort of untouchable essence of human beings, see M. R. FERRARESE, *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale*, Roma-Bari, Laterza, 2006 pp. 103 ss.

⁵⁵ The European citizenship has an “ancillary” character, as a complement of the member State citizenship; but some rights of the EU citizen are allowed to «Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State» (art. 194 EC); see M. CONDINANZI, A. LANG, B. NASCIBENE, *Cittadinanza dell'Unione e libera circolazione delle persone*, Milano, Giuffrè, 2006, pp. 6 ss.

territory, and only in a second time has the steady closing of frontiers begun, upheld by the will to build a sense of belonging to the American nation based on race, language and religion.

The design of ideals and forms of European citizenship, in order to avoid the same path of growing exclusion which the American experience has produced, can become an instrument for the experimentation of new types of “belonging in rights” capable of including, rather than excluding, each and every person who resides, even on a temporary basis, on the European territory.

II. 4. A ‘Silent’ Law: the Condition of Migrants in the United States in the XIX Century

In our analysis of the American changes in migrant rights history since the XIX century, the decisions of the Courts represent a remarkable point of view. The courts’ ruling on immigration leading cases is like a lens which, on the one hand, allows us to recognize the balancing between the individual rights and the public interests, and, on the other, shows the distance between central or federal Courts and state legislation. In American history, as well as in present EU experience, it is possible to affirm as a matter of principle that while state immigration laws have been oriented towards restrictive policies and discriminatory rules of aliens admission, High Courts decisions have paid little more attention to migrants’ rights⁵⁶.

During the XIX century in the United States the first problem was to affirm the exclusive power of the Congress in regulating immigration, forbidding each State to pass different laws. At the beginning it was resolved as an economic matter concerning with the constitutional commerce clause: in *Gibbons v. Ogden* (1824), in the course of invalidating the New York steamboat monopoly, the power of Congress to regulate commerce was extended to navigation carried on by vessels exclusively employed in transporting passengers. Then some States started to promulgate acts concerning foreigner passengers coming to their ports: the Legislature of the New York State required the master, within twenty-four hours after the arrival of the vessel in the port of NY after a transatlantic journey, to make a report in writing to the mayor or recorder of the name, place of birth, and last legal settlement, age, occupation of every landed person. In *Mayor of New York v. Miln* (1837) the Court upheld this power of the state which was excepted by the commerce clause and was «clearly embraced within the general power of the states to

⁵⁶ On the “immigration anomaly” in the history of the American legislation «where normal constitutional reasoning does not necessarily apply», see G. L. NEUMAN, *Strangers to the Constitution. Immigrants, Borders, and Fundamental Law*, Princeton, Princeton University Press, 1996 (quotation p. 13).

regulate their own internal police and to take care that no detriment come to the commonwealth», so that was considered «as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported or from a ship the crew of which may be laboring under an infectious disease»⁵⁷. Passengers were completely associated to goods in bulk and the right of the importer, secured by the Constitution and the acts of Congress, was regarded as subjected to the restraints and limitations of the police laws of a state, and was submitted to inspection, health and quarantine laws⁵⁸.

In the *Passenger Cases* (1849) the Court expressed a different opinion and declared that the statutes of the states of New York and Massachusetts imposing taxes upon alien passengers arriving in the ports were unconstitutional and therefore null and void. After these decisions the State of New York enacted a law that required the master of every ship or vessel arriving at the port of the city, besides recording the data about all passengers, also to give a bond for every passengers landed to indemnify the commissioners of emigration and every county, city and town in the State against any expense for the relief or support of the person named in the bond for four years thereafter; but the owner could commute for such bond by paying, within twenty-four hours after the landing of the passengers, the sum of \$ 1,50 for each one of them. In *Henderson v. Mayor of New York* (1875) this act was still considered as an imposition of a tax upon immigrants and so unconstitutional because in violation of the Constitution art. 1 sect. 8 and sect. 10 subd. 2. But beyond the conflict between federal or state competence, in this case the Court recognized that immigration had become a social problem which could not be solved only with commercial rules: «it has become a part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come among us to find a welcome and a home within our borders. In addition to the wealth which some of them bring, they bring still more largely the labor which we need to till our soil, build our railroads, and develop the latent resources of the country in its minerals, its manufactures, and its agriculture. Is the regulation of this great system a regulation of commerce?»⁵⁹.

⁵⁷ 36 U.S. 102 at 142-143 (1837).

⁵⁸ On the image of emigrants as ‘article of commerce’ see M. S. BILDER, “The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce”, *Missouri Law Review*, 61, 4, 1996, pp. 743-824.

⁵⁹ 92 U.S. 259, 270.

The magnitude and importance of immigration increased the necessity for a specific regulation and aroused restrictionist movements invoking immigration laws by the Congress: the core of the matter was to find a common strategy to satisfy both the federal commerce regulation and the states police activity. In fact the Court had never denied the police power of the States for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases. Migrants could lawfully be damaged by this kind of acts on condition that the commerce clause was not violated: the problem of the rights of the migrants did not exist yet, and, 'in the silence of the law', they could be discriminated or excluded by police measures against poverty, crime and disease. As Neuman has written «the nineteenth-century search for the mysterious line between the exercise of the police power and the regulation of commerce left indeterminate room for state control of immigration»⁶⁰: so in this «complex hybrid of state and federal policy»⁶¹ the Court did not offer real guarantees to new comers, but only excluded head taxes on immigrants or avoided prohibition not well-founded on rightful police statute.

II. 5 Designing American Citizenship and the Rights of Migrants: the Courts' Leading Cases

In the 1840s and early 1850s the anti-immigrant movements coalesced in the American or Know-Nothing party, whose aim was to tighten the naturalization laws which required any free white person over the age of twenty-one to reside for at least five years in the U.S. to be naturalized and barring the foreign-born from holding any local offices⁶². This party, supported on economics and religious grounds, made a common sentiment of fear or anger against aliens explicit, and invoked on legislative reforms to protect the Americans. Even if the Know-Nothings did not reach their political purpose, they obtained important outcomes in some state legislations and raised the political debate between supporters of nativist ideals and advocates of free immigration, inspired both by the myth of America as a land of asylum for the poor of Europe where ethnic integration was possible and by the economic needs of foreign-born

⁶⁰ See G. L. NEUMAN, "The Lost Century of American Immigration Law (1776-1875)", *Columbia Law Review*, 93, 8, 1993, pp. 1885-1901 (quotation p. 1893).

⁶¹ See *id.* p. 1896.

⁶² See M. F. HOLT, "The Politics of Impatience: The Origins of Know-Nothingism", *Journal of American History*, 60, 2, 1973, pp. 309-331 and L. D. SZUCS, *They Became Americans: Finding Naturalization Records and Ethnic Origins*, Salt Lake City, Ancestry Inc., 1998, pp. 22-48.

labour⁶³. In 1868 Congress changed the Constitution and the naturalization statute with the ratification of the XIV Amendment, which for the first time established a uniform national citizenship granting that «All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws». Just thanks to this rule the Court introduced other arguments to avoid State acts discriminating or excluding foreign-born persons: in the unending judicial conflicts about the exclusive federal power on immigration, and after the enactment of the first Immigration Act in the 1880s, the Court played an important role to contrast (or rather to hinder) the pressure for a closure of the national borders and to design the shape of American citizenship in a continuing floating population.

In fact, after the Immigration Act of 1875 which barred prostitutes and criminals, in 1882 Congress passed both the Chinese Exclusion Act which made Chinese labourers inadmissible and the first general Immigration Law, which introduced a head tax of 50 cents on each passengers who was not a citizen of the U.S. and provided that foreign convicts (except those convicted of political offences), lunatics, idiots, and persons likely to become public charges should not be permitted to land. In 1885 with the Contract Labor Act the contract labour admissions were prohibited and, with another Act the Chinese exclusions were extended; the Immigration Act of 1891 created a federal immigration bureaucracy, and authorized the deportation of illegal aliens at the expense of the transportation company or of the persons bringing such aliens into the country (any alien becoming a public charge within one year after arrival was considered to have come in violation of law too). The Act of 1903 barred also polygamists and anarchists and strengthened the provisions of the Contract Labor Act, by dropping the word “contract” and inserting in its place the words “offer, solicitation, promise”,

⁶³ See, e.g., J. H. ST. JOHN DE CREVECOEUR, *Letters from an American farmer* (1782), *Letter III*: «He is an American, who leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds. He becomes an American by being received in the broad lap of our great *Alma Mater*». On the early immigration policy see R. TOTTEN, “National Security and U.S. Immigration Policy, 1776–1790”, *Journal of Interdisciplinary History*, XXXIX, 1, 2008, pp. 37–64: «The evidence indicates that, in an effort to find ways to protect the nation, America’s early leaders looked to immigrant manpower as a possible resource to generate the wealth needed to establish the military in case of war and to occupy and protect the land, especially the frontier» (p. 46).

and by affording that any alien rejected contract labourer could be detained, if such detention was necessary to be used as a witness in behalf of the Government in any suit against the contractor inducing his unlawful immigration to the United State. Further, extended from one to three years the time within which an alien who had become a public charge could be deported⁶⁴ and set out the punishment of the owners of vessel who took on shipboard diseased persons, imposing a more careful examination at the port of embarkation⁶⁵.

All these Acts were the outcome of a rising anti-immigration movement, excited both by periods of economic depression or wage struggles and by growing racial arguments⁶⁶. The most influential group was the Immigration Restriction League (IRL), whose chief political spokesman Henry Cabot Lodge, delegate of Massachusetts in Congress from 1887 to 1924, became the most obstinate supporter of the literacy test and of the quota system⁶⁷. In this changing climate against foreigners, in *Fong Yue Ting v. United States* (1893), the Court resolutely affirmed the absolute competence of Congress in expelling or deporting any aliens whenever in its judgment their removal was «necessary or expedient for the public interest»⁶⁸: the power to exclude aliens and to expel them, «rest upon one foundation, are derived from one source, are supported by the same reasons, and are, in truth, but parts of one and the same power», that was the power of Congress. It had to be exercised entirely through executive officers or with the aid of a judge who was to ascertain any contested facts on which depended an alien's right to be in the country. So Congress, «having the right, as it may see fit, to expel

⁶⁴ This provision, confirmed in another Act of Congress in 1907 with reference to the importation into the U.S. of any alien woman or girl for the purpose of prostitution or for any other immoral purpose, was applied by the Court in *Keller v. United States*, 213 U.S. 138 (1909).

⁶⁵ See C. C. FOSTER, "The Development of the United States Immigration Law Selection System and the Immigration Bar", *Houston Journal of International Law*, 5, 2, 1983, pp. 193-202 and R. DANIELS, *Guarding the Golden Door. American Immigration Policy and Immigrants Since 1882*, New York, Hill and Wang, 2004, pp. 3-26. As a result of the 1886 Contract Labor Law started the U.S. officials' efforts to extend the border control directly into European ports, with the aim to restrict the undesirable migrants in the countries of origin and to diminish the cost of rejection at the U.S. border; about this see D. SCHNEIDER, *The United States Government and the Investigation of European Emigration in the Opened Door Era*, in N. L. Green and F. Weil (eds.), *Citizenship and Those Who Leave. The Politics of Emigration and Expatriation*, Urbana and Chicago, University of Illinois Press, 2007, pp. 195-210.

⁶⁶ For a critical description of the escalation in restrictive laws, see E. ABBOTT, "Federal Immigration Policies, 1864-1924, II", *The University Journal of Business*, 2, 3, 1924, pp. 347-367. See also K. CALAVITA, *U.S. Immigration Law and the Control of Labor: 1820-1924*, London etc, Academic Press, 1984, pp. 51-71, and A. M. KRAUT, *The Huddled Masses. The Immigrant in American Society, 1880-1921*, 2nd ed., Wheeling, Harlan Davidson, 2001, pp. 173-213.

⁶⁷ About the political activity of the IRL, see D. J. TICHENOR, *Dividing lines: the politics of immigration control in America*, Princeton, Princeton University Press, 2002, pp. 114-146.

⁶⁸ 149 U.S. 698, 724.

aliens of a particular class or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides»⁶⁹. This case, in spite of the dissenting opinion of Justice Brewer who criticized the constitutional power of the Congress to remove resident aliens and to deprive them of their liberty without a due process of law⁷⁰, asserted that immigrants had no rights under Constitution against the federal power to forbid aliens or classes of aliens from coming within national borders and expel aliens or classes of aliens from United States.

But three years later, this unlimited supremacy of Congress over immigrants was tempered by a decision of the Supreme Court (*Wong Wing v. United States*) which distinguished the legal provisions of a law which contemplated only the exclusion or expulsion of Chinese persons and of those laws which provided for their imprisonment at hard labour: as far as the last ones were concerned, it was not a problem of restraint of the Congress competence about aliens, but a problem of constitutional right to be accused in a legal judicial trial to prove the guilt. Everyone, migrants included, could not be punished without a due process of law: «No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation unless provision were made that the fact of guilt should first be established by a judicial trial»⁷¹.

In *Yick Wo v. Hopkins* (1886) and in *Traux v. Raich* (1915), the Court avoided statutory provisions discriminating aliens because they were in contrast with the XIV Amendment. The constitutional rights must be granted to “any persons” within the jurisdiction of the United States, included aliens: the due process of law and the equal protection, said the court, «are universal in their application to all persons within the territorial jurisdiction, without regard to

⁶⁹ See id. 713 and 714.

⁷⁰ See id. 746; about this, see L. DINNERSTEIN, “The Supreme Court and the Rights of Aliens”, *This Constitution*, 8 (Fall 1985), pp. 24-35, and R. J. VECOLI, *Immigration, Naturalization and the Constitution*, Etudes Migrations, 1987, 85, pp. 82-83.

⁷¹ 163 U.S. 228, 237. On this case, see also L. P. MCGEHEE, *Due Process of Law Under the Federal Constitution*, Northport, New York, 1906, pp. 192-193.

any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws»⁷². So the statutory police power, «does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood»⁷³, neither gives the State the authority to discriminate aliens denying them the right to look for a good employment, because this «is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure»⁷⁴. It was evident in the argument of the Court the risk to betray the spirit of the amendment, because the immigrants lawfully admitted to the country under the authority of the acts of Congress «instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality»⁷⁵.

Notwithstanding these minimal protections accorded by the Court to migrants, the federal sovereignty on restriction strategies still persisted and resulted in the Immigration Acts of 1917 and 1924, with the adoption of the literacy test and of the quota system.

II. 6. The Creation of a National Identity: Biological Determinism, Literacy Test and Quota System

At the beginning of the XX century the anti-immigration movement, in both its political and cultural approaches, stirred the idea of the American national identity as the basis for alien discrimination. The “new” problem was the creation of a pure American race to set against the diversity of people coming from foreign nations: it was necessary to distinguish the old immigrants from the new comers, because the formers were the founding fathers, the others the undesirable aliens. The criterion to select migrants became the perfect correspondence to the “Good Americanism”, early presented not as a racial matter but as an individual choice, but then used to exclude specific types of immigrants. As Theodor Roosevelt said in his Presidential Message to Congress on December 6, 1904, «Good Americanism is a matter of heart, of conscience, of lofty aspiration, of sound common sense, but not of birthplace or of creed. (...) There is no danger of having too many immigrants of the right kind. (...) But the citizenship of

⁷² *Yick Wo v. Hopkins*, 118 U.S. 356, 369.

⁷³ *Traux v. Raich*, 239 U.S. 33, 41.

⁷⁴ *Id.* 41.

⁷⁵ *Id.* 42.

this country should not be debased. (...), and therefore we should not admit masses of men whose standard of living and whose personal customs and habits are such that they tend to lower the level of the American wage-worker, and above all we should not admit any man of an unworthy type, any man concerning whom we can say that he will himself be a bad citizen»⁷⁶.

The conviction of finding the solution of immigration problems in a selective method, to choose the individual quality of individual men, met with a cultural nationalism, based on the respect for the old American tradition and for the Anglo-Saxon race myth, with the growing faith in biological determinism. The national character was ‘naturalized’ and transformed in a physical type: under the influence of Darwinism, the battle for the survival of the Anglo-Saxon American race became a biological struggle, and the common anti-immigrant feeling against aliens found a scientific basis in the anthropological theories⁷⁷. European immigrants were classified into three race lines, conformed not to national groups but to physical characters: the Nordics of northern Europe corresponding to the old immigration, the Alpines of central Europe and the Mediterraneans of the southern countries corresponding to the new ones. So eugenic implications in Progressive Era modified also the immigration policy, with the aim to avoid a ‘race suicide’ keeping out Italians, Poles, Turks etc: economists and scientists asserted that the racial superior stock (the ‘natives’) was being outbred by a more prolific, but racially inferior stock (immigrants)⁷⁸. The industrial capitalism with a higher living standards tended to promote the survival of the unfit and the consequent gradual elimination of the fit, fiddling with the Darwinian rules of the struggle for life. The eugenic solution implied «the substitution of state selection for natural selection of the fittest», barring the degenerated immigrants, setting a minimum-wage and a ‘low-wage race’⁷⁹.

⁷⁶ *A Compilation of the Messages and Papers of the Presidents*, by J. D. Richardson, New York, Bureau of National Literature, vol. XVI [continuation of XV], n.d., pp. 6915-6916.

⁷⁷ About the influence of biological determinism on immigration policy, see J. HIGHAM, “American Immigration Policy in Historical Perspective”, *Law and Contemporary Problems*, 21, 2, 1956, pp. 213-235 (spec. pp. 223-226) and ID., *Strangers in the Land. Patterns of American Nativism, 1860-1925*, pp. 149-157. In corroboration of the anti-immigration climate, in the Dillingham Commission Reports, there is a *Dictionary of Races or Peoples* (Serial set no. 5867, Senate document 662, session 61-3, session-date: 1910, 1911, vol. no. 5).

⁷⁸ The “race suicide” is expounded, e.g., by E.A. ROSS, *The Old World in the New. The Significance of Past and Present Immigration to the American People*, New York, The Century Co., 1914, pp. 299-304.

⁷⁹ See T. C. LEONARD, “Eugenics and Economics in the Progressive Era”, *Journal of Economic Perspectives*, 19, 4, 2005, pp. 207-224.

Criminal anthropology, mostly imported by the Italian Positive School of Enrico Ferri, and the ‘Lombrosian myth’, contributed to bring forth prejudice against immigrants⁸⁰. The immigrant was a pauper and therefore one of the principal cause of the increase of criminality: he was seen as a ‘indigestible’ food for the American stomach. Congress was invoked to enforce a discrimination in the admission criteria and to restrict naturalization laws; the legal literature also spread the coincidence between immigrant and criminal, asserting «the right and duty of the nation to preserve itself and protect itself from injury, in whatever way this danger may threaten it».⁸¹ The popular sentiment against immigrants was echoed by simplistic analyses on the growth of foreign born convicts made by prison officials or by the Commissioner-General of Immigration, who emphasizing the alarming increase of the number of lawless, illiterate and defective alien criminals, recommended as a remedy «the exclusion of this undesirable class of immigrants»⁸². Although the true statistical records showed a completely different situation, attesting that «the wave of criminality coincided with the lowest ebb of immigration while the high tide of immigration was contemporaneous with a decrease of crime»⁸³ and that «the immigrants are less prone to commit crime than are native Americans»⁸⁴, on the contrary the common opinion associated the urban criminality with the rise in arrivals.

The new proposal of the restrictionist supporters was to enforce the expulsion of the aliens, because the exclusion-barriers were not enough: «Expulsion offers an alternative to

⁸⁰ About the influences of Lombrosian and Italian Positive School theories on American criminal system, see C. PETIT, “Lombroso en Chicago. Presencias europeas en la Modern Criminal Science Americana”, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 36, II, 2007, pp. 801-900, and M. PIFFERI, *Exporting Criminology: the Individualization of Punishment in Europe and America*, in L. Beck Varela, P. Gutiérrez Vega, A. Spinosa (eds.), *Crossing Legal Cultures, Yearbook of Young Legal History/Jahrbuch Junge Rechtsgeschichte*, 3, Munich, Martin Meidenbauer, [forthcoming], pp. 439-457.

⁸¹ H. M. BOIES, *Prisoners and Paupers. A Study of the Abnormal Increase of Criminals, and the Public Burden of Pauperism in the United States; the Causes and Remedies*, New York, G.P. Putnam’s Sons, 1893, p. 49.

⁸² So the superintendent of the state prison of the state of New York in his report for the year 1909 (p. 12), quoted in I. A. HOURWICH, “Immigration and crime”, *The American Journal of Sociology*, 17, 4, 1912, p. 478.

⁸³ Id. pp. 479, 485. See also H. H. HASTINGS, “Immigration and Crime”, *The American Journal of Sociology*, 2, 3, 1896, pp. 369-377.

⁸⁴ *Reports of the United States Immigration Commission (1907-1910)* vol. 36, *Immigration and Crime*, (S. Doc. No. 750, 61st Cong., 3d sess.), Washington, D.C., USA, Government Printing Office, 1911, chapter I, *Introduction*, p. 1. The Dillingham Commission in its investigation recognized that «from the data gathered it is evident that immigration has had a marked effect upon the nature of the crimes committed in the United States» (p. 2), as an increase in the commission of offences of personal violence (abduction, kidnapping, assault, homicide, rape) and of offences against public policy (drunkenness, vagrancy, violation of corporation ordinances), whether the offences of pecuniary gain were committed in most cases by Americans. Trying to trace the character of crimes to racial traits and to the immigration from specific countries, the Commission associated the offences of personal violence to south Europeans and observed that Italians specially committed homicide, abduction and kidnapping, even if the data showed that «the native (or American born) exhibited in general a tendency to commit more serious crimes than did the immigrant» (p. 5).

exclusion. It is an alternative, I would suggest, more effective, more workable, and less costly»⁸⁵. There were also dissenting opinions. The anthropologist Franz Boas, e.g., measured the head forms of second generation immigrants, and concluded that the American environment seemed to be having a positive influence on immigrants and their children, rather than affecting the “pure race” negatively; his analysis was the scientific proof of the rapid assimilation of all European strains to a common ‘American type’ with an uniform ‘American face’⁸⁶. But, even though the Franz Boas’ physiological and craniometric studies had demonstrated that immigrants were not a peril for the pure American race, the scientific and legal arguments walked hand in hand towards a denial of the rights of migrants. «No political scientist nowadays believes in the doctrine of natural rights»⁸⁷: this was the ‘breakthrough’ of the legal theories at the beginning of the century; the problems of immigration were not regulated by the idea that every restriction was *a priori* forbidden. It was a lawful right of the Nation to discriminate between the desirable comers and the undesirable ones, and the options introduced were the educational or literacy test and the quota system.

Thanks to both the great deal of reports issued by the Dillingham Commission (1907-1911)⁸⁸, and to the pressure of nativist and restrictionist movements, the Immigration Act of 1917 denied the admission to Asians (except for Japanese and Filipinos), criminals, persons who failed to meet certain moral standards, persons with various diseases, paupers, assorted radicals (due to the so called ‘Red Scare’⁸⁹) and introduced the literacy test (literacy was defined as being able to read in any recognized language, including Yiddish and Hebrew). The literacy test, the strong point of the Immigration Restriction League, represented a radical change in the immigration policy, because with the wish to contrast the new immigration danger consisting in the too large number of aliens, aimed at substituting the principle of selection, that was the basis of the American legislation to keep out the undesirables, with the principle of restriction. The illiterate emigrant was considered as a menace to American institution not only because they could not read, but also because there was the conviction that they contributed to crime,

⁸⁵ H. SAMUEL, “Immigration”, *The Economic Journal*, v. 15, n. 59, 1905, pp. 317-339, quotation p. 327.

⁸⁶ See HIGHAM, *Strangers in the Land*, p. 125.

⁸⁷ *Id.*, p. 320.

⁸⁸ See R. F. ZEIDEL, *Immigrants, Progressives, and Exclusion Politics. The Dillingham Commission, 1900-1927*, DeKalb, Northern Illinois University Press, 2004.

⁸⁹ See S. COBEN, “A Study in Nativism: The American Red Scare of 1919-20”, *Political Science Quarterly*, 79, 1, 1964, pp. 52-75.

pauperism and degeneracy to a greater extent, being potentially more dangerous and less susceptible to Americanizing influences.

Nevertheless, the relationship between illiteracy and crime and pauperism was not sufficiently convincing and the strong supporting argument was the apparent need for the restriction of the volume of new arrivals, because statesmen and public opinion thought that the saturation point of the American melting pot had been reached. Moreover, the literacy test was justified by the idea that a selective restriction of the entries would ease the assimilation process, aiding the work of Americanizing the unassimilated immigrants already in the country but living as ‘undissolved’ elements in the society. The real purpose of the test was, however, «to determine the general mental status of the immigrant» and to introduce a racial selection criterion to bar the newcomers from south-eastern Europe. But this attempt to found the exclusion on a scientific and sociological basis had a methodological weakness because it indicated «merely the lack of opportunity or the presence of political oppression and not the lack of intelligence». In fact the standards for appraising the general intelligence of the individual immigrant did not take into account of «the immigrant’s home environment», particularly compulsory education and school facilities⁹⁰.

Before its passing, the educational test was presented in several bills, all vetoed by the Presidents: in March, 1897 President Cleveland returned the bill explaining in his veto message that it was a «radical departure from our national policy relating to immigration»; in January, 1913, after a long debate and many modifications a bill satisfactory to both Houses was vetoed by President Taft who recommended distribution as a preferable means of correcting the evils of immigration and was opposed to a restrictive measure; in January, 1915, President Wilson vetoed the bill clarifying in his message that the literacy test as a way «to limit the number of immigrants by arbitrary test» would «reverse the policy of all the generations of Americans that have gone before». Finally, on February 5, 1917, the test became law, because both Houses passed the bill notwithstanding Wilson’s second veto⁹¹.

⁹⁰ About this clear analysis of the literacy test, even if considered «worthy of adoption», see H. HOYT, “The Relation of the Literacy Test to a Constructive Immigration Problem”, *The Journal of Political Economy*, 24, 5, 1916, pp. 445-473 (quotation pp. 455-456). For other criticisms on the economic benefits of enacting merely restrictive measures as the literacy test, see E. G. BALCH, W. F. WILLCOX, J. W. JENKS, M. J. KOHLER, “Restriction of Immigration – Discussion”, *The American Economic Review*, 2, 1, *Supplement*, 1912, pp. 63-78.

⁹¹ On this slow process to enact the test see H. P. FAIRCHILD, “The Literacy Test and Its Making”, *The Quarterly Journal of Economics*, 31, 3, 1917, pp. 447-460 (quotation of Presidents’ speeches pp. 454, 457-458). Commenting on the passing of the law on literacy test with enthusiasm, the American sociologist observed the general difference

The quota plan, based on the notion to limit the total number of immigrant per year and to assign percentages of that total to particular nationalities on the basis of the number of people from that nation already in the US, was enacted in the 1920s. The National Quota Law of 1921 limited the immigration of each nationality to 3% of the number of foreign-born of that nationality living in the U.S. in 1910, and the Immigration Act of 1924 introduced more restrictive criteria, setting the annual quota for each nationality at 2% of the number of persons of that nationality in the U.S. as determined by the 1890 census (so that southern Europeans immigration was strictly reduced). As Daniel J. Tichenor writes, «if economic and national security were important concerns of early-twentieth-century immigration reformers, the primary intent and effect of their national origins quota system were manifestly racist»⁹²; there was the idea of an ethnic and racial hierarchy beyond this measure, supported by the scientific arguments based on sociology, criminology, biology and eugenics widespread during the Progressive Era.

III. Contrasting Perspectives: Those Who Leaves, Those Who Receives

III. 1. *Jus Migrandi* in the Modern Legal Experience: the Denied Emigration

The *Jus migrandi* is nowadays sanctioned in at least three fundamental international documents: the Universal Declaration of Human Rights (1948), art.13 par. 2 «Everyone has the right to leave any country, including his own, and to return to his country»; the fourth Additional Protocol, European Convention on Human Rights (ECHR), art. 2 par. 2 «Everyone shall be free to leave any country, including his own» and International Covenant on Civil and Political Rights, art. 12 «Everyone shall be free to leave any country, including his own».

The right to emigrate has received protection on a supranational level but such recognition has not induced the state to adopt legislations which are aware of the rights and interests of their migrants. Paradoxically, in the past, despite the absence of substantial and complex legislation regarding human rights, the right to emigrate enjoyed a certain political and legal protection, to the extent of raising discussions around its foundation (state or natural).

in attitude toward this question between the Executive and the Legislative power, arguing that «possibly a partial explanation may be that the regulation of immigration is a technical matter, and the President, having little time to inform himself, is more impressed by tradition and the superficial “liberality” of free admission than is Congress, which has ample opportunity to become conversant with the facts» (p. 460).

⁹² TICHENOR, *Dividing lines*, p. 147. See also C. SHANKS, *Immigration and the Politics of American Sovereignty, 1890-1990*, Ann Arbor, The University of Michigan Press, 2001, pp. 55-95. Likewise, see Elizabeth Cohen, *Carved from the Inside Out*, p. 41: «It was a law driven by sociobiology rather than sovereignty».

Today, even though the *jus migrandi* has been recognized, there are many barriers that each state has raised to the exercise of this right, in addition to the more and more diffused lines against the process of emigration in the receiving societies. The firm opposition to emigration is also demonstrated by the support that is normally shown (in both institutional seats and not) toward the so called readmission agreements and the praxis of the so called externalization of European borders control.⁹³ As far as the European experience is concerned, the European member states have been stipulating agreements with other countries with the aim of demanding the States of emigration to contribute to the check and repression of illegal immigration. It is equally clear that, as there are few chances of access to legal immigration procedures, the cooperation to the repression of illegal immigration entails participating to the repression of the entire stream of migrants trying to reach the shores of Europe. This necessarily means that the migrants' countries of origin institute local detention centers, provide to the identification of whoever passes through those territories, send back to other countries unidentified citizens.⁹⁴

In this way, the positive right to emigrate loses its specific connotation of positive and negative expectation attributed a subject by means of a legal law (in this case more several laws contained in supranational documents). Indeed, the right to emigrate finds its form in both ways: in a positive expectation as it requires the state to set up all the activities to safeguard the migrant in the exercise of their right (as in Italy at the beginning of the XX century); in a negative expectation, as the exercise of a freedom which implies the other's abstention, the direct non-intervention to prevent the realization of the choice of an individual. The positive expectation is largely violated as the countries of origin hinder the practice of the right to emigrate both for its citizens and for the "passing" migrants, upon explicit invitation of European countries (which is also supported by massive "incentives"). The negative expectation is equally disregarded as the countries of emigration, instead of abstaining, operate with the aim of hindering the exercise of this freedom.

⁹³ For more informations on the "readmission agreement" see P. M. COSSU, "Gli accordi di riammissione nel quadro della politica comunitaria", in *Migrazioni frontiere diritti*, cit., pp. 109-122; see also S. PEERS, "Irregular immigration and EU external relations", in *Irregular migration and Human Rights*, cit., pp. 193-217.

⁹⁴ AMNESTY INTERNATIONAL, *Lampedusa: ingresso vietato. Le deportazioni degli stranieri dall'Italia alla Libia*, Torino, EGA, 2005.

III. 2. The Right to Emigrate Seen From the South. Documents of North-African NGOs

The point of view so far adopted is the western, that is to say the one of the countries or societies of arrival of migrants. So, it is worth reversing the perspective and cast a look at it from south to north to evaluate, at least, referring to the sole European experience, what the ongoing reflection are in the countries of Maghreb on the right to emigrate and on European policies about emigration.

As many studies now confirm, over the past ten years civil associationism has been raising exponentially in the countries of North Africa and Middle East, the number of activists has centuplicated and there are numerous NGOs specializing on rights of migrants.⁹⁵ Maghreb and middle eastern societies are experiencing a very difficult situation, held in a tight grip between the authoritarianism of their governments and the integralist drifts of political Islam, yet there is room for attention toward migrants and their denunciations are against national government, international community and in particular the member states of the European Union.

The documents which are drafted by Maghreb NGOs for the European and global international summits or the Social Forums are examples of their revendications. These are interesting texts through which the NGOs show that the reflections on these issues are not only fed by the debates in the receiving countries, on the contrary they are widely discussed also in the countries of origin albeit in different tones and underscores.

In the *Manifeste non gouvernemental euro-africain sur les migrations, les droits fondamentaux et la liberté de circulation* (Rabat, 07/01/2006) is written:

“Nous, acteurs des sociétés civiles d’Afrique subsaharienne, d’Afrique du Nord et d’Europe, réunis en Conférence non gouvernementale euro-africaine les 30 juin et 1er juillet 2006 à Rabat, indignés par la guerre aux migrants qui s’amplifie d’année en année le long des côtes méditerranéennes et atlantiques, refusons la division de l’humanité entre

⁹⁵ On the contemporary arab-muslim societies see, among others, S. AMIN, A. EL KENZ, *Le monde arabe. Enjeux sociaux – Perspectives méditerranéennes*, Paris, L’Harmattan, 2003; S. BEN NEFISSA (ed.), *Pouvoirs et association dans le monde arabe*, Paris, CNRS Editions, 2002; Id., “ONG et gouvernance dans le monde arabe: l’enjeu démocratique”, *Working paper*, (2004), 10, Le Caire, CEDEJ; M. CAMAU, “Sociétés civiles “réelles” et Téléologie de la démocratisation”, *Revue Internationale de Politique Comparée*, (2002), 2; O. GIOLO, “L’associazionismo civile nel Mediterraneo arabo-islamico”, in F. Cassano, D. Zolo (eds.), *L’alternativa mediterranea*, Milano, Feltrinelli, 2007, pp. 148-178; Id., “I diritti umani e le società civili nei paesi arabo-musulmani”, *Parolechiave*, 37, 2007, pp. 47-63; F. MERNISSI, *Les Sindbads Marocains. Voyage dans le Maroc Civique*, Editions Marsam, 2004.

ceux qui peuvent circuler librement sur la planète et ceux à qui cela est interdit, refusons également de vivre dans un monde aux frontières de plus en plus militarisées qui segmentent nos continents et veulent transformer chaque groupe de pays en forteresse. Considérant que le respect de ce droit fondamental qu'est la liberté de circulation telle qu'énoncée dans l'article 13-1 de la Déclaration Universelle des Droits de l'Homme de 1948 est une condition préalable à l'exercice des autres droits fondamentaux, et que cet article 13-1 posant comme un droit fondamental celui de pouvoir quitter son pays signifie nécessairement celui de pouvoir s'installer dans un autre pays;[...] Considérant que les restrictions actuelles à la liberté de circulation restreignent uniquement celle des plus pauvres et reflètent non seulement la montée en puissance des nationalismes xénophobes mais aussi la peur élitiste des populations défavorisées;[...] Considérant que les politiques sécuritaires font croire que les migrations sont un problème et une menace alors qu'elles constituent depuis toujours un phénomène naturel et que, loin d'être une calamité pour les pays développés, elles constituent un apport économique et culturel inestimable; Nous exigeons: le renoncement à l'idéologie sécuritaire et répressive qui oriente aujourd'hui les politiques migratoires, notamment à «l'externalisation» de l'asile et des contrôles aux frontières, à la criminalisation des migrations, ainsi qu'à toute loi raciste, xénophobe ou discriminatoire; la refondation des politiques migratoires sur la base du respect des droits humains, d'une réelle égalité des droits des personnes vivant sur un même territoire et, dans l'immédiat, de la régularisation de tous les migrants sans papiers; la dépénalisation du délit de séjour irrégulier et de l'aide aux personnes contraintes à ce type de séjour; l'annulation des accords de réadmission de personnes expulsées et l'abandon de toute négociation en ce sens par les Etats;[...] que toute négociation euro-africaine repose sur le principe d'égalité des interlocuteurs et que les dirigeants africains, qui ont si peu défendu les intérêts de leurs populations, assument pleinement leurs responsabilités, tout particulièrement en remettant en cause les accords de partenariat euro-africains[...].⁹⁶

These quotations recall the international law concerning human rights in a stronger and more precise way than the arguments in many western debates, to demonstrate that the allegiance to the rights – often sold as a typical expression and product of modern western culture – is deeply rooted somewhere

⁹⁶ In <http://www.migreurop.org/rubrique188.html>. To see documents and learn about the activism of Maghreb and middle-eastern societies concerning immigration see also *Portail de la société civile au Maghreb-Machrek civil society portal*, in www.e-joussour.net.

else, at least in the common way of feeling of modern societies. The consequence is the downsizing of the theories which doubt the universality of consensus on human rights, the same analyses dating back to the communitarians and scholars like Samuel Huntington, which have offered some many arguments to the defense of the local or national western identities, of which the rights themselves would constitute the templates.⁹⁷

Yet, according to these texts, there is a consensus on rights which is transversal to cultures and national belongings, and in the south the main problem is found in the perpetrated violations: by the governments, above all through readmission agreements and a legislation which is detrimental to the rights of whoever decides to leave their own countries; by the international community, with its failed prediction of the right of immigration and the adoption of those regulations and practices which end by being strongly discriminatory toward those who do not enjoy the so called “fine citizenships”.⁹⁸

The strongest accusations are addressed in particular to the member states of the European Union, with its choice of urging the Maghreb countries “en sous traitant la répression et en sacrifiant les principes fondamentaux des Droits humains”.⁹⁹ In the Report of 14 May 2008 *l'Association des amis et des familles des victimes de l'immigration clandestines* writes: “En effet, ces politiques se font contre la volonté des peuples, et en connivence avec des régime en faillite: l'Europe sacrifie la démocratie.”¹⁰⁰

In the Appeal of 11 March 2008 signed by numerous NGOs Euro-Mediterranean it is stressed:

⁹⁷ S. HUNTINGTON, *The clash of civilizations and the remaking of world order*, New York, Simon & Schuster, 1996.
⁹⁸ See also on this matter the articles appeared in *El Watan-Le quotidien indépendant*. They criticize the European Directive adopted on 18 June 2008 on repatriation: N. BOUZEGHRANE, “Ils adoptent la directive sur les sans-papiers: Le mépris des députés européens”, 18 juin 2008, in <http://www.elwatan.com/ils-adoptent-la-directive-sur-les>; R. YACINE, “Expulsion des sans-papiers: L'Europe se sarko-berlusconise”, 9 juin 2008, in <http://www.elwatan.com/Expulsion-des-sans-papiers-L>. See the document signed from same NGOs (A.T.F - Association des Tunisiens en France ; A.M.F -Association des Marocains en France- ; S.A.E -Solidarité Algérienne en Europe - ; A.T.M.F -Association des Travailleurs Maghrébins en France- ; F.T.C.R -Fédération des Tunisiens pour une Citoyenneté des deux Rives-), *Face à la Directive de la honte, le mutisme coupable des dirigeants maghrébins!*, in http://www.citoyensdesdeuxrives.eu/index.php?option=com_content&view=article&id=423:directive-de-la-honte--mutisme-coupable-&catid=105:maghreb&Itemid=112; I. MELANDER, *Les pays africains condamnent la directive retour de l'UE*, http://maghreb.msn.com/Actualites/ViewArticle.aspx?Cat=Monde&Id=2008-July-09_10_33_13. We must remember that the Bolivian President Morales expressed himself against the adoption of such directive (in <http://www.cadtm.org/spip.php?article3449>).

⁹⁹ *Rapport relatif au naufrage de migrants au large des côtes d'Al-Hoceima dans la nuit du 28 au 29 mars 2008*, in www.e-joussour.net/fr/node/1154.

¹⁰⁰ Ibidem.

“le lien existant entre, d'une part, le durcissement de la politique marocaine en matière de gestion des flux migratoires et de contrôle des frontières et, d'autre part, la pression grandissante de la part de l'UE sur le Maroc en matière de coopération pour la lutte contre l'immigration irrégulière vers ses frontières”.¹⁰¹

Moreover, the very policy started in the picture of cooperation between the European Union and Morocco is deplored, as it is not aiming to the protection of the rights of migrants and refugees, whereas “toute personne migrante, même irrégulièrement, bénéficie de droits fondamentaux qu'il est impératif de respecter”.¹⁰²

III. 3. Freedom to Emigrate: the European Debate between the end of 1800s and the World War I

The *jus migrandi* has gained a lot more recognition in the past rather than in the present. After the theorization by Francisco de Vitoria at the end of the XVI century¹⁰³, *jus migrandi* received an ample attention by juridical and philosophical-juridical science and the national legislations “took him seriously” giving it protection and administrative provisions¹⁰⁴. Since the XIX century, Europe was a land of emigration where the legal problems were, on the one hand, the acknowledgment of the individual right to emigrate leaving the homeland and, on the other, the power of each State to regulate the emigration of citizens with police or social laws.

The European policy of emigration should be read as a combination both of different economic theories and political strategies adopted by the States to reinforce their nation-building process. Mass migration was not only a social occurrence but also a pawn in the hand of governments which alternatively implemented restrictive or open-border rules, trying to exploit this fact as a stimulus for economic growth, demographic control and design of a national identity. During the mercantilism, the growth of national population was considered as a richness to be preserved and European protectionist policies hindered the emigration with restrictions to

¹⁰¹ *Rafles massives d'immigrants-Les côtes noirs de la coopération Maroc-Union européenne*, in www.e-journal.net/fr/node/782.

¹⁰² *Ibidem*.

¹⁰³ On the origin of the *jus migrandi*, see FRANCISCO DE VITORIA, *Relectio de Indis*, I, 3, I.

¹⁰⁴ See K. G. BALLESTREM, “Zur Theorie und Geschichte des Emigrationsrechtes”, in G. Birtsch (ed.) *Grund- und Freiheitsrechte im Wandel von Gesellschaft und Geschichte: Beiträge zur Geschichte der Grund- und Freiheitsrechte vom Ausgang des Mittelalters bis zur Revolution von 1848*, Göttingen, Vandenhoeck und Ruprecht, 1981, pp. 146-161.

exit based on economic and military grounds. At the beginning of the XIX century only the United States promoted the freedom of movement and the right of expatriation as opposed to the European states doctrine of “perpetual allegiance”, which indissolubly linked the subject to the sovereign: the American interest in receiving skilled and unskilled workers and the founding myth of America as the welcoming land for all refugees, clashed with European (especially British) acts to deter emigration. The situation changed when the Malthusian thesis induced the governments to consent to the freedom to emigration as a solution to the socio-economic problems of overpopulation. If we except France, many other European states enacted liberal laws based on the laissez-faire principle (United Kingdom) and recognized the right to emigrate (Germany¹⁰⁵ and Italy), setting up an emigration fever which prompted the overseas government to consider the wage-depressing effects of labor importation and to revise its immigration policy in a more restrictive manner¹⁰⁶.

When, in the XIX century, the flow of mass departures achieved a notable importance, many Governments started to temper the open-door principle. Two different opinions on freedom of emigration, reflecting two concepts of state and political power, faced each other. The first one asserted that the emigration faculty was a human natural right, strictly inherent to the individual autonomy: it belonged to the public rights catalogue, which the State did not create but only had to recognize. The State had the possibility to regulate and to limit its exercise, imposing conditions or obligations, but always respecting the rule of law: restrictions to migration right, as restrictions to individual freedom, had to be enacted only by law and could never be imposed by any administrative dispositions (e.g. circulars or regulations)¹⁰⁷. This way every emigration law had to offer guarantees and advantages to the citizens who wanted to leave

¹⁰⁵ The 1819 Baden Constitution, § 12, ruled: «Das Gesetz vom 14. August 1817, über die Wegzugsfreiheit, wird als ein Bestandteil der Verfassung angesehen», the 1819 Württemberg Verfassung § 29: «Jeder hat das Recht, seinen Stand und sein Gewerbe nach eigener Neigung zu wählen, und sich dazu im In- und Auslande auszubilden, mithin auch auswärtige Bildungs-Anstalten in Gemäßheit der gesetzlichen Vorschriften zu besuchen»; the 1820 Constitution of the Grand Duchy of Hesse, art. 24. Jedem Hessen steht das Recht der freyen Auswanderung, nach den Bestimmungen des Gesetzes, zu»; the 1831 Constitution of the Kingdom of Saxony. § 29 «Jedem Unterthan steht der Wegzug aus dem Lande ohne Erlegung einer Nachsteuer frei, soweit nicht die Verpflichtung zum Kriegsdienste oder sonst Verbindlichkeiten gegen den Staat oder Privatpersonen entgegenstehen»; the Constitution of the Electorate of Hesse, § 41: «Jedem Einwohner steht das Recht der freyen Auswanderung unter Beobachtung der gesetzlichen Bestimmungen zu»; the 1919 Weimar Constitution, art. 112.1 «Jeder Deutsche ist berechtigt, nach außerdeutschen Ländern auszuwandern. Die Auswanderung kann nur durch Reichsgesetz beschränkt werden». About the freedom to emigrate in Germany, see K. GERTEIS, „Auswanderungsfreiheit und Freizügigkeit in Deutschland. Das 18. und 19. Jahrhundert im Vergleich“, in *Grund- und Freiheitsrechte*, pp. 330-344.

¹⁰⁶ About this process, see A. R. ZOLBERG, *The Exit Revolution*, in *Citizenship and Those Who Leave*, pp. 33-60.

¹⁰⁷ See, e.g., F. P. CONTUZZI, “Emigrazione”, in *Il Digesto Italiano*, X, 1895-1898, pp. 369-372.

the country because the task of the modern State was to act as a ‘lightning rod’, a perpetual providence for its citizens, a loving father who comforts his weak sons during the struggle for life.

The second opinion, corresponding to the liberal notion of *Rechtsstaat*, denied the existence of subjective natural rights before the existence of the State: every citizen only had the rights vested by the State, the individual rights are nothing more than an auto-limitation of the absolute State sovereignty. As a consequence, no freedom of emigration existed before the State, no unavoidable right to leave the country, but this right could lawfully be determined, restricted or extended by the State power, whose interest always prevailed upon citizens’ demands to emigrate¹⁰⁸. This way, the State could control and regulate the national emigration both with laws and with policy provisions, because emigration must not to disrupt the progress and the ordinary life of the community at all. More than an individual right, the emigration was a social occurrence which needed to be governed.

In the XX century the dispute over the right of emigration enriched with new positivistic matters, which mixed the growing nationalism of European states with a racial sentiment biologically motivated. The public debate on the freedom of movement was strictly connected with the nation-building policies and the emigrant citizens became more and more a value to protect even abroad because they represented the symbol of a voluntary free colonization. This approach had effect on the concept of citizenship too: the idea (or rather the aim) of a strong national identity, based on the conviction of the belonging to a racial group, prompted the lawmakers to base the citizenship on the *jus sanguinis* instead of on the *jus soli* (Germany 1913, Italy 1912), granting to the migrants and their sons a strong link with the motherland¹⁰⁹.

But, in this continuing variation of political approaches and of juridical regulation of migration, if we adopt the migrants point of view it’s difficult to recognize a concrete betterment in their situation. They experienced a double administrative and criminal regulation during their voyages, in the country of origin and in the country of destination. The macro-history of migrations always shows a Janus-faced profile, because when the United States enacted an ‘immigrationist’ legislation the European states, fearing for the loss of population and of

¹⁰⁸ See e.g. L. RAGGI, *L’emigrazione italiana nei suoi rapporti con il diritto*, Città di Castello, Lapi, 1903, pp. 45-50.

¹⁰⁹ See D. GABACCIA, D. HOERDER, A. WALASZEK, *Emigration and Nation Building During the Mass Migrations from Europe*, in *Citizenship and Those Who Leave*, pp. 63-90, and, with specific focus on German legislation, A FAHRMEIR, *From Economics to Ethnicity and Back: Reflections on Emigration Control in Germany, 1800-2000*, in *Idem*, pp. 176-191.

economic resources, opposed a restrictive system with restraints to the freedom of movement, and vice versa, when European governments recognized the benefits of emigration and implemented protective and social laws for their migrant citizens, the United States on the wave of nativist movement contrasting the rise in ‘undesirable’ aliens, shifted to more and more restrictionist policies. So each migrants’ micro-history, made of family desertions and returns, of illiteracy and unskilled labour, of escape from pauperism and racial prejudices, run into a complicated bureaucratic procedure on both side of the Atlantic, ever living in the borderline between legality and illegality.

The same theoretical contraposition is nowadays characterizing the European debate on irregular migration and on the legal basis of a common immigration policy; in fact, the national laws of the member States, based on the distinction between regular, irregular and clandestine immigration, move from the premise that doesn’t exist any individual right to emigrate, but that each non-EU migrant has before the entry State only a ‘diminished’ right to be accepted.

III. 4. From a Police Law to a Social Law: the Italian Experience

With a realistic approach, Italian politicians in the 1880s recognized that emigration was like a rivulet turned into a river and was ‘a fact’ which nobody had neither the right to wipe out nor the resources to bar¹¹⁰. The emigration was presented as a historical and natural relentless occurrence because it was aroused by the dream of the poor people to get a better life. As the spokesman De Zerbi said in Parliament in 1887, to forbid emigration would be like to abolish the sexual intercourse by law, and any state law had neither the power nor the must to obstruct this event for several reasons: because it was a voluntary resource to temper the population rise, because each country was indivisible from the entire world, because emigration was a providential law of “human circulation” and of human progress, because the modern concept of homeland was a spiritual unity connected to the flag rather than to the soil. Emigration was described as a “law of harmony”, a natural favourable event with useful effects on economic, politic, ethnographic and social features. All these optimistic portrayals of migrants were the necessary premise to justify the full freedom of migration, as the face of an individual right

¹¹⁰ See the opinion of Francesco Crispi in *Atti Parlamentari. Camera dei Deputati*. Legislatura XVI, II sessione 1887-88, *Documenti – Disegni di legge e relazioni*, n. 85: *Provvedimenti relativi all’emigrazione*. Introduzione al disegno di legge Crispi, p. 9: «Io stimo inutile di esaminare se la emigrazione sia un bene, oppure se in essa prevalga il danno sul beneficio o avvenga il contrario; la emigrazione è un fatto che non si ha il diritto di sopprimere e che non si hanno i mezzi di impedire»

which could never be restricted due to collective interests or to economic benefits of the Nation¹¹¹. But the Italian Government had the responsibility to direct this ‘fact’, to make citizens’ emigration more risk-free, orienting their voyages towards the countries which were looking for foreign labourers and preventing the frauds by the emigration agencies.

The first Italian emigration law was passed on December 30th, 1888, and, like other European legislations, was a police law whose main reach was the fact regulation rather than the direct migrants assistance. Art. 1 ruled that «the emigration is free, excepting the duties imposed to the citizens by law», and that the conscript soldiers in discharge from the army could go overseas only if they had a licence given by the Minister of War. It was the end result of a compromise reached in the Parliament between the faction of the absolute individual freedom of migration and the more conservative politicians worried about the loss of military forces. As De Zerbi said, the Government wanted to enact a law of liberty, «but each liberty is hindered by the need»: in this case the right of the State, expressed by the duty of the military service, had to prevail on the individual unrestricted right. This was the specific and limited aim of the act, a police law passed to prevent evils within the limits of the possible and to protect the weakest when and where it was possible¹¹².

This moderate liberal idea of the role of the State in regulating emigration proposed by the Crispi’s Government was passed in both Houses of Parliament in spite of the criticism of some powerful socialist Congressmen. Enrico Ferri asserted that even if they were debating on a police law, the subject was typically a social problem; he was favourable to the emigration because, from the criminal point of view, it was like an “emergency valve” for the society, and from the economic one, it was profitable to both the owners (it meant a new wider market) and the employees (it meant better wages and greater savings with the possibility to improve their status). But the mass emigration of poor people required more protections by the State in every

¹¹¹ See *Atti Parlamentari. Camera dei Deputati*. Legislatura XVI, II sessione 1887-88, *Documenti – Disegni di legge e relazioni*, n. 85-A, Relazione della Commissione. *Sulla emigrazione*, pp. 7-8. As De Zerbi said in his speech, the freedom of emigration had to be absolute («Piena ed intera adunque la libertà di emigrare») and to forbid the migration, it would have been necessary to surround Italy with an army («circondare l’Italia di gendarmi»). About this, see G. CAZZETTA, “Predestinazione geografica e colonie degli europei. Il contributo di Attilio Brunialti”, *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, 33-34, 2005, pp. 162-165. The importance of the right of emigration was likened to the inviolable right of free movement, to the right of conscience and the right to think (see the speech of Francesco Guicciardini in *Atti Parlamentari. Camera dei Deputati*. Legislatura XVI, II sessione, *Discussioni*. Tornata del 6 dicembre 1888, p. 5772).

¹¹² *Atti Parlamentari. Camera dei Deputati*. Legislatura XVI, II sessione, *Discussioni*. Tornata del 7 dicembre 1888, pp. 5826-27.

moment, the departure, the journey and the stay in the new country too: so Ferri proposed to give special powers to the shipboard doctors, to reform the Italian Consuls' tasks and invited the Government to contract mutual protection Conventions with other States of destination. He considered the solemn assertion in art. 1 useless and impracticable, because the full individual freedom was already ruled in the Constitutional Law (*Statuto Albertino*, 1848, art. 26) and because the formula «excepting the duties imposed by law» was too undetermined and risked to become an indirect restraint to the freedom of emigration¹¹³.

Also the preventive authorization of the Minister of War was condemned by many members of the Parliament, who accused the Government of militarism. This ruling virtually forbade the emigration to all males between 20 and 33 years and stimulated the illegal migration, because poor people, in the hope of reaching a better standard of life and of surviving the poverty, were open to everything in order to be able to emigrate. So, as Sidney Sonnino said, the excess of bureaucracy was forcing the emigrants to illegal choices and was uselessly increasing the number of crimes committed by harmless paupers¹¹⁴. The solution to the wide wave of Italian emigrants could not be found in their criminalization, but the Government real task was to set up a whole system of social reforms, to enact a social security law with the aim to contrast the emigration rise in a country full of cultivable lands and in need of land reclamations¹¹⁵.

Besides the so controversial art. 1, the law was based on two provisions, already enacted in almost all other European countries: the first one was that all the emigration agencies and their brokers were under the obligation to catch a government licence, given only to those who proved to have specific qualifications (art. 2). The aim of the law was to control the emigration business preventing illusory promises and frauds on ignorant migrants. The second one was the payment of a compulsory bond by the emigration agencies or by the masters of the vessel (art. 4), as an indemnity bond in case of any troubles with the travel (art. 16).

¹¹³ The same opinion was expressed in the Senate by Majorana-Calatabiano, in *Atti Parlamentari. Senato del Regno*. Legislatura XVI, II sessione, *Discussioni*. Tornata del 22 dicembre 1888, pp. 3045-46.

¹¹⁴ *Atti Parlamentari. Camera dei Deputati*. Legislatura XVI, II sessione, *Discussioni*, Tornata del 6 dicembre 1888, p. 5797.

¹¹⁵ These were the subjects of the Andrea Costa's speech, in *Idem*, Tornata del 7 dicembre 1888, pp.5807-09. About the parliamentary debate on the freedom to emigrate and 'freedom to let emigrate', regarding the rights and duties of the recruiting agents, see F. MANZOTTI, *La polemica sull'emigrazione nell'Italia unita (fino alla prima guerra mondiale)*, Milano, Società Dante Alighieri, 1962, pp. 86-95, and A. ANNINO, "La politica migratoria dello stato postunitario", *Il Ponte*, 1974, II, 10-11, pp. 1229-1268.

Soon this law turned out to be virtually ineffective and totally inadequate to the migration problem. At the *First Italian Geographical Congress* in 1892, Giuseppe Carerj railed against the law, defined as a “monument of ignorance”, an “infringement of the individual right”, a “contradiction with the colonial expansion principle”: he bashed the restrictive provision against the emigration agents and the constraints connected with the compulsory military service, asserting that emigration was not free. The Crispi law had tried to control or decrease the consequences without modifying the causes of the phenomenon: but the real liability of the mass emigration was due to the appalling fiscal policy of the Government which was compelling many families to leave the country. In the era of global free trade and of free international competition, the state defence of the borders was a nonsense, because people, as goods, run where they found the best price and the higher wage; so, Carerj said, “today, the will to bring the emigration into question is more or less as the will to deny the sunshine” and, moreover, “the emigration represents the present type of the occupation”¹¹⁶.

Public opinion and Parliament asked for a new legislation: times were radically changed, the emigration had become a significant social problem and in place of the ‘old’ police law of 1888 it was necessary to enact a ‘social law’. The State had the duty to protect its emigrant citizens not only in their homeland, but also during the journey and, above all, in the land of destination. Italians could not be left alone in their troubles and called for the aid of the Government like a child with his mother. The Giolitti period, with its gradual creation of a welfare state, modified the emigration policy; besides being a natural occurrence or a problem of public order, Italian emigration was seen as a global circulation of labour force beyond borders and as well as a social issue.

On January 31st, 1901 a new law was passed, with much more guarantees for the emigrants and, as the proposer Lampertico said, with two main purposes: to protect the emigrants from the hollow promises of the recruiting agents and to safeguard the emigrants healthiness¹¹⁷. First of all, there was a definition of emigrant («the citizen who voyages towards transoceanic country with a steerage-class ticket», art. 6 par. 1), and also non-Italian citizens who boarded in

¹¹⁶ G. CARERJ, *La legge sull’Emigrazione al cospetto della critica*, in *Atti del primo Congresso geografico italiano*, vol. II, p. II, Genova, tip. R. Istituto sordo-muti, 1894, pp. 322-51 (quotation pp. 324, 345).

¹¹⁷ See, e.g., *Atti Parlamentari. Senato del Regno. Legislatura XXI. I sessione. Discussioni*. Tornata del 22 gennaio 1901, p. 878. About the political discussion on this reform, which thanks to its provisions on the military service and the citizenship fortified the link between emigrants and their motherland, see MANZOTTI, *La polemica sull’emigrazione*, pp. 132-141 and C. FESTA, *L’emigrazione nella legislazione comparata*, Castrocaro, tip. Moderna, 1904, pp. 92-117.

any Italian port had the same protections of citizens (art. 6 par. 2). In art. 1, essentially the same as in the previous law, was added a paragraph which vested the Foreign Minister of the power to suspend the emigration towards a specific country because of public order grounds or when the emigrants life, freedom or goods were in danger. It was set up a national emigration bureau and an emigration surveyor in each relevant seaport; on each vessel had to be present a doctor of the Italian navy with the task to watch over the passengers (art. 11). In the destination countries the Government opened protection offices, information offices and employment bureaus (art. 12). The hygienic conditions of the vessels and the minimum standard of food for the steerage passengers were clearly fixed and was also created an emigration fund for all the expenses correlated with the emigration policy and offices. Some years later, provisions to favour the remittances of the emigrants from America to Italy were enacted¹¹⁸ and to assist the deported or expelled Italian emigrants in their return journeys (L. 17/07/1910 n. 538, art. 13^{ter}).

This ‘progressive law’ reflected a new idea of emigration and expressed what has recently been defined as a «striking paradox», made manifest «in the coexistence of a policy for integrating and valorizing emigration as an ineluctable fact (which the state knows to be indispensable, facilitates, and even uses) and a discourse that, by vehemently refusing to accept the *fait accompli*, ultimately conveyed an image of emigrants not as active citizen-workers but victims of exploitation»¹¹⁹. The European States with a mass emigration, and Italy among these, realized that their citizens in the world could also be an important economic resource and that their nation building effort passed also through the ‘hidden colonialism’ of the emigrants.

III. 5. The right of immigration

As it is widely known and already been stressed by many authors there is no direct correspondence between the right to emigrate and the right to immigrate: while to emigrate is decreed in several legislative texts on an international level, the right to immigrate has not yet obtained this kind of recognition. Obviously, there are several questions that hinge around this failed recognition and there are several ways to tackle them; here it will suffice to stress two aspects that have to do with the “nature” of the right to emigrate and the reasons for its failed enactment.

¹¹⁸ See G. MASSULLO, “Economia delle rimesse”, in *Verso l’America*, pp. 85-107.

¹¹⁹ See C. DOUKI, *The Liberal Italian State and Mass Emigration, 1860-1914*, in *Citizenship and Those Who Leave*, pp. 91-113 (quotation p. 107).

By using the term “recognition”, we might mean that the right of immigration is a natural right needing a state recognition to specify its guarantees. Some, among whom Jürgen Habermas, believe that it is a “moral” right, not actionable on a legal level, which would morally impose the practice of a liberal policy of immigration, which opens western society to foreigners and checks the entry according to the means at their disposition.¹²⁰

Differently, the need for the enactment of this right derives not from its alleged intrinsic morality to such a claim but from technical and legal issues.¹²¹ Particularly singular is the prediction of the fact that each individual can emigrate and thus leave his country without his being obliged to emigrate somewhere else¹²². According to the legal theory, it is worth to observe that this normative gap could belong to the so called “technical gaps”, which consist in the absence of a rule which is the necessary condition for the application of another rule. Without any law which sanctions the right to immigrate, the rule proclaiming the right to emigrate becomes inapplicable. For example, with such technical gap, the answer of the Italian juridical system tries to redress it by recognizing not just a right but an “interesse legittimo”. The entry of the migrant is considered by the jurisprudence as a “interesse legittimo” of the migrant, because when he enters in a new Country, the respect of the power of the state and the Public Administration prevails on the subject and his rights.

On the level of the philosophical reflection, the absence of a specific prediction of the right to immigrate to any place (as a guarantee of the right to emigrate) it offers a further explanation of the reasons why the migrant is represented as a “non-person”¹²³. After exercising their right to emigrate migrants enters a political and juridical “non-place”, a place, that is, juridically non-recognized and politically ignored. With the evidence shown, we can say that only “non-persons” can reside in a “non-place”, that is human beings who are not recognized the identity and the dignity of a person.¹²⁴

¹²⁰ J. HABERMAS, C. TAYLOR, *Multiculturalismo. Lotte per il riconoscimento*, Milano, Feltrinelli, 1998, p. 103.

¹²¹ For a reconstruction of the liberal theses which support, from a philosophical and ethical point of view, the need to open the frontiers to liberalize the entry in a state territory see M.J. GIBNEY, *The Ethics and Politics of Asylum. Liberal Democracy and the Response to Refugees*, New York, Cambridge University Press, 2004, p. 60 e ss.

¹²² See FERRAJOLI, *Principia iuris*, vol. 2, pp. 349 ss.

¹²³ This notion is proposed by A. DAL LAGO, *Non-persone. L'esclusione dei migranti in una società globale*, Milano, Feltrinelli, 1999.

¹²⁴ Augé writes that if a place can be described as identity-giving, relational, historical, a place which cannot be defined identity-giving, nor relational, nor historical, will define a non-place (AUGÉ, *Non-Lieux*). We can add that if a place can be legally defined, in the absence of a definition or a legal qualification, we would be facing a non-

So, if you do not enact the right to immigrate then you offer the juridical assumption to the lack of protection of the migrants. Furthermore, its demotion to a “*interesse legitimo*” justifies the praxes used in public administration concurring to extend this situation, rather than personal right, to the permanence of the migrant on the territory. In doing so, what pertains to the inalienable human rights (sanctioned in international laws) is left to the administrative discretionary power.

The failed provision of the right to immigrate is due according to some authors, mostly to non-juridical reasons, since the motivations do not concern precise technical and legal difficulties. As everybody knows, there are technical difficulties in the acknowledgement of a right if it is difficult or impossible to identify the owners of unfavorable subjective situations (duties, obligations, abstentions) given as a guarantee of favorable situations (rights).¹²⁵ In this case there are no such problems: on the contrary the prediction of some consequences derivable from the actionability of the right to immigrate forces us to abandon its positivization. It is not strange that many arguments for its non-prediction should be defined as “consequentialist”¹²⁶: the right to immigrate must not be established because this would cause the complete opening of the frontiers (with the subsequent loss of state sovereignty over the control of borders), the crash of the labor market, the collapse of the welfare state with evident damages for the receiving society which must maintain the political power to decide on who to admit.¹²⁷

Other arguments given for the failed recognition of the right to immigrate send to “communitarian” or “culturalist” ideas, as they privilege the preservation of local cultural identities or political communities territorially limited, recognizing in both a value to be preserved to the happiness of both the individuals and the society.¹²⁸

Other reflections which make possible some parallelisms between the right of property of individuals and the right to a territory of a political and cultural community, with similar rights “of exclusion” of others from the property and the access to the same territory, are founded on

place, and this confirms what has been affirmed, in different terms, by ASGI and by the democratic jurists concerning THC, believed to be “non-right places”.

¹²⁵ A typical example in this sense is the “right to peace”, of which we could reconstruct the content (by drawing it from the international legislation concerning human rights) but it's difficult to identify the subject entitled to ask for it or the organism (States, international community) to be asked for it. On this subject see G. PECES-BARBA, *Curso de Derechos fundamentales. Teoria general*, Madrid, S.A., 1991.

¹²⁶ RIGO, *Europa di confine*, p. 44.

¹²⁷ WALZER, *Spheres of Justice*, p. 50.

¹²⁸ Cfr. D. JACOBSON, *Rights Across Borders: Immigration and the Decline of Citizenship*, Baltimore-London, John Hopkins University Press, 1997.

the existence of territorial rights which the local and cultural communities (national rectius) can claim against those who do not belong in it.¹²⁹

Two types of criticism can be moved against these arguments. First of all, they are not based on any juridical argument. The need of the prediction of the right to immigrate, as we have tried to explain before, is based on juridical grounds, whereas the criticisms on its sanctions recall motivations which are specifically “political”: the control over borders, the keeping of the welfare state (in both Europe and the United States), the protection of cultural and economic peculiarities of the local and national communities are issues that recall political options (culturalist, neo-liberist, protectionist, communitarian) which must appraise their compatibility in the light of the international law on fundamental rights. Is it possible the existence of a “right to territory”¹³⁰ when the ownership of rights disregards, according to international law, from the belonging or not to a certain territory?

Or else, is it possible to use consequentialist arguments to avoid the recognition of a fundamental right? Such a reason, if considered legitimate for other rights, might blow the entire system of fundamental rights as it is not sustainable: the guarantee to any fundamental right is without costs, to start from the consolidated rights to health and education, and no right has been recognized without the transformation, at times radical, of the political and institutional background, of the legal culture, of common feeling.

Another criticism which can be moved against culturalist and communitarian arguments, within which it is possible to lay all the theses against the right to immigration, is based on what was said before on the notion of “alien”. The theories of Finnis and Walzer reclaim the use of the pre-juridical notion of “alien”, they reinstate that meaning of “alien” referring not to the national connotation, but to the cultural, territorial, ethnic and racial belonging. The alien as legal category of exclusion, would be widely redeemed in this perspective, contradicting, rather than taking seriously, whatever is ruled in the international law on human rights and affirming the legitimacy of “liberal asymmetry”¹³¹: whoever is in a position of power, whoever enjoys some

¹²⁹ J. FINNIS, “Commentary on Dummer and Withman”, in B. BARRY, R.E. GODIN (eds.), *Free Movement. Ethical Issues in the Transnational Migration of People and Money*, Philadelphia, Pennsylvania University Press, pp. 203-210.

¹³⁰ RIGO, *Europa di confine*, p. 175 e ss.

¹³¹ Idem, p. 40. See also P. COLE, *Philosophies of Exclusion. Liberal Political Theory and Immigration*, Edinburgh, University Press, 2000, p. 46.

rights – albeit by accident of birth – may legally decide that these rights do not universally belong to everybody, but only to the members of their own blood, religion, cultural community.

The liberal asymmetry would give birth to an “illiberal symmetry”¹³², the one existing between power and right: whoever has the power may decide on the rights of others and this, as history has it, is the most illiberal policy.¹³³ An exemplary expression of the “illiberal symmetry” is given by the asymmetrical political representation of native European citizens and migrant citizens in Europe, as they do not enjoy any power of democratic negotiation concerning their rights.¹³⁴ There are subjects (native citizens) who enjoy rights, power (native citizens) and political representation to whom correspond other subjects (migrants) who are deprived of any power to participate to the definition of any policies concerning them.¹³⁵

III. 6. Latent Tensions: Rights and Sovereignty. Are Human Rights Still Useful?

According to the site Fortress Europe¹³⁶, migrants who died at the EU borders are more than 20,000¹³⁷. Over the past 10 years tens of thousands of people died because of the hardships of the journey. The journey itself is evidently what brought many citizens of the so called third countries (states which are not members of EU) to leave their countries of origin to try to build a better life for themselves and their families elsewhere. “Hope trips” entail risks, and those who are leaving are well aware of them: to leave does not necessarily mean to arrive.

During the XX century, various events have revolutionized the concepts of international rights and above all of fundamental rights. As we have already stressed, in the 2nd post-war period, beginning with the signing of the Universal Declaration of 1948, various Charters and Conventions have been passed which have made clearer and clearer and also more binding the

¹³² Idem, p. 47.

¹³³ Human rights, writes Norberto Bobbio, are tools to defend a human being: “Difesa da chi? La risposta che ci viene dall'osservazione della storia è molto semplice e netta: dal Potere, da ogni forma di Potere. Il rapporto politico per eccellenza è un rapporto tra potere e libertà. Vi è una stretta correlazione fra l'uno e l'altra. Più si estende il potere di uno dei due soggetti del rapporto più diminuisce la libertà dell'altro” (N. BOBBIO, *L'età dei diritti*, Einaudi, Torino, 1990, p. 266-267).

¹³⁴ See N. URBINATI, *Ai confini della democrazia. Opportunità e rischi dell'universalismo democratico*, Roma, Donzelli, 2007, p. 134.

¹³⁵ Benhabib recalls the definition that Hannah Arendt gave to citizenship, as “the right to have right”: the loss of the right to citizenship means the loss of human rights in their complex. BENHABIB, *The Rights of Others. Aliens, Residents, Citizen*; ARENDT, *The Origins of totalitarianism*, p. 295.

¹³⁶ <http://fortresseurope.blogspot.com/>

¹³⁷ See M. DELLE DONNE, *Un cimitero chiamato Mediterraneo. Per una storia del diritto d'asilo nell'Unione europea*, Roma, DeriveApprodi, 2004 and the inquiry by P. REKACEWICZ, “Réfugiés au Sud, barrières au Nord”, *Le Monde diplomatique*, mars 2008, pp. 14-15.

obligation from the member states to guarantee on their territory the respect and protection of human rights without any limitation to their racial, cultural, ethnic, religious, linguistic or national belonging. This set of not-negotiable rights cannot, due to the peculiarity of human rights, be doubted by the choices of national politics, for any reason.

However, in recent times a new conviction has been spreading in public opinion and the juridical debate, that rights work neither as substantial bonds to the practice of political power, nor do they work as a guiding criterion to the work of judges and of public officials. Rather, a new idea has been imposing itself, according to which human rights run the risk of becoming a hindrance to the protection of national interests or the war on the organized crime and international terrorism. Recent debates on the suspension of the torture ban aiming at the use of a soft torture in exceptional cases (a sort of “democratic” torture)¹³⁸, or else the suspension of the constitutional and international guarantees on the detention of dangerous terrorists, as in Guantanamo¹³⁹, or the expulsion of subjects under suspicion of being connected with terrorist groups,¹⁴⁰ have marked the extent of the danger of the human rights theory as consolidated over the past 50 years. Human rights appear as the incorrect tools in the present complex and violent societies, which are incompatible with economic, political and military dynamics which characterize life in modern western states and dictate the agenda for international relations. In the same way they have become unsustainable bonds in the practice of investigations and war on terrorism, or else principles that can be derogated if immigration must be contained or discouraged, or to seek redress to the growing unemployment and to the need to easily find underpaid workforce.

Human rights were born as instruments for the protection of citizens against the strong powers of the State. The whole history of the rights which we now call “human” is full of struggles for claims which have caused real institutional upturns (the French Revolution, for example, after which the Declaration of the Rights of the Man and of the Citizen was passed). *L'égalité en droits* was the goal of many political and civil wars

¹³⁸ M. IGNATIEFF, *The Lesser Evil. Political Ethics in an Age of Terror*, Princeton, Princeton University Press, 2004.

¹³⁹ B. ACKERMAN, *Before the Next Attack*, New Haven, Yale University Press, 2006; A. M. DERSHOWITZ, *Rights From Wrongs. A Secular Theory of the Origin of Rights*, New York, Basic Book, 2004; cfr. R. DWORKIN, “Terror and the Attack on Civil Liberties”, *The New York Review of Books*, Vol. 50, No. 17, November 6, 2003, pp. 15-17 e D. COLE, J. X. DEMPSEY, *Terrorism and Constitution. Sacrificing Civil Liberties in the Name of National Security*, New York, The New Press, 2002.

¹⁴⁰ F. VASSALLO PALEOLOGO, *Decisioni di rimpatrio e ricorso alla tortura*, in <http://www.meltingpot.org/articolo12857.html>

undertaken by those subjects who were excluded by the enjoyment of rights, and who aimed at removing those criteria (racial, sexual, national, religious) on the basis of which their exclusion from equality was determined. Thus women, for example, demonstrated and protested until they obtained the recognition of their capacity to have rights and their subsequent inclusion in the equal enjoyment of rights, obtaining the removal of that very criterion on the basis of which only male citizens were entitled to that capacity to have rights.

The subjects excluded from the enjoyment of rights fight to obtain the inclusion in those rights, considering them an effective tool of protection of themselves, their goods and their needs. In this perspective, it is possible to assert that human rights are the rights of the weaker, the rights of people in a position of major difficulty (economic, sanitary, familiar, environmental) who would not have the possibility to defend autonomously their interests, dignity and life.

The intolerance we are witnessing these days is against this meaning of human rights: in fact human rights are perceived as bonds against the practice of any form of power both private and public. This intolerance is stronger in western countries which are considered the cradle of human rights, and the way migrants arriving at the European border are treated is a paradigmatic example of the process of erosion of those rights. One of the most disturbing and evident aspects of this process of erosion lies in the acceptance of the “rightfulness” of this process: of its truth in the case of the problems connected with multiculturalism; of its necessity in the field of immigration and war on terrorism; of its inevitability in the field of the labour market. To sum up, human rights are not useful any more. They were instrumental to the achievement of a certain standard of diffuse well being, but now they are not necessary.

This consideration contains an illuminating element: human rights are not useful to western societies enjoying those guarantees of right which allow to live a dignified life. On the other hand, this perspective eliminates the presence of “others”, who may find in those rights the tools, both ideological and operational, which can be useful to the overcoming of the discriminations and exclusions from the very standards of well being which western citizens normally enjoy. As a matter of fact, human rights are the tools for the protection of the weaker not the stronger. Whoever is in power does not need any particular juridical guarantees, as they already have other means which allow them to reach their goals. It is those who are in need (in all possible ways), not possessing their own means that require those means that a third subject

can offer: we are talking about rights. So rights are guarantees offered to protect those who could not protect their lives, families, goods.

As a consequence, the massive collective removal of the existence of human beings in need, banished into a category of “non-people”, has allowed the progressive removal of the so called “culture of right”. The poor, suffering, at risk of being ill-treated because of their position of disadvantage, do not enjoy any specific guarantee. Moreover, if those falling within the boundaries of this definition do not belong to western cultures, that is, those who are Muslim, African, Asian, Rumanian, they will not be interested in enjoying those guarantees which are typical to those belonging to western cultures.

The public opinion is not left out by governments. On the contrary, they follow the public opinion, avoiding to pass laws which may be unpopular so that they gain the necessary consensus to lead them through the vote. Many parties were born out of popular feelings turned into slogans by politicians: Umberto Bossi’s Lega Nord, Le Pen’s Right in France, xenophobe parties in Holland, Austria and so on. So, the so called “neo-absolutist” drift in politics, the will of political power to question even the fundamental principles of the modern constitutional states and the international legal system, would not acquire an authoritarian dimension as it is not growing independently from the popular consensus. On the contrary, it seems to be the popular consensus to lead the action of the various governments on certain issues, outside the bonds of the right, contravening the fundamental legal principles.

IV. Conclusions.

IV. I. The Constitutionalization of the Right to Immigrate as a Tool of Balance. A

Hypothesis de jure condendo

Two founding rhetorical reasonings, which are different but at the same time curiously similar, concur to the identity definition of the United States and European Union. The U.S. have always self-defined as “the land of migrants”, European Union has always preferred the idea of “free movement area”.¹⁴¹ In both cases they have always been used and still work as instruments

¹⁴¹ J. L. COLEMAN, S. K. HARDING, “Citizenship, the demands of justice, and the moral relevance of political borders”, in *Justice in immigration*, pp 19-62.

to discriminate who is part of a certain political community and who is not, who is included in the enjoyment of those opportunities that the two richest areas of the planet seem to offer and guarantee to whoever resides there and who is excluded. Still, in both cases these two rhetorics have produced paradoxes, illiberal symmetries which seem to deny the respective founding myths at the basis. In the case of Europe, the free movement area has served as a tool to overcome the internal frontiers and reinforce the external ones; in the case of the United States, the land of migrants has made the acquisition of a citizenship more accessible to some categories of people. What must be underlined is that both arguments are *ad excludendum alios*, that they allow to identify “classes of subjects” who, for different reasons, can enjoy more rights than others. We must add that both positions impose nothing on the management of entry: what happens is that some supposed solidaristic openings, such as easy acquisition of American citizenship, are in reality thwarted by the limitations given to the obtaining of the legal necessary pre-requisites to the acquisition of the same citizenship (legal entry, legal stay, etc.).

The recognition of the right to immigrate might unhinge both rhetorics, obliging a radical revision of the modern liberal and communitarian theories, as they both show a conservative attitude aiming at defending the *status quo*.¹⁴²

The arguments described which aim at founding the unrecognizableness of the right to immigrate agree on the danger that this right represents for some prerogatives of the sovereignty of the state, such as the management of borders. It is worth precisising, however, that the right to immigrate would not necessarily mean the complete and immediate opening of national frontiers: declaring such a thing would be like saying that the whole of the public expense of a state should be employed to guarantee the protection of the welfare state and the right to education because in contemporary political orders there are laws that impose governments to take care of the health and the education of their citizens. It is well known that this is not what happens, much in the same way for the other rights.

Indeed fundamental rights, besides being laws, they are projects, they give directions and perspectives: the right to immigrate might act in this sense.

If this were provided for by an international law, first the problem of its ratification would pose itself, a preliminary question that is posed in relation to the efficacy of each international

¹⁴² On the conservatorist/conservative dimension of today’s liberal comunitarist theories see O. GIOLO, “L’urgenza della tolleranza”, *Ragion Pratica*, 27, 2006, pp. 421-444.

treaty. This has recently occurred in the case of the Rome Statute, which instituted the International Criminal Court, an organization with ample power of interference with the state sovereignty, to the point that the United States and China have not yet signed it. Nonetheless, the Statute has been signed by a sufficient number of States and has been enforced.

Once the problem of ratification was overcome, the question of its transposition into national law would come out. It would be a question of constitutional range as we are talking about the recognition of a fundamental right within national orders. The same problem exists in relation to the implementation of the majority of the international laws concerning human rights, as the right to asylum or the ban of torture, which have not yet found the fair protection in many national orders (including Italy).

Only on these bases the right to immigrate would become actionable, but in what way? It could probably constitute the standard to appraise the constitutional legitimacy of the national legislations on the management of legal entries, a judgment which is not possible now due to the lack of constitutional standard *ad hoc*.¹⁴³ Such an evaluation would allow to ponder on the rationality of some predictions of law (for example, the precautionary possession of a labor contract and lodging to obtain an entry visa)¹⁴⁴ and would allow the owner of the right to immigrate to judicially argue his reasons.

Moreover, the positivization of the right to immigrate would give the possibility to balance this right against the other fundamental rights by appraising their compatibility with other principles, their restraint or prevalence.

As a consequence, its protection would have to be steadily, and in all probability, slowly built as for the other human rights which now belong by tradition to the group of fundamental rights which are necessary to guarantee a worthy existence.¹⁴⁵ The same rights that only some decades ago (should we recall the racial laws of civilized Europe or the racial segregation in America in the 50s?) might seem inadmissible, unjustifiable, ungrounded.

Rights, now as then, show a perspective and open new ways, many still have to be explored. Migrants themselves might indicate the right route.

¹⁴³ On the function of the right to immigrate as a break to the state power to limit its exercise see A. DUMMET, "The transnational Migration of People Seen in a Natural Law Tradition", in *Free Movement. Ethical Issues in the Transnational Migration*, pp. 169-180.

¹⁴⁴ See art. 5-bis, art. 22 of Italian law, so called Bossi-Fini (decreto legislativo 25 luglio 1998, n. 286).

¹⁴⁵ PASTORE, *Per un ermeneutica dei diritti umani*, p. 137.