IMMIGRANTS' RIGHTS AND THE RECENT ITALIAN CONSTITUTIONAL EXPERIENCE (*)

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1. Introduction

According to continental Europe's general theory of public law, sovereignty, land and people were, and still are, the three "constituent elements of the State". This theory was partly built upon, and can be harmonised with the dualistic theory of international law, which considers the State as the only subject of the international community and its laws as the supreme and exclusive expression of a sovereign power to grant rights to aliens who reside on its land.

Nevertheless, it is also certain that the legal status of citizenship was born during the French Revolution, and has been considered an obvious issue of constitutional provision since then.

This is why, in continental Europe countries, the historical roots of the concept of citizenship are so ambiguous. From one side, this concept is linked with a theory of public law whose main task was to affirm the sovereignty of the State. From the other side, it is linked with a political and constitutional promise of freedom and equality.

In this way one can explain, for example, some scholar's proposal of the first period of Italian republican experience tending to a direct insertion among constitutional provisions of the status of citizenship, against the "too liberal tendencies" which were considered as a permanent threat to national values, and in order to end "the absolute contradiction between universalism and the idea of citizenship".[1]

Even in those years, there was no room, in Italy, for such a suggestion. While the legal culture was ideologically state-centered, parties and people's political culture didn't pay any attention to national values after the fascist regime and the war's defeat.[2]

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* Report of the XI Colloquio Internazionale Romanistico Canonistico of the Pontificia Universitas Lateranensis, "Etica e diritto nella formazione dei moderni ordinamenti giuridici", Rome, 22–25 May 1996.

1 See R. Quadri, Cittadinanza, in Novissimo Digesto, Torino 1959, 317.

2 F. Cerrone, *Identità civica e diritti degli stranieri*, in *Politica del Doherty*, 1995, 441 ss.

In Italy, as in other countries of continental Europe, legal culture has changed also in this field. Some scholars try to find in the constitutional provisions a chance for the development of a "*common* international law regarding aliens treatment", that could recognise human rights even where there are no international treaties or conventions on the matter.[3]

There can be no doubt that constitutional scholars are now aware that the old German *Staatsrecht* and the classical international doctrines, organised around the States sovereignty, can no longer be the baseline for aliens discriminations. We are bound to Constitutions, and we have to find through constitutional interpretation any baseline for an equal or for a different treatment of citizens and aliens.

This does not mean that things are easier. First, as we will see through a quick glance to Italian provisions, constitutional interpretations may themselves be very controversial. And, second, the old cultural ambivalence of citizenship between a democratic and a state-centered conception has been replaced by new and sometimes dramatic contrasts. The translation of the "human rights common law" in terms of constitutional law is partly due to immigration waves, which are changing completely the social landscape of western countries. So far it means an enjoyment of fundamental rights, and especially welfare rights, by aliens, this translation is often perceived by citizens as a threat to their own rights, to their cultural if not ethnical identity, to their religious beliefs.

2. The different interpretations of aliens' rights according to the Italian Constitution and recent trends in constitutional jurisprudence

Enforcement of constitutional rights to aliens is a very controversial issue in Italy, even on a strict interpretation ground.

While art. 2 of the Constitution of 1948 recognises and grants inviolable rights of man, and requires the fulfilment of duties which cannot be derogated, equal protection of the laws is granted only to citizens (art. 3), and art. 10 states that the legal status of aliens is fixed by the laws according to international law and treaties.

One can distinguish a core of rights granted to everybody (citizens and aliens) as expression of universal features of mankind, and classes of constitutional rights which could be reasonably differentiated between citizens and aliens. But one can also distinguish different spheres of rights

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[3] G. D'Orazio, Lo straniero nella Costituzione italiana, Padova 1992, 126-127.

(civil, social, political), in order to find the treatment each one reserves to citizens and aliens. The difficulty does not consist in having no solution, but in having too many.

In its thirty years jurisprudence, the Constitutional Court has always stated that the equal protection of the laws can be extended to aliens to the extent that a question of fundamental rights is at stake (see decisions nn.. 120/1967, 104/1969, 109 and 244/1974, 62 and 283/1994, 28 and 58/1995).

But if we search the concrete applications of this general rule, we have to consider the cultural and social framework, that is to say, the evolution of the concepts of "citizen" and "alien", and many factual changes, the most relevant of which are the big waves of migration Italy has known in the last years.

In one case of deportation of an alien who was submitted to preventive detention, the Court, after having repeated once again the general rule of non-discrimination of aliens in the enjoyment of fundamental rights, *habeas corpus* included, has stated that, while aliens have no relation with the national community and with the State, citizens are granted in their general *status libertatis* also the freedom of circulation.

This means, for the Court, that Parliament is free to regulate the entry and residence of aliens, balancing among different interests, "the national immigration policy", with the only limit of reasonableness (decision n. 62/1994).

Here the Court seems to feel very strongly the contrasts between immigration policy and the consequences of an unrestricted extension to aliens of fundamental rights. This explains why, going much further than the occasion required, the Court introduces the distinction we have seen. While the regulation of entry and residence can be left almost entirely to legislative discretion, in the regulation of fundamental rights of resident aliens, Parliament has to respect strictly constitutional provisions.

More recently, the Court has smoothed this distinction, arguing that the discretionary power of Parliament has to be restricted even in the regulation of entry, residence and deportation of aliens when fundamental rights are at stake. In decision n. 28/1995, the immigrant worker has the right to join with his parents, and this is considered a right entirely applicable to citizens by artt. 29 and 30 of the Constitution. And in decision n. 58/1995, the Court has stated that when deportation is considered a security measure depending on a legal presumption of a socially dangerous person, the *habeas corpus* principle, which is "a fundamental right of man, citizen or alien", must prevail.

One has to remember that the right of the immigrant worker to join his family had been recognised by the European Court of Human

Rights[4], and international lawyers note that State duties regarding aliens safety and personal freedom have been generally recognised just in cases of deportation.[5]

This is the first reason why the distinction outlined by the Italian Court in decision n. 62/1994, and followed, as we will see now, by other courts, suddenly becomes very problematic. In order to succeed as a general framework in immigrants discrimination cases, the distinction between regulation of entry, residence and deportation and regulation of fundamental rights should correspond to the distinction between immigrants as non citizens and immigrants as persons. But this correspondence does not work when, in entry and deportation cases, immigrants have to be considered as persons, and when, vice versa, regular immigrants are denied fundamental rights such as the right to vote without reactions by courts or by scholars.

3. Jurisprudential and legislative trends in other countries

Another reason why the distinction fails in becoming a general framework for immigrants discrimination cases is that it does not tell us anything about illegal immigrants treatment.

In immigration cases, the United States Supreme Court has developed a doctrine of full deference towards Congress.[6] But in *Plyler vs. Doe* (1982), Justice Brennan, writing for the majority, said that the XIV Amendment, referring to "the person", the due process of law and equal protection of the laws, is enforceable to the "shadow population of illegal immigrants ... (raising) the specter of a permanent caste", whose sons have a right to public education, which, although not granted by the Constitution, "has a fundamental role in maintaining the fabric of our society".[7]

Today, this clear call for the protection of illegal immigrants is threatened by a strong climate of intolerance towards immigrants and by the related tendency of legislatures in setting a privileged standard protection for citizens, and liberals recognise "that enforcement of the

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[4] In the decisions Berrehab of 21 June 1988 and Moustaquim of 18 February 1991, in Publications of the European Court of Human Rights, series A, Vol. 138, 14 - 16 and Vol. 193, pp. 18 - 20, respectively.

[5] See B. Nascimbene, *Straniero (dir. internaz. pubbl.)*, in *Enciclopedia del diritto*, Milano 1990, 1151.

[6] S. H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress and the Courts*, in *Hastings Constitutional Law Quarterly*, 1995 925 ss.

[7] 457, U.S., 202.

border is a legitimate and significant public policy goal", perhaps thinking "that emphasis on border control might lessen concern about interior enforcement". But this strategy remains doubtful, as there is a growing consensus for measures to ensure that illegal aliens already in the U.S. receive neither jobs nor benefits.[8]

Meanwhile, the French *Conseil Constitutionnel* has stated that "Aucun principe, non plus qu'aucune règle de valeur constitutionnelle n'assure aux étrangers des droits de caractère général et absolut d'accès et de séjour sur le territoire national ...; les étrangers se trouvent placés dans une situation différente de celle des nationaux ... Toutefois si le législateur peut prendre à l'égard des étrangers des dispositions spécifiques, il lui appartient de respecter les libertés et droits fondamentaux de valeur constitutionnelle à tous ceux qui résident sur le territoire de la République".[9]

But the reforms of 1993 known as "Pasqua laws" have strongly questioned the *iure soli* standard of achieving citizenship, which was Revolution legacy, and the country seems now to know a kind of regressive circle. Immigrants are denied any legal status in order to legitimise their deportation.[10]

In Italy the approach is different, since there is more hypocricy than elsewhere. The reform of the 1990 law, which has not yet passed through Parliament, tends to transform immigration policy and the questions of immigrants rights, into a question of public order by broadening the chances of deportation, and by giving judges the last word.[11] In this light it is not difficult to guess that "the tightening circle of membership" may prevail.

Last but not least, the European Union's Council Resolution of 20 June 1994 has stated that members of the Union will take into account the requests for entry in their country for working purposes only when the working offer of the State cannot be fulfilled by national or EU workers,

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[8] T. A. Aleinikoff, The Tightening Circle of Membership, in Hastings Constitutional Quarterly, 1995, 918.

[9] Decision of 13 August 1993. R. Pinto, *Le Conseil constitutionnel et la Cour Suprème des Etats Unis confrontés au droit international. Entrées et séjour des étrangers*, in *Journal du droit international*, 1994, 310 ss., has noticed a similar approach of the two Courts in immigration cases.

[10] S. Nair, *France, la crise de l'intégration*, in *Le Monde*, 23 april 1996, 16.

[11] See the critical note of M. Cuniberti, *Politica dell'immigrazione, condizione dello straniero e garanzie costituzionali: a proposito del recente decreto legge sull'immigrazione*, in *Diritto Pubblico*, n. 1, 1996.

or by other countries' workers who reside permanently and legally in that State.

According to this rule, whoever is outside must be kept outside, so that whoever is inside can be privileged for employment. Is it a rational standard and can it face the immigration waves? Surely, it is not an encouraging solution to the efforts in finding at the Community level solutions not foreseeable at the national level, where the traditional state powers over the entry regulations still remain very strong. These efforts had been justified on the basis that the EC Treaty creates specific rights that go beyond what national law can achieve, in that their scope of application *ratione territorii* extends to the entire geographical area of the twelve Member States. These rights, it was noticed, "fill in precisely the gaps left in the economic field by national law and the general international human rights instruments".[12]

'Citizen' and 'person' are, everywhere, problematic concepts, whose definition and interpretation must be considered a difficult achievement, not a dogmatic or a sure premise for the recognition of rights. This remains true, even when the immigration dilemmas and the political struggle between integration and segregation, or exclusion, become more difficult to handle. It remains true for the courts, who may be called to arbiter these dilemmas, and it remains true for constitutional scholars and for diverging political theories.

4. Ethics and constitutional law facing the challenge of immigration

"It has always been easier, it always will be easier, to think of someone as a non-citizen than to decide that he is a non-person".[13] Those who are convinced that the concept of citizenship has always been the best way for tightening the circle of membership of a certain State community will surely agree with Alexander Bickel.

In the American tradition, the origin of these ideas, the meaning of citizenship has been very different from the one which prevailed in continental Europe. Bickel's criticism on the "artificial" characterisation of citizenship confirms these differences, as, in Europe, the concept and status of citizen have been built on artificial basis, in order to engage a battle against the dominant idea that nature, or metaphysical entities,

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[12] C. Tomuschat, The Legal Status of Non-Citizen of the EU. General Introduction, in European Review of Public Law, 1995, 544.

[13] A. Bickel, *The Morality of Consent*, New Haven and London 1975, 53.

assigned a destiny to everybody, so that different social roles and status could not be discussed.

A different stand is taken by some European thinker who suggests a return to Francisco Vitoria's constructions about the *ius societatis et communicationis*, the *ius peregrinandi* in our *provincias et illic degendi*, and about the *ius migrandi*. According to these thinkers, taking human rights seriously means to "have the courage to break all connection with citizenship, that is to say, the last status privilege remained in modern law".[14]

I do not agree with this idea of citizenship, and I think that the real question lies in the fact that, today, political cultures and legislative trends favouring citizens and discriminating immigrants look at citizenship as if it were a naturally driven concept, whereas, we have seen it before, in Europe this concept grew up against the idea of social roles assigned by nature or metaphysical entities.

Are we witnessing the end of the artificial conception of citizenship? Do the restriction's policies reflect a widely accepted notion of citizenship as a naturally driven status? If it were so, today's difficult balances between fundamental rights recognised to everybody as persons and citizens rights would be teared away. Such a conclusion would take us into a deep regression in the relationships not only between citizens and aliens, but also between citizens themselves. Once started, one cannot stop the tendency towards the tightening circles of membership, especially with objections founded on the universal notion of the human person.

This is why I think that the focus of our attention must be kept on the concept of citizenship. In this way, we can hope to deal with the great challenges of immigration. By leaving aside the concept of citizenship, as if it were a privileged status built against a more general idea of equality between men, we miss the central point and we encourage the trends towards social regression in our communities.

The diverging cultures and theories opposing these trends have the task is to build a well balanced conditioned, we can't forget it, by national borders. Here different ethical traditions and constitutional cultures have plenty of work to do.

The mutual relationship between citizens rights and duties could be one of the main aspects of this work. This relationship was at the core of the original idea of citizenship, but in some countries, or in some of them

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[14] L. Ferrajoli, La sovranità nel mondo moderno. Nascita e crisi dello Stato nazionale, Milano 1995, 54.

more than in others, it gradually lost its ultimate sense of a reasonable standard for living together. But it is sometimes recognised that the present challenges to citizenship can succeed more easily where that relationship has lost its sense, while they can be resisted where citizens do not see themselves as mere passive perceptors of public subventions or services.[15]

In the Italian constitutional experience, the chapter of duties has been gradually removed with the slow decline of the state-centered ideology, to whom it was associated in the collective perception, and even by constitutional scholars, at least if we consider the very little attention given to the matter.

In conclusion I would like to refer to art. 2 of the Italian Constitution, which recognises and grants fundamental rights of man, but seeks also the fulfilment of duties of political, economic and social solidarity which cannot be derogated. But in what sense can we speak of a mutual relationship between rights and duties according to the text?

The Italian Constitution does not provide an automatic reciprocity between single rights and duties, as the nineteenth century version put it. Fundamental rights of man cannot be "violated" by any public or private power; solidarity duties cannot be "derogated" by citizens, in the sense that the laws providing those duties (and only laws can provide them according to the Constitutional Court) have to be respected by them.

I think that an idea of reciprocity between rights, especially social rights (e.g. education, health) and solidarity duties is a necessary condition for the growth, or the establishment, of a responsible human coexistence. Solidarity cannot be truly cultivated without individual responsibility, and these two values are part of "the full development of the human person" that is the ultimate constitutional goal. I think that a conceptual development of this kind is necessary if we want to find a suitable approach to immigration challenges.

My views have centered on the Italian Constitution, not only because of my origins, but also because, for historical and cultural reasons, the Italian case is the best example of a wide contrast between the spirit of the Constitution and the effective lack of reciprocity between rights and duties.

Nevertheless, there are similar problems elsewhere, and sometimes approaches may be similar too. According to an English judge, "Whether

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[15] V. E. Parsi, Democrazia e mercato. Elementi di analisi del sistema internazionale, Milano 1995, 55.

we are dealing with aliens or not, the language of rights is not adequate to describe the legal balance which a civilised state should achieve between autonomous human beings and the state itself. People only have rights because they possess free will and are rational creatures; and so are to be treated as ends not means. This is at the very basis of any decent moral philosophy. But for the very same reason they have duties, towards each other and to the community where they live: duties to act responsibly, to respect the rights of others ... In the end, our legal treatment of aliens is a function of our moral perception of the balance the law should achieve between an individual's interests of others".[16]

Following this inspiration, attention would be firstly given to citizenship, in order not to reduce it into a naturalistic concept and to meet, in this way, regressive tendencies towards a primitive egoism and a legally enforced privileged status. It would be driven towards citizenship because integration of immigrants can be understood only if citizenship is founded on the idea of a minimal reciprocity between rights and duties.

After the decline of state-centered ideologies in continental Europe, States are more and more perceived reasons as uncertain organisations of living together. If this is so, a naturally driven concept of citizenship would acquire the sense of a non-principled defense of a status. This is the challenge we have to face together, in order to prepare for a difficult but plausible future.

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[16] The Hon. Mr. Justice Laws, The European Convention on Human Rights and Non-EU Aliens, in European Review of Public Law, 1995, 571-572.