

**QUESTIONING THE FRONTIERS OF RIGHTS:  
THE CASE LAW OF THE ITALIAN CONSTITUTIONAL COURT ON  
NON-EUROPEAN UNION CITIZENS' SOCIAL RIGHTS**

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*The issue of foreigners' entitlement to social rights evokes deep constitutional tensions. On the one hand, there is the egalitarian spirit of constitutions. On the other hand, there are legal systems in which paradigms such as citizenship, legal status or prolonged residence still represent the main criteria for accessing rights. How does the Italian Constitutional Court respond to this tension in adjudicating the welfare claims of migrants? Does it broaden non-nationals' access to social rights and, if so, what reasoning does it rely on? By analysing the constitutional jurisprudence on non-European Union citizens' social rights, this article aims to show the peculiar role of the Italian Court, its involvement in the governance of migration, its participation in reshaping the boundaries of the Italian community in the face of government decisions and the limitations of its intervention in this regard. This article will show how the Italian Constitutional Court has attempted to fulfil two intertwining mandates: to rule on issues which are key to migrants' rights and to define the relationship between the foreigner and the community in a more constitutionally oriented way.*

**Keywords:** comparative legal studies, constitutional courts, immigration and asylum, solidarity, social rights

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## I. MIGRANTS, SOCIAL RIGHTS AND COURTS: A CONSTITUTIONAL CONUNDRUM

There is a silent, overlooked, yet evident contradiction in European democracies between the very essence of constitutionalism (and its profound universalistic and egalitarian impetus) and the legislative frameworks regulating the legal status of foreigners, where paradigms such as citizenship, legal status or prolonged residence still represent the main criteria for accessing rights. The ample protection of fundamental rights preached by constitutions clashes with a legal approach that transforms territorial frontiers into rights frontiers. The contradiction becomes even more blatant when foreigners' entitlement to social rights is at stake. After the Second World War, it appeared necessary to expand the understanding of constitutionalism beyond a mere system of guarantees, towards a system of principles aimed at guiding and orienting people and public authorities alike.<sup>1</sup>

<sup>1</sup> The spread of judicial review across the world is somehow paradigmatic of this shift, as acutely by Mauro Cappelletti: 'When the Nazi Fascist era shook this faith in the legislature, people began to consider the judiciary as a check against

Within this system, social rights were meant to promote and realize a new social order informed by the principles of equality and social justice. However, more and more restrictive social policies seem to have betrayed their original promise and mission (to reduce inequalities and favour integration) and become an extension of migration control and a means of social engineering.

In Europe, welfare systems are often constructed around a central cleavage: citizens and non-citizens. Further fragmentations resulting from the proliferation of foreigners' legal statuses have created 'civic stratification': a hierarchy among migrants.<sup>2</sup> Political decisions about how to distribute available resources end up reflecting and consolidating choices and perceptions about 'wanted' and 'unwanted' migrants, which are mostly based on their supposed ability to contribute to the national welfare system (or, seen from another perspective, not being a burden on the state).<sup>3</sup> In this regard, the structure and organisation of welfare systems in European Union (EU) countries may be seen as a powerful tool of post-entry, internal 'migration control'.<sup>4</sup>

Regulating access to social rights also means determining who is part of the 'distributive community' and who is not.<sup>5</sup> This action enmeshes authorities in a dense web of interaction with concepts such as "belonging", "solidarity" and "social inclusion". Entitlement to social rights reflects and secures

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legislative disregard of principles once considered immutable. They began, in a sense, to "positivize" these principles, to put them in written form and to provide legal barriers against their violation'. Mauro Cappelletti, 'Judicial Review in Comparative Perspective' (1970) 5 *California Law Review* 1017, 1018.

<sup>2</sup> Lydia Morris, 'Managing Contradiction: Civic Stratification and Migrants' Rights' (2003) 37 *The International Migration Review* 74.

<sup>3</sup> Andrew Geddes, 'Migration and the Welfare State in Europe' (2003) 74 *The Political Quarterly* 150.

<sup>4</sup> Ilker Ataç and Sinenglinde Rosenberger, 'Social Policies as a Tool of Migration Control' (2019) 17 *Journal of Immigrant & Refugee Studies* 1.

<sup>5</sup> For the concept of human society as a 'distributive community', see Michael Walzer, *Sphere of Justice: A Defence of Pluralism and Equality* (Basic Books Inc. 1983), which is mentioned in Francesca Biondi dal Monte, *Dai Diritti Sociali alla Cittadinanza. La Condizione Giuridica dello Straniero tra Ordinamento Italiano e Prospettive Sovranazionali* (Giappichelli 2013) 2.

membership in the community. It also proves a person's belonging to the community and guarantees that person's "social identity" – society being one of the main channels and sites of self-expression. In contrast, a trend towards 'categorisation' (the fragmentation and parcellation of foreigners' legal status) and 'selectivity' (where social rights are restricted to 'economically desirable' foreigners) can be observed across the variety of welfare systems in Europe.<sup>6</sup>

Despite being threatened by these processes and obscured by further trends towards privatisation of public services and increasing social isolation, social rights still occupy a central role within the framework of constitutional protection. This may explain why European societies and legal systems are witnessing a countermovement that aims to promote a different understanding of social rights and the requirements for accessing them, based on a more egalitarian and constitutional approach. Among the actors at the vanguard of this movement are the courts, especially constitutional courts, who are more and more frequently being asked to issue rulings on political choices about resource redistribution embedded in national or regional laws.<sup>7</sup> Excluded from democratic processes, immigrant newcomers turn to the courts as the only channel for their welfare claims. In responding to these demands, constitutional courts face not only the pressures of tackling such delicate issues as the availability of resources for regulating migratory flows, but also those of challenging the priorities of political leaders. This means they must manage to 'speak to the political sphere with the language of judges'<sup>8</sup> and address established distributive arrangements without invading the purview of political power by interfering with the competence of the executive or the legislative.

Court assessments of migrants' welfare claims evoke deep constitutional tensions (including, to mention one, the separation of powers), which will be

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<sup>6</sup> Geddes (n 3) 152ff.

<sup>7</sup> On this subject, see, among others, Virginie Guiraudon 'European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping' (2000) 38 *Journal of Common Market Studies* 251; Christina Boswell 'Theorizing Migration Policy: Is there a Third Way?' (2007) 41 *International Migration Review* 75.

<sup>8</sup> Enzo Cheli, *Il Giudice delle Leggi* (Il Mulino 1999) 31, quoted by Silvana Sciarra, 'Prove di Solidarietà in alcune Sentenze della Corte Costituzionale' (2019) 2 *Rivista del Diritto della Sicurezza Sociale* 265.

explored here in the specific context of the constitutional jurisprudence of Italy. How does the Italian Constitutional Court respond to these tensions when adjudicating the welfare claims of migrants? Does it broaden access to social rights for non-nationals and, if so, what reasoning does it rely on? What are, if any, the limitations of the Court's decision-making?

By addressing these questions, this analysis aims to explore the close ties between the legal impact and social saliency of the Court's decisions, that is, their effects on the shape of the community and social relations of individuals inhabiting it. This dual focus, combining legal analysis with social science discourses, represents the main contribution of this article to the existing literature on courts and access to social rights for non-nationals. Too often, legal scholars refrain from engaging with a more interdisciplinary approach and turn a blind eye to the performative role that legal structures play on conditioning individuals, their understandings of social relations, and their views and behaviours. Paradigms surrounding normative provisions and judicial discourse end up influencing the 'social meaning of goods', which are no longer perceived as sources of rights and obligations, but rather as 'property assets placed at the mercy of free trade'.<sup>9</sup> This also applies to the realm of social rights and their access for non-nationals. Interestingly, though, the social effects of legal structures not only affects foreigners but inevitably have a cascade effect on all the members of the community. Instead, the case law analysis herein is enriched with debates emerging from both the legal studies and social sciences literatures. The illustration of the main lines of argumentation of the Court's jurisprudence is supplemented with an inquiry into the peculiar role of the Italian Court, and its involvement in the governance of migration, its participation in reshaping the boundaries of the Italian community in the face of government decisions, as well as its

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<sup>9</sup> Giorgio Resta, 'Gratuità e solidarietà: fondamenti emotivi e "irrazionali"' (2014) *Rivista critica del diritto privato* 25, 61 (my translations). Adopting a rich interdisciplinary, the author highlights the mutual relations between law and society: the former is influenced by social values and, at the same time, it can be considered a 'technique to structure the society' both on a practical and ideological level. Therefore, the legal system should promote a logic of solidarity, which is embedded in the constitutional values. *Ibid* 59.

role in promoting a paradigm of solidarity rather than contractual logic in social relations and the limitations of its interventions in this regard.

Two main circumstances make Italy an interesting case study. First, it is a country affected by fierce pressures to govern the effects of both the economic crisis and an increasing presence of foreigners.<sup>10</sup> Furthermore, the Italian Constitutional Court has intervened on the issue many times, often by securing spaces of legal protection in favour of foreigners (at the expense of the state's discretionary power). As such, on the slippery and contested terrain of access to social rights, the Italian Constitutional Court has performed a 'counter-majoritarian' role.<sup>11</sup>

Given the unique status bestowed upon EU citizens, this article deals with non-EU citizens only.<sup>12</sup> Within the wider universe of social rights, it focuses on the specific areas of education, housing, health care and financial allowances. This is not only because these issues are addressed in the Constitutional Court's most significant rulings on social rights,<sup>13</sup> but also because they account for the most common claims raised by foreigners before

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<sup>10</sup> According to the Italian National Institute of Statistics (Istat), the labour market in Italy is still below the pre-crisis level. Meanwhile, Istat has documented a growing presence of foreigners: 8.7 % in 2019 versus 5.2% in 2008. Istat, *Rapporto Annuale 2019: La Situazione del Paese* (Istat 2019) 26ff. and 116ff.

<sup>11</sup> This expression is taken from Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1986) 254ff, which makes reference to a 'counter-majoritarian difficulty' with respect to guarantees that judicial decisions provide for minorities' rights, even when this goes against what the majority has stipulated through the political process.

<sup>12</sup> Unlike other EU Member States, the Italian legal system enables EU citizens with more than three months of residence in Italy to have the same access to social rights as Italian citizens (without additional restrictions based on the length of residence, family status or economic condition). See Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77, art 24(2).

<sup>13</sup> See e.g. Corte cost 22 marzo 2001, n 105; Corte cost 28 novembre 2005, n 432; Corte cost 30 luglio 2008, n 306; Corte cost 26 maggio 2010, n 187; Corte cost 5 luglio 2010, n 249; Corte cost 11 marzo 2013, n 40; Corte cost 11 novembre 2015, n 230.

the Constitutional Court in the broader area of social rights.<sup>14</sup> Thus, the case law on these matters is ideal for exposing the duelling legal, political and social tensions on display in such a delicate domain as social rights. In addition, recent developments make the selected group of social rights extremely crucial from another perspective: as will be illustrated later, it is the field which has given rise to the most comprehensive dialogue between the Italian Constitutional Court and the Court of Justice of the EU (CJEU).<sup>15</sup>

This article is structured as follows. After section 2 provides some basic context on the role of the Constitutional Court, its composition and the Italian system of constitutional adjudication, section 3 is devoted to the review and analysis of the case law of the Italian Constitutional Court on foreigners' social rights. While acknowledging the complexity and fragmentation of the constitutional jurisprudence in this specific field, this article identifies some main lines of argumentation. Specifically, it demonstrates that, apart from a few decisions, the Italian Constitutional Court has promoted an inclusive approach in cases concerning foreigners' social rights, often relying on the principle of social solidarity enshrined in Article 2 of the Italian Constitution, which explicitly speaks of a duty of solidarity.<sup>16</sup>

Indeed, dealing with key constitutional concepts, such as "inviolable rights", "solidarity" and "residence", the Italian Constitutional Court has attempted to fulfil two intertwining mandates: to rule on issues which are key to migrants' rights and to define the relationship between the foreigner and the community in a constitutionally oriented way. In doing so, the Court has sometimes ended up providing new, revolutionary paradigms, which further develop this relationship in a spirit of solidarity and interdependence. Thus,

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<sup>14</sup> Concerning the saliency of the above-mentioned issues within the constitutional jurisprudence on foreigners' social rights, see Claudio Panzera and Alessio Rauti (eds), *Dizionario dei Diritti degli Stranieri* (Editoriale Scientifica, 2020).

<sup>15</sup> However, this article only peripherally addresses the specific and ample issue concerning the multilevel protection of rights and the dialogue between the Constitutional Court and the CJEU. See n 45.

<sup>16</sup> This principle is explicitly mentioned in the following decisions of the Italian Constitutional Court aimed at securing foreigners' access to social rights. Corte cost 2005, n 432 (n 13); Corte cost 12 dicembre 2011, n 329; Corte cost 2013, n 40 (n 13); Corte cost 27 gennaio 2015, n 22; Corte cost 2015, n 230 (n 13).

drawing upon some of the Court's decisions, this article concludes by questioning whether the paradigms of citizenship, foreigners' legal status and territoriality are adequate foundations on which to build a system of social rights. Meanwhile, this article engages in broader reflection on the possibility of rebuilding welfare systems (as well as migration governance) around a non-contractual and solidarity-based logic, reframing the traditional understanding of the very concepts of citizenship and belonging to a community.

## II. SOME PRELIMINARY REMARKS ON THE ITALIAN CONSTITUTIONAL COURT AND ITS ROLE IN DETERMINING FOREIGNERS' SOCIAL RIGHTS

Some background information about the Italian Constitution and the Italian Constitutional Court is necessary to better understand the role played by this institution. The Italian Constitution establishes the Constitutional Court and sets forth its basic functions and composition and the effects of its decisions.<sup>17</sup> The Court is composed of 15 judges, one-third of whom are appointed by the Parliament (in a joint session), the President of the Republic, and the ordinary and administrative supreme Courts, respectively. Members are appointed to nine-year non-renewable terms. Candidates are chosen among long-established lawyers, full professors of law and judges from the higher courts.

The Constitutional Court has jurisdiction over, among other things, jurisdictional disputes over the allocation of powers between the state and the regions.<sup>18</sup> Such cases arise when a state (or a region) requests the Court to protect its sphere of competence as guaranteed under the Constitution against infringements committed by a region (or by the state or another region). The Constitutional Court is also empowered to adjudicate on the

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<sup>17</sup> The Constitution of the Italian Republic, arts 134-36 (Constitution). For the official English-language version, see 'Constitution of the Italian Republic' (Senato della Repubblica) <[https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf)> accessed 18 February 2022.

<sup>18</sup> Ibid art 134.



constitutionality of laws and acts having force of law.<sup>19</sup> Access to the Court in such matters is reserved to judges, who can raise a question as to a law's constitutionality during the course of a trial that requires the application of that law. Court decisions declaring a law to be unconstitutional render it null and void from the day of publication, with an *erga omnes* effect.

The Italian legal context offers a peculiar realm of analysis with regard to the constitutionality of legal provisions on foreigners' rights. Indeed, although the Constitution provides few rules directly addressing asylum, migration and the legal status of foreigners,<sup>20</sup> other pivotal constitutional provisions operate to raise the national standards of foreigners' rights. These are: Article 117, through which the EU legislation and international treaties signed by Italy acquire 'constitutional relevance';<sup>21</sup> the so-called "personalist" principle of Article 2, which guarantees the full and effective respect of human rights and proclaims the duty of social solidarity;<sup>22</sup> and the equality clause of Article 3, which forbids unfair discrimination and guarantees substantial equality.<sup>23</sup>

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<sup>19</sup> Ibid. For a complete overview of the proceedings which may take place before the Constitutional Court, see 'Decisioni' (Corte Costituzionale) <<https://www.cortecostituzionale.it/actionPronuncia.do>> accessed 27 March 2022.

<sup>20</sup> But see Constitution (n 17) art 10, which states that '(2) legal regulation of the status of foreigners conforms to international rules and treaties; [and] (3) foreigners who are, in their own country, denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution, are entitled to the right to asylum under those conditions provided by law'; *ibid* art 117, distributing legislative powers in Italy between the state and the regions, which provides that legislation on immigration, right of asylum and legal status of non-EU citizens is subjected to the exclusive legislative competence of the state. Meanwhile, other policy areas affecting the management of migration and the legal status of foreigners, such as housing, healthcare, and education, are assigned to the concurrent or exclusive regional legislative competence. *Ibid* art 117(3).

<sup>21</sup> *Ibid* art 117(1), which proclaims that '[l]egislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations'.

<sup>22</sup> *Ibid* art 2, according to which 'the Republic recognises and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity'.

<sup>23</sup> *Ibid* art 3, which states that '(1) [a]ll citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political

Beyond the constitutional framework, Italian legislation on foreigners' social rights presents a complex and confusing maze of normative provisions, which are the product of repeated and inconsistent interventions. Article 2(5) of the Italian Consolidated Law on Immigration (the 'Consolidated Law'), which is the framework law in the field, provides foreigners with the same access to public services as Italian citizens 'within the limits and in the manner proscribed by law'.<sup>24</sup> In the same vein, article 41(1) of the Consolidated Law states that foreigners holding an EU long-term residence permit or a regular residence permit valid for at least one year should enjoy services and benefits of social assistance on an equal footing with Italian citizens.<sup>25</sup> However, for financial reasons, the egalitarian spirit of the legal framework has subsequently been compromised by Article 80(19) of Law 388/2000, an ambiguous and obscure law that severely restricted foreigners' access to social rights, providing that only EU long-term residence permit holders are entitled to the so called *assegno sociale* and other 'financial allowances constituting subjective rights under the law on social service'.<sup>26</sup> As will be illustrated below, the constitutional legitimacy of this latter normative provision has been called into question many times before the Constitutional Court.

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opinions, and personal or social conditions' and '(2) [i]t is the duty of the Republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organisation of the country'. As explored in more detail in the following paragraphs, despite the fact that Article 3 makes reference only to citizens, the Italian Constitutional Court, adopting a constitutionally oriented interpretation, has clarified that the equality principle also applies to non-citizens. Corte cost 23 novembre 1967, n 120; Corte cost 19 giugno 1969, n 104; Corte cost 10 febbraio 1997, n 46.

<sup>24</sup> DL 25 luglio 1998, n 286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, art 2(5) (Consolidated Law on Immigration).

<sup>25</sup> Ibid art 41. This normative provision has been recently modified. See n 44 for further details.

<sup>26</sup> L 23 dicembre 2000, n 388, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2001), art 80(19) (Budgetary Law 2001). See also n 43.

Indeed, against this backdrop of multiple fragmentary (and frequently inconsistent) normative stratifications, the Court has often found itself invested with the task of balancing fundamental rights against budgetary constraints, concerns about peaceful coexistence, the scarcity of financial resources and the margin for political choices regarding the allocation of these resources.<sup>27</sup> In some cases, the Italian Constitutional Court has intervened to redefine these competing interests for the parliament or the government, which has contributed, on a case-by-case basis, to the establishment of criteria for the distribution of welfare benefits and the recognition of social rights. Can the state introduce limitations concerning the content of social rights and the beneficiaries to whom they can be attributed? On which grounds can these limitations be considered constitutionally lawful? By answering these questions, constitutional case law has ended up defining the boundaries of a distributive community.

However, as further illustrated below, these borders are extremely variable and mobile. Indeed, the main argumentative tool used by the Italian Constitutional Court to approach the legislative balancing exercise is a reasonableness test.<sup>28</sup> Through this technique, the Court assesses whether the legislative exclusion of foreigners from social welfare can be justified (1) in the light of the principle of non-discrimination (i.e. treating like cases alike) and/or (2) from the standpoint of the coherence of the entire legal order, based on its intrinsic logic, appropriateness and proportionality. The reasonableness test does not provide a definitive formula for measuring

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<sup>27</sup> Marta Cartabia, 'Gli «immigrati» nella giurisprudenza costituzionale: titolari di diritti e protagonisti della solidarietà', in Claudio Panzera, Alessio Rauti, Carmela Salazar and Antonino Spadaro (eds), *Quattro lezioni sugli stranieri: atti della Giornata di studi* (Jovene 2016).

<sup>28</sup> On the reasonableness test in the case law of the Italian Constitutional Court, its function and its link to the principle of equality, see Gino Scaccia, *Gli "Strumenti" della Ragionevolezza nel Giudizio Costituzionale* (Giuffrè 2000); Andrea Morrone, *Il "Custode" della Ragionevolezza* (Giuffrè 2001); Luigi D'Andrea, *Ragionevolezza e Legittimazione di Sistema* (Giuffrè 2005). With specific reference to foreigners and the right to non-discrimination, see Maria Chiara Locchi, 'Facta Sunt Servanda: per un Diritto di Realtà in Tema di Uguaglianza degli Stranieri' (2010) 3 Quaderni Costituzionali 571.

competing interests against each other and determining which carries the most weight.

The flexibility of this hermeneutic technique allows for an adequate response to the peculiarity of each case. However, at the same time, it generates an equilibrium that relates only to the normative and factual elements of the case in hand. Thus, the Italian Constitutional Court's jurisprudence risks resembling a plethora of operations of "microsurgery" that fail to provide holistic and thorough protection. Furthermore, the Court's decisions in jurisdictional disputes over the allocations of powers between the state and the regions may result in significant variations between regions in the attribution of social rights to foreigners. Nonetheless, as will be discussed later, these limitations in the Court's reasoning must be understood also as part of its constitutional function. The Court performs a politically relevant role (securing rights under the aegis of the Constitution against the abuse of public authorities) while maintaining his independence and being careful to not invade the political sphere.

### III. WHO BELONGS TO THE DISTRIBUTIVE COMMUNITY? THE CASE LAW OF THE ITALIAN CONSTITUTIONAL COURT ON FOREIGNERS' ENTITLEMENT TO SOCIAL RIGHTS

This section is devoted to identifying the main lines of argumentation that the Italian Constitutional Court has relied upon in adjudicating the social rights of migrants.

#### *1. Solidarity with Whom? Foreigners Cannot Be Excluded from Social Rights on the Sole Grounds of (Non-)Citizenship*

The first main outcome of the constitutional case law is the elimination of citizenship as a criterion for identifying the beneficiaries of social rights. As the Court has clarified, the boundaries of solidarity – of the distributive community – do not coincide with the boundaries of citizenship. Despite the growing support for the "Italians first" slogan,<sup>29</sup> the Constitutional Court has

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<sup>29</sup> It is interesting to assess the link between immigration, the rise of right-wing populism and anti-immigrant sentiments. For an analysis of the "Salvini era" and his strategies, see Dylan Patrick McGinnis, 'Anti-Immigrant Populism in Italy: An

maintained that citizenship cannot be considered by the legislator as a valid and reasonable requirement upon which to condition entitlement to social rights.

This view is consistent with the constitutional text. Indeed, there is no reference to *citizenship* in the sections of the Italian Constitution devoted to 'ethical and social relations' and to 'economic relations'.<sup>30</sup> The only provision of the Constitution that mentions the term 'citizen' is Article 38, concerning social assistance and support to be guaranteed to citizens who are unable to work and do not have sufficient economic resources. However, here the term must be read through a teleological interpretative lens: the intention of the Constitutional Assembly was to ensure social security rights, traditionally associated with the labouring condition, to all citizens (and not just to the working class). The possibility of applying Article 38 of the Constitution to non-citizens as well, which meant ensuring access to social rights regardless of citizenship status, was first affirmed by the Constitutional Court in judgment No. 454/1998. Here, the Court stated that the right to vocational training guaranteed by Article 38(3) of the Constitution also applies to foreigners.<sup>31</sup> Therefore, foreign workers suffering injury or invalidity have the right to be enrolled in the public unemployment register.

However, it was not until the landmark judgment No. 53 of 2005 that the Court explicitly eradicated the traditional distinction between citizens and non-citizens, though it still permeates the constitutional case law on foreigners' rights to liberty.<sup>32</sup> In this case, the Court was called on to determine the constitutional legitimacy of Art. 8 (2) of Law No. 1/2001 of the Lombardy Region, which excluded foreigners with a 100% disability rating

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Analysis of Matteo Salvini's Strategy to Push Italy's Immigration Policy to the Far Right' [2021] The Yale Review of International Studies <<http://yris.yira.org/winter-issue/4659>> accessed 27 March 2022.

<sup>30</sup> Constitution (n 17) ss II-III; see Cecilia Corsi, *Lo Stato e lo Straniero* (Cedam 2001) 101ff; Cecilia Corsi, 'Prestazioni Assistenziali e Cittadinanza' [2009] (2) *Diritto Immigrazione e Cittadinanza* 34.

<sup>31</sup> Constitution (n 17), art 38(3), which reads: 'Disabled persons are entitled to receive education and vocational training'.

<sup>32</sup> See, among others, Corte cost 2005, n 432 (n 13). See also, more broadly, Mario Savino, *Le libertà degli altri. La regolazione amministrativa dei flussi migratori* (Giuffrè 2012).

(and their caregivers) from the right to free public transport.<sup>33</sup> The Court's reasoning points to the social aims and solidarity values underlying this measure. Indeed, disabled people have very limited access to economic resources and experience difficulties in participating in the social life of the community. A law that distinguishes between disabled citizens and disabled foreigners introduces arbitrariness into the legal order, since there is no reasonable correlation between citizenship status, on the one hand, and the functions and grounds underlying the social right on the other hand. Without a reasonable justification for the differential treatment of foreigners, the citizenship requirement violates the principle of equality enshrined in Article 3 of the Italian Constitution.<sup>34</sup>

The Court's clear pronouncement that citizenship is *not* a lawful criterion for selecting who is entitled to social rights raises other questions that have yet to be fully resolved. Can we conclude that *all* foreigners are entitled to social rights, regardless of the specific residence permit or status they have been granted? Or are there other, additional requirements that can legitimately be imposed by legislation on foreigners as a condition for the enjoyment of social rights?

A partial answer to the first question comes from European legislation, which has enacted an "equivalence" clause with reference to foreigners holding specific types of residence permit. For instance, obligations to grant foreigners the same rights as Italian citizens are laid down by (i) Article 29 of

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<sup>33</sup> LR 15 gennaio 2001, n 1 (Disciplina dei mutamenti di destinazione d'uso di immobili e norme per la dotazione di aree per attrezzature pubbliche e di uso pubblico), art 8(2), as amended by LR 9 dicembre 2003, n 25, Interventi in materia di trasporto pubblico locale e di viabilità, art 5(7).

<sup>34</sup> As has been highlighted by scholars, the claimant was a refugee. See Graziella Romeo, 'Il cosmopolitismo pragmatico della Corte Costituzionale tra radicamento territoriale e solidarietà' (2018) 1 *Rivista AIC* 13, citing Gianluca Bascherini, *Immigrazione e diritto fondamentali. L'esperienza italiana tra storia costituzionale e prospettive europee* (Jovene 2007) 392-93. Hence, the Court could have solved the case just by relying on the provisions of EU law prohibiting any discrimination between refugees and nationals in terms of entitlement to social rights. For other decisions by the Court replicating this reasoning, see Corte cost 29 luglio 2008, n 306 (n 13); Corte cost 14 gennaio 2009, n 11. But see, for a partial reversal, Corte cost 15 marzo 2019, n 50.

Directive 2011/95, which applies to beneficiaries of international protection,<sup>35</sup> (2) Article 11 (1) and (4) of Directive 2003/109 concerning foreigners with an EU long-term residence permit and (3) Article 12 of Directive 2011/98 on third-country nationals residing and working in a Member State.<sup>36</sup> These provisions notwithstanding, the Constitutional Court recently had to intervene to strike down regional and national

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<sup>35</sup> For CJEU case on this subject, see in particular Joined Cases C-443/14 and C-444/14 *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover* EU:C:2016:127; Case C-713/17 *Ahmad Shah Ayubi v Bezirkshauptmannschaft Linz-Land* EU:C:2018:929.

<sup>36</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337, art 29; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16, arts 11(1) and (4) (Long-Term Residents Directive); Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343, art 12 (Single Permit Directive). For a complete overview of these obligations, see Associazione per gli Studi Giuridici sull'Immigrazione (ASGI), *Stranieri e accesso alle prestazioni sociali* (Alberto Guariso (ed), 2018) <<https://www.cgil.lombardia.it/wp-content/uploads/2018/02/Stranieri-e-accesso-alle-prestazioni-sociali-gennaio-2018-guariso.pdf>> accessed 4 June 2021. In particular, the equality provision of the Single Permit Directive is limited to measures of social security, whereas measures of social assistance are excluded from the scope of the Directive. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166, art 3(5). According to the case law of the CJEU, the latter are social measures, which depend 'on an individual assessment of the claimant's personal needs'. Social security measures, by contrast, are characterised by the fact that 'the criteria applied are objective, legally defined criteria which, if met, confer entitlement to the benefit, the competent authority having no power to take account of other personal circumstances does not depend from the state discretionary choices, but from the fulfilment of specific, predetermined conditions'. Case C-449/16 *Kerly Del Rosario Martinez Silva v Istituto nazionale della previdenza sociale (INPS) and Comune di Genova* EU:C:2017:485.

provisions excluding foreigners holding applicable permits from access to important housing support allowances.<sup>37</sup>

*2. Solidarity to What Extent? Foreigners Cannot be Excluded from Social Measures Aimed at Responding to Primary Needs.*

This section will address the second question raised towards the end of the last section, inquiring into legitimate limits to the scope of social rights accorded to foreigners. The Constitutional Court has clearly acknowledged that, in principle, the different legal status of foreigners may justify a different legal treatment.<sup>38</sup> However, it has also found that this reasoning does not apply when the social measure in question aims to protect fundamental rights. This means that, although different treatment may be justified (in view of the principles of reasonableness and proportionality), no limitation of fundamental rights may be deemed legitimate.

To this end, the Constitutional Court, when called upon to determine the constitutional legitimacy of article 80(19) of Law No. 388/2000, which reserved access to social welfare allowances solely to EU long-term residence permit holders, found that non-EU citizens were entitled to all such 'essential social benefits', including disability benefits for mobility needs, blindness and deafness, regardless of the typology of residence permit owned by the foreigner.<sup>39</sup> Indeed, such limitations have been declared unreasonable by the Constitutional Court several times.<sup>40</sup> In this regard, the Court has observed that obtaining the status of EU long-term resident requires proving the availability of financial resources and the possession of a regular permit to

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<sup>37</sup> Corte cost 24 maggio 2018, n 106; Corte cost 20 luglio 2018, n 166. For further details, see s IV below.

<sup>38</sup> See Corte cost 1969, n 104 (n 23); Corte cost 24 febbraio 1994, n 62.

<sup>39</sup> Corte cost 2008, n 306 (n 13) (on the disability allowance); Corte cost 2015, n 22 (n 16) (concerning the pension for blind people); Corte cost 2015, n 230 (n 13) (on the civil disability pension for deaf people).

<sup>40</sup> In addition to the above-mentioned judgments, see also Corte cost 2009, n 11 (n 34) (on the disability pension); Corte cost 2010, n 187 (n 13) (on the monthly disability allowance); Corte cost 2011, n 329 (n 16) (on the allowance for disabled minors to facilitate access to school); Corte cost 2013, n 40 (n 13) (with reference again to the disability allowance and to the disability pension).



stay in Italy for at least five years.<sup>41</sup> However, foreigners who apply for these social benefits are often poor or experiencing a situation of economic hardship and in need of urgent assistance and care. Specific social benefits, constituting 'a remedy for satisfying the primary needs for the protection of the human person', must be considered 'fundamental rights because they represent a guarantee for the person's survival'.<sup>42</sup> Therefore, these social benefits must be guaranteed to all in order to assure compliance with the principle of equality and with the constitutional mandate to protect fundamental rights such as the right to health and education.<sup>43</sup> In such cases, the only requirement is a regular and stable presence in the territory of the state.

However, consistent with the interlocutory nature of the constitutional review process, the Court never invalidated the entire law, but each time censored only that part of it which excluded foreigners without an EU long-term permit from enjoying the particular social benefit aimed at guaranteeing the primary needs at stake in the specific case. Some recent legislative amendments notwithstanding,<sup>44</sup> the national legal framework continues to lack coherent, sound rules, raising concerns about compliance with the non-discrimination principle enshrined in the Italian Constitution, the Charter

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<sup>41</sup> Consolidated Law on Immigration (n 24) art 9.

<sup>42</sup> Corte cost 2010, n 187 (n 13). See also Corte cost 2011, n 329 (n 16); Corte cost 2013, n 40 (n 13); Corte cost 2015, n 22 (n 16); Corte cost 2015, n 230 (n 13). All quotes from cases are my own translations.

<sup>43</sup> Corte cost 2011, n 329 (n 16).

<sup>44</sup> The legal framework has been recently modified by L 23 dicembre 2021, n 238, Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea - Legge europea 2019-2020, art 3(1)(a). The law implicitly abrogates Article 80(19) of the Budgetary Law 2001 (n 26) and modifies Article 41 of the Consolidated Law on Immigration (n 24). According to the new Article 41, foreigners holding a residence permit of at least one year enjoy the same access to social benefits as Italian citizens. Different requirements are introduced concerning those social benefits constituting a right. Foreigners with a single permit issued under the Single Permit Directive (n 36) have access to non-family allowances only if they have worked in Italy for more than six months and to family allowances only if they have a residence permit allowing them to work for more than six months. Consolidated Law on Immigration (n 24) art 41.

of Fundamental Rights of the EU (CFR) and European Court of Human Rights (ECtHR) case law.<sup>45</sup>

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<sup>45</sup> See e.g. DL 21 dicembre 2021, n 230 Istituzione dell'assegno unico e universale per i figli a carico, in attuazione della delega conferita al Governo ai sensi della legge 1° aprile 2021, n 46, which discriminates against some foreigners benefitting of a national form of protection (such as those with residence permits under DL 286/1998 (n 24) for 'social protection' (e.g. victims of trafficking (art 18)) or the assistance of minors (art 31)) with regard to access to the new single universal child benefit (*assegno unico universale*). Furthermore, on 8 July 2020, the Italian Constitutional Court considered a referral from the Court of Cassation questioning the constitutionality of the rule making the eligibility of third-country nationals for the childbirth allowance and the maternity allowance conditional upon holding an EU long-term residence permit. The Court decided to refer the question to the CJEU for a preliminary ruling concerning the direct applicability of Article 12 of the Single Permit Directive. Corte cost 8 luglio 2020, n 182 (English translation available at <[https://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/EN\\_Ordinanza\\_182\\_2020\\_Sciarra.pdf](https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/EN_Ordinanza_182_2020_Sciarra.pdf)>) accessed 18 February 2022. With its judgment of 2 September 2021, the Court of Justice ruled that third-country nationals who hold a single work permit obtained pursuant to the Italian legislation transposing the Single Permit Directive are entitled to a childbirth allowance and a maternity allowance as provided for by the Italian legislation. Case C-350/20 *OD and Others v Istituto nazionale della previdenza sociale (INPS)* EU:C:2021:659. With Decision No. 54/2022, the Italian Constitutional Court declared the constitutional illegitimacy of the normative provisions that excluded foreigners allowed to work with a residence permit of more than six months from childbirth allowance and maternity allowance. According to the Court, these provisions violated Articles 3 and 31 of Constitution and Article 4 of the CFR. Recently, in a judgment rendered on 28 October 2021, the CJEU intervened again on an Italian legislative provision that excluded third country nationals from eligibility for the so called 'family card', a document which confers entitlement to discounts on supplies of goods and services by public and private entities that have entered into an agreement with the Italian government. The CJEU ruled that this exclusion 'constitutes unequal treatment contrary to Article 11(1)(f) of Directive 2003/109, Article 12(1)(g) of Directive 2011/98 and Article 14(1)(g) of Directive 2009/50'. Case C-462/20 *Associazione per gli Studi Giuridici sull'Immigrazione (ASGI) and Others v Presidenza del Consiglio dei Ministri – Dipartimento per le politiche della famiglia and Ministero dell'Economia e delle Finanze* EU:C:2021:894. In a subsequent judgment of 11 March 2022, declaring the inadmissibility of certain questions referred by the Court of Cassation, the Italian Constitutional Court stipulated that third country

Furthermore, many scholars have criticised the flaws of the pattern of argumentation regarding 'primary needs'. First, it has been argued that the Court has failed to apply its approach in a coherent and consistent way.<sup>46</sup> There have been controversial decisions in which the Court did not consider certain rights, such as the right to access to the universal basic income (*reddito di cittadinanza*), as serving primary needs.<sup>47</sup> On this basis, regional laws requiring foreigners to have been legal residents for a certain amount of time in order to access such rights were deemed constitutionally legitimate by the Court. Second, it has been observed that social measures are sometimes

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citizens with a single permit or an EU long-term permit should have access to the family unit allowance on an equal footing with Italian citizens, even if some members of the family are residing temporarily in their country of origin. The Court also took the opportunity to reaffirm the primacy of EU law, the binding nature of the CJEU's decisions and their contributions to enhancing the protection of rights. Corte Cost 11 marzo 2022, n 67. On the broader subject of foreigners' access to social rights, see also Cecilia Corsi, 'L'Accesso degli Stranieri ai Diritti Sociali' in Antonio Bartolini e Alessandra Pioggia (eds), *Cittadinanze amministrative* (Firenze University Press 2016); Maria Dolores Ferrara, 'Status degli stranieri e questioni di welfare tra diritti e inclusione sociale' (2017) 2 *Rivista del Diritto della Sicurezza Sociale* 265; Sciarra 'Prove di Solidarietà in alcune Sentenze della Corte Costituzionale' (n 8).

<sup>46</sup> See e.g. Paola Chiarella, *Solidarietà e diritto sociali. Aspetti di filosofia del diritto e prassi normative* (Cedam 2017); Cecilia Corsi, 'La Trilogia della Corte Costituzionale: ancora sui Requisiti di Lungo-residenza per l'Accesso alle Prestazioni Sociali' (2018) 6 *Le Regioni* 1170.

<sup>47</sup> See e.g. Corte cost 11 febbraio 2008, n 32. See also Chiarella (n 46); Corsi, 'La Trilogia della Corte Costituzionale' (n 46). See further Corte cost 25 gennaio 2022, n 19, in which the Court confirmed the constitutionality of the rule making the eligibility of third-country nationals for the universal basic income conditional upon holding an EU long-term residence permit. According to the controversial decision of the Court, the so called *reddito di cittadinanza* is a measure with composite contents and objectives: it is not only a measure of social assistance, aimed at responding to primary needs of individuals, but also an active labour market measure. Furthermore, according to the Court's reasoning, this measure involves a job placement process, hence a long period of time, which is why the requirement of the EU long-term residence permit cannot be considered unreasonable.

intended to fulfil multiple aims (so-called 'multifunctional measures').<sup>48</sup> How should the legislator (and the interpreter of the law) approach these measures? Should the aim to satisfy 'primary needs' prevail, hence making these measures applicable to everyone? Or should prevalence be given to the function related to 'non-essential needs', such that these measures can be made subject to given conditions?

Notwithstanding these criticisms, the role of the Constitutional Court in promoting the legal entitlements of foreigners and preventing the downgrading of foreigners' rights cannot be underestimated. As illustrated by the brief overview above, the Court is involved in the difficult task of balancing among competing interests which drive the political choices tied to the allocation of economic resources, on the one hand, and the preservation of the principle of non-discrimination, on the other hand. In these cases, the solidarity principle enters into the equation and tips the scales in favour of the non-discrimination principle, guiding the outcome of the Constitutional Court's decisions.

### *3. A Universal Form of Solidarity: All Foreigners are Entitled to Inviolable Rights*

The Court takes the reasoning explored above even further when the protection of inviolable rights is at stake. Hence, in these cases, the legal status of foreign nationals is not even taken into account. Even undocumented foreigners are entitled to enjoy social rights when these are strictly related to inviolable rights, i.e. rights belonging 'to individuals not as members of a political community but as human beings as such'.<sup>49</sup> Embracing this line of argumentation, the Constitutional Court, as reflected in its well-established case law analysed below, has upheld foreigners' entitlement to social rights which are directly related to the right to health and healthcare services. According to the Court, there is an 'inalienable core of the right to health' guaranteed by the Constitution as an 'inviolable part of the human dignity', and any failure to prevent a lack of protection amounts to violations of this constitutional right.<sup>50</sup>

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<sup>48</sup> Francesca Biondi dal Monte, 'Radicalismo Territoriale e Accesso dei Minori agli Asili Nido' (2019) 4 *Studium iuris* 441

<sup>49</sup> Corte cost 2010, n 249 (n 13). See also e.g. Corte cost 2001, n 105 (n 13).

<sup>50</sup> Corte cost 5 luglio 2001, n 252; Corte cost 22 luglio 2010, n 269.

This reasoning runs through several decisions in which the Constitutional Court has been called upon to verify the competence of regional authorities to extend the scope of the legal protections in areas of social assistance and public services provided at the national level to undocumented foreigners. Law No. 29/2009 of the Region of Tuscany is emblematic in this regard. Under this law, all migrants in Tuscany were entitled to benefit from 'urgent and non-delayable social welfare measures, which are necessary to ensure respect for fundamental rights'.<sup>51</sup> The Italian government claimed that all of these measures exceeded regional legislative power, were in conflict with national legislation and infringed the state's exclusive competence in matters related to migration.<sup>52</sup> However, as already mentioned, the Constitutional Court ruled that these regional provisions were legitimate, highlighting that migrants are entitled to a core set of inviolable fundamental rights regardless of their status.<sup>53</sup>

Tuscany was not an isolated case. Similar provisions were approved, for instance, in Apulia, where Regional Law No. 32/2009 established that undocumented migrants would be granted access to a number of medical treatments, including mental health services, pharmaceutical assistance, gynaecological care and abortions,<sup>54</sup> and in Campania, where the right to

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<sup>51</sup> LR 8 giugno 2009, n 29, Norme per l'accoglienza, l'integrazione partecipe e la tutela dei cittadini stranieri nella Regione Toscana, art 6(35).

<sup>52</sup> For relevant constitutional provisions, see n 15 above.

<sup>53</sup> Corte cost 2010, n 269 (n 50). The recognition of a 'hard core' of fundamental and inviolable rights, regardless of citizenship and legal status, led the Constitutional Court to rule that expulsion cannot be enforced if an undocumented migrant is undergoing an essential therapeutic treatment. Corte cost 2001, n 252 (n 50). Similar reasoning underpins the affirmation of a foreigner's rights to legal defence, even in case of undocumented foreigners. Indeed, the Constitutional Court has clarified that the effective exercise of the right of defence 'implies that the addressee of a measure restricting the freedom of self-determination must be enabled to understand its content and meaning'. Corte cost 8 giugno 2000, n 198. As a consequence, 'in the case of non-culpable ignorance of an expulsion order - in particular due to non-compliance with the obligation to translate legal documents - the deadline for submitting an appeal should not be considered'. Ibid.

<sup>54</sup> LR 4 dicembre 2009, n 32, Norme per l'accoglienza, la convivenza civile e l'integrazione degli immigrati in Puglia, art 10(5) (Apulia Immigration Law). This

social housing was guaranteed to all foreigners regardless of their status.<sup>55</sup> In both cases, the Court ruled in favour of the regional legislation, ascertaining that they did not infringe upon the state's exclusive legislative competence as guaranteed by the Constitution. These decisions were also grounded on the universal and inviolable nature of the rights recognised by the regional provisions in question.<sup>56</sup>

Within the realm of inviolable rights, the Court seems to conceptualise a universal solidarity where the welfare system applies to all, regardless of status and legal conditions. Some outcomes, particularly involving undocumented foreigners, have called into question the state's discretionary power to decide who is entitled to enter and stay in the national territory. Indeed, as some authors have highlighted, it appears that the state's exclusive power to plan and control migration is being hollowed out by progressive constitutional protection of the foreigner as 'human being'.<sup>57</sup>

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provision extends the scope of the right to healthcare as compared to national legislation, which guarantees only urgent and essential healthcare services to undocumented foreigners. Consolidated Law on Immigration (n 24) art 35(3).

<sup>55</sup> LR 8 febbraio 2010, n 6, Norme per l'inclusione sociale, economica e culturale delle persone straniere presenti in Campania, art 16 (Campania Immigration Law). This law guaranteed the right to social housing to all foreigners, regardless of their status. Ibid arts 17(2) and (5). In contrast with this regional legislative provision, Article 40 of the Consolidated Law on Immigration (n 24) only provides for accommodation centres and access to social housing to long-term resident migrants who are temporarily unable to provide on their own for their basic living and subsistence needs. Furthermore, Article 18(1) of the regional law provides that all foreigners who are present in the region are entitled to the same healthcare services as Italian citizens.

<sup>56</sup> Corte cost 22 ottobre 2010, n 299, concerning the Apulia Immigration Law (n 54); Corte cost 21 febbraio 2011, n 61, concerning the Campania Immigration Law (n 55).

<sup>57</sup> Donatella Morana, *La Salute come Diritto Costituzionale* (Giappichelli 2013) 130. These decisions of the Constitutional Court have also received some criticism for having failed to respect state competence on immigration issues, as established by Article 117 of the Constitution (n 17). Scholars elaborated a distinction between 'immigration policies' and 'immigrant policies'. See Tomas Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (Avebury 1990); Tiziana Caponio, 'Governo Locale e Immigrazione in Italia. Tra Welfare e Politiche di Sviluppo' (2004) 5 Le

This approach of universal solidarity is built upon two main normative bases: (1) the principle of non-discrimination, proclaimed by Article 3 of the Italian Constitution and Article 14 of the European Convention on Human Rights;<sup>58</sup> and (2) the principle of social solidarity, whose constitutional basis as a binding duty is to be found in Article 2 of the Italian Constitution. These are 'super-personal social rights',<sup>59</sup> which, according to the reasoning of the

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istituzioni del federalismo 789, 805; Marco Benvenuti, 'Dieci Anni di Giurisprudenza Costituzionale in materia di Immigrazione e di Diritto di Asilo e Condizione Giuridica dei Cittadini di Stati Non Appartenenti all'Unione Europea' (2014) 3 *Questione giustizia* 82. The former, which fall within the exclusive jurisdiction of the state, embrace all the measures establishing the conditions for the legal entry and stay of foreigners in Italian territory, whereas the latter, over which regions have concurrent or even exclusive legislative competence, refer to issues such as social assistance, education, health, housing and public interventions to promote migrant integration. For relevant decisions of the Constitutional Court, see Corte cost 2011, n 61 (n 56); Corte cost 27 gennaio 2010, n 30; Corte cost 27 febbraio 2008, n 50. However, the Court has also established that public intervention in the field of migration cannot be limited to control of the entry and stay of foreigners, but that it also involves other fields, such as public assistance, education, healthcare or housing, where 'national and regional competences are intertwined, as established by the Constitution'. Corte cost 7 luglio 2005, n 300. In other words, asylum and migration are necessarily the subject of both central and regional intervention and the picture is more complicated than the strict distribution of powers provided by Article 117 of the Constitution (n 17). Furthermore, while the Constitutional Court traditionally displays centralising tendencies when resolving jurisdictional conflicts between the state and regions, when immigration issues are at stake, it leans in favour of the competence of regions. Some authors suggest a possible explanation for this trend, highlighting the correlation between Constitutional Court decisions and particularly restrictive policies on immigration adopted during the timeframes 2005-06 and 2010-11. See e.g. Benvenuti (n 57) 104-05.

<sup>58</sup> To this end, see ASGI (n 36). For relevant ECtHR case law cited in the ASGI report, see *Gaygusuz v Austria* (1996) 23 EHRR 364; *Niedzwiecki v Germany* (2006) 42 EHRR; *Fawsie v Greece* App no 40080/07 (ECtHR, 28 October 2010) (finding that the objective of tackling the demographic decline in the national population does not constitute a reasonable basis for restricting social support to large families with Greek citizenship); *Dhabbi v Italy* App no 17120/09 (ECtHR, 8 April 2014) (concerning an Italian social allowance for large families).

<sup>59</sup> Barbara Pezzini talks about '*diritti sociali personalissimi*', such as where the hard core of the right to health care and the minors' rights are at stake. Barbara Pezzini,

Court, should not be conceptualised as a social right under Article 38 of the Constitution, but should rather be included among the provisions in Article 2 aimed at safeguarding persons' inviolable rights.

#### IV. TESTING THE LIMITS OF EXCLUSION UNDER THE "TERRITORIAL PARADIGM"

Through the case law illustrated thus far, the Constitutional Court has traced the ultimate boundaries of social rights that cannot be overruled by the legislator's discretionary power. This section will attempt to broaden the picture by further exploring the reasoning of the Italian Constitutional Court in respect of foreigners' social rights in cases involving provisions that are not meant to address primary needs or secure inviolable rights.

##### *I. A Conditioned Form of Solidarity: Residence-Based Access to Social Rights*

Except for the cases discussed above where a universal form of solidarity steps in to address severe or urgent needs, the Constitutional Court clearly maintains that the legislator can legitimately condition the entitlement of social rights on the fulfilment of specific requirements. The legislative framework on social protection measures offers a vast spectrum of such requirements, ranging from EU long-term residency status to mere presence in the territory.<sup>60</sup> In which instances can the legislator lawfully restrict access to social rights without being censured by the Constitutional Court? As will be illustrated below, the response offered by the constitutional case law is a 'gradation of legal protection'.<sup>61</sup>

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'Una questione che interroga l'uguaglianza: i diritti sociali del noncittadino', in Associazione italiana dei costituzionalisti, *Lo statuto costituzionale del non cittadino. Atti del Convegno annuale dell'Associazione italiana dei costituzionalisti, Cagliari, 16-17 ottobre 2009* (Jovene 2010).

<sup>60</sup> Cecilia Corsi, 'Stranieri, Diritti Sociali e Principio di Eguaglianza nella Giurisprudenza della Corte Costituzionale' (2014) *Federalismi Focus Human Rights* No 3/2014, 9-10, 28 <<https://www.federalismi.it/AppOpenFilePDF.cfm?artid=27711&dpath=document&dfile=22102014151431.pdf>> accessed 18 February 2022.

<sup>61</sup> Romeo (n 34) 21.



Here, the case law seems to reflect a conditioned form of solidarity and it is possible to witness a decisive shift in the arguments. Indeed, since 2013, when the criterion of citizenship was declared unconstitutional on grounds of unreasonableness, a different approach has taken its place: the so-called 'territorial paradigm'.<sup>62</sup> According to this paradigm, legislative provisions differentiating access to social rights based on the "duration of stay" have been considered constitutionally legitimate on several occasions. In Decision No. 222/2013, concerning access to social measures beyond essential services, regions were allowed to favour foreigners who were long-term residents with prolonged residence in their territory in view of their 'contribution to the moral and material progress of the community'.<sup>63</sup> The Court concluded that it is not unreasonable to give priority to supporting families who have resided in the territory for a long time in order to promote the most 'active' and 'vital components of the community'.<sup>64</sup> Similarly, in Decision No. 141/2014, the Constitutional Court upheld Regional Law No. 141/2014 of Campania, which restricted childbirth allowances to foreigners who had resided in the regional territory for at least two years. The choice of making childbirth support conditional on 'a stable presence in the territory' passed the reasonableness test.<sup>65</sup>

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<sup>62</sup> See Mario Savino, 'Lo Straniero nella Giurisprudenza Costituzionale: tra Cittadinanza e Territorialità' (2017) 1 Quaderni costituzionali 41. This shift was also aided by the fact that in 2013 the EU Commission launched an infringement procedure (No n 2013/4009) against the Italian government for non-compliance with the legal obligations stipulated by the Long-Term Residents Directive (n 36). Subsequently, legislative provisions attributing social rights only to Italian and EU citizens were changed accordingly to extend access to social rights to foreigners holding an EU long-term residence permit.

<sup>63</sup> Corte cost 16 luglio 2013, n 222. The challenged law granted access to social measures (provision of rent allowances, financial support to family income and tax reduction through the so-called 'Carta famiglia', or family charter) only to foreigners who had resided in the regional territory for at least 2 years and in the national territory for at least 5 years. LR 30 novembre 2011, n 16, Disposizioni di modifica della normativa regionale in materia di accesso alle prestazioni sociali e di personale.

<sup>64</sup> Corte cost 2013, n 222 (n 63).

<sup>65</sup> Corte cost 28 maggio 2014, n 141.

In line with this trend, except where fundamental rights are at stake, the Court allows the national and regional legislator to select the beneficiaries of social measures based on their social embeddedness. Thus, the enjoyment of forms of social solidarity can be lawfully made subject to the demonstration of a strong relationship with the community. This criterion does not coincide with a mere legal presence in the territory, but rather requires a non-occasional, non-short term stay in the territory of the region,<sup>66</sup> 'participation in the political, economic and social organisation of the Republic',<sup>67</sup> a requirement which, according to the Court, is fulfilled through the demonstration of long-term residence.

However, the 'duration of stay' criterion has likewise encountered some limitations and adjustments. As explained above, differentiation introduced by national or regional laws can only be considered constitutionally legitimate as long as the legislative provision, and the balance among the competing interests underlying it, conform to principles of reasonableness and proportionality.<sup>68</sup> This reasoning led the Constitutional Court to declare the unconstitutionality of a regional legislative provision and a national law, each of which made access to housing benefits conditional on ten-year residency in the national territory.<sup>69</sup> The Court ruled that these provisions

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<sup>66</sup> See, among other decisions of the Constitutional Court, Corte cost 2008, n 306 (n 13); Corte cost 2010, n 187 (n 13).

<sup>67</sup> Corte cost 2013, n 222 (n 63).

<sup>68</sup> See, among others, Corte cost 2005, n 432 (n 13), requiring that, when the law introduces a differentiation between citizens and foreigners, there should not be an arbitrary or irrational 'normative reason'.

<sup>69</sup> LR 7 giugno 2017, n 13, Modifiche alla legge regionale 29 giugno 2004, n 10 (Norme per l'assegnazione e la gestione del patrimonio di edilizia residenziale pubblica e modifiche alla legge regionale 12 marzo 1998, n 9 (Nuovo ordinamento degli enti operanti nel settore dell'edilizia pubblica e riordino delle attività di servizio all'edilizia residenziale ed ai lavori pubblici)) e alla legge regionale 3 dicembre 2007, n 38 (Organizzazione dell'intervento regionale nel settore abitativo); DL 24 giugno 2008, n 112, Disposizioni urgenti per lo sviluppo economico, la semplificazione, la competitività, la stabilizzazione della finanza pubblica e la perequazione Tributaria, art 11(13), converted into L 6 agosto 2008, n 133, Conversione in legge, con modificazioni, del decreto-legge 25 giugno 2008, n. 112, recante disposizioni urgenti per lo sviluppo economico, la semplificazione, la competitività, la stabilizzazione della finanza pubblica e la perequazione

violate European law, which puts foreigners holding an EU long-term residence permit on an equal footing with nationals in respect of the enjoyment of social rights,<sup>70</sup> and that they were unreasonable and disproportionate because there is no connection between a ten-year 'duration of stay' and 'access to a measure aimed at satisfying a primary housing need'.<sup>71</sup>

In other cases the Court has denied the possibility that cost-saving considerations could override the reasonableness principle.<sup>72</sup> However, in Decision No. 50/2019 the Court seemed to maintain the legitimacy of a link between the payment of taxes and access to social services, in line with some judgments of the ECtHR.<sup>73</sup> The case concerns access to a welfare benefit (the so-called *assegno sociale*), which Article 80(19) of Law No. 388/2000 restricts

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tributaria, under which foreigners who wished to access the national fund for housing rent allowances were required to certify ten-year residency in the national territory or five-year residency in the same regional territory.

<sup>70</sup> Long-Term Residents Directive (n 36) art 11(f).

<sup>71</sup> Corte cost 2018, n 106 (n 37); Corte cost 2018, n 166 (n 37).

<sup>72</sup> See Corte cost 14 gennaio 2013, n 2, in which the Court specifies that seeking a balance between the broadest possible extension of social rights and the scarcity of financial resources could not take precedence over the reasonableness principle.

<sup>73</sup> Valentina Zonca, *Cittadinanza Sociale e Diritto degli Stranieri. Profili Comparatistici* (Cedam 2016) 120. On this subject, see *Dhabbi* (n 58) para 52, where the Court maintained that, since the claimant had been paying contributions in the same way and on the same basis as EU workers, he consequently did not belong to the category of individuals who had failed to contribute to the funding of public services and about whom a State could have legitimate reasons for restricting recourse to expensive public services. In the same vein, see also *Ponomaryovi v Bulgaria* ECHR 2011-III 365, para 54, where the Court observes that 'a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory. For instance, the preferential treatment of nationals of member States of the European Union – some of whom were exempted from school fees when Bulgaria acceded to the Union [...] – may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship'.

to foreigners with an EU long-term residence permit. The Court determined that this legal requirement was legitimate: given the scarcity of economic resources, when inviolable rights are not at stake, the legislator may legitimately introduce restrictive criteria or even exclude foreigners from the enjoyment of social services.

These measures of social protection become the instruments through which the legislator acknowledges and rewards the foreigner's participation in the life of the community over a certain period of time.<sup>74</sup> Following the Court's reasoning, unlike mere legal residence, the possession of an EU long-term residence permit may prove such participation. Indeed, the requirements for obtaining this specific status (holding of a regular permit to stay for a minimum of five years, possessing sufficient financial resources and passing an Italian language test) are such as to certify foreigners' social and legal integration into the national context. Therefore, making access to this welfare benefit subject to possession of an EU long-term residence permit is neither discriminatory nor unreasonable, since this social measure should be interpreted as a form of 'solidarity-based compensation' provided to persons over 65, after their retirement, 'for the contribution they have offered to the moral and material progress of the society.'<sup>75</sup> By rooting the territorial paradigm in the foreigner's economic contribution to the community, this judgment ties the conditional form of solidarity, tempered by the reasonableness principle, to a stronger commutative logic.

The above-described developments within constitutional case law show all the contradictions underlying the so-called territorial paradigm. In line with a broader trend, citizenship has been progressively substituted by long-term residence (so-called 'denizenship') as the main anchor for welfare entitlements.<sup>76</sup> Nonetheless, whereas in some cases (for instance, with EU long-term residency status) the links between access to social rights and the duration of stay (as a demonstration of *radicamento* (social embeddedness)) have ended up placing foreigners and citizens on equal footing, this criterion

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<sup>74</sup> Corte cost 2019, n 50 (n 34), para 7.

<sup>75</sup> Ibid.

<sup>76</sup> For more on the concept of denizenship, see Hammar (n 57).

has more often been invoked to further exclude foreigners from legal protection.

Indeed, based on the territorial paradigm, laws regulating access to social rights often require demonstration of *radicamento*, of social and economic integration, which can be substantiated only by what can be termed as a "qualified presence" in the territory. To this end, a foreigner's legal presence in the territory, even for a long time, is not enough. Nor is the possession of a permit to stay. In order to prove this "qualified presence" in the territory, the law requires foreigners to meet specific legal requirements, such as a continuous residence, or in the case of the EU long-term residence, the continuous possession, over time, of a short-term permit and a given income, among other things. However, the territorial paradigm, together with requirements of a "qualified presence", can hardly provide a reasonable or efficient indicator of whether a foreigner has formed a social bond with the host community, which is the rationale to which the Court often refers in its decisions. For instance, in a static and rigid immigration system like Italy's, where there is no possibility of regularising the condition of 'being undocumented', the legal system denies social rights to foreigners who may have arrived undocumented, but have since regularly resided in Italy for a long time, have kept working and have cultivated meaningful relationships with the community.<sup>77</sup> In addition to this, practical difficulties of obtaining a residence may also exclude foreigners with a regular permit to stay from access to welfare services.<sup>78</sup>

In this vein, some authors have aptly observed that policies affecting residence can be regarded as instruments that 'allow reallocating public resources unequally'.<sup>79</sup> Requirements such as long-term residency in the

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<sup>77</sup> Locchi (n 28) 585.

<sup>78</sup> For reporting on these difficulties, see UNHCR, Focus Group on Integration. Final Report (UNCHR 2017) 24-25. <<https://www.unhcr.org/it/wp-content/uploads/sites/97/2020/07/Focus-group-on-integration.pdf>> accessed 19 February 2022.

<sup>79</sup> Enrico Gargiulo, *L'inclusione esclusiva. Sociologia della cittadinanza sociale* (Franco Angeli 2008). See also Andrea Guazzarotti, 'Lo Straniero, i Diritti, l'Eguaglianza' [2009] (1) *Questione Giustizia* 87; Enrico Gargiulo, 'Le Politiche di Residenza in Italia: Inclusione ed Esclusione nelle Nuove Cittadinanze Locali', in Emanuele

regional or national territory or the possession of an EU long-term residence permit reflect the same logic: limiting the beneficiaries of the welfare system to those who are deemed 'more desirable' because they are less likely to weigh on national public resources.<sup>80</sup> Therefore, the shift toward the territorial paradigm, as conceptualised above, generates a multiplicity of 'small and exclusive' communities defined by a multiplicity of social statuses,<sup>81</sup> which is also the result of the (again global) tendency to decentralise the regulation and provision of social services.<sup>82</sup>

## 2. *A Forward-Looking Non-Contractual Solidarity: Assessing the Boundaries of the Social Community*

Like the citizenship paradigm, the territorial paradigm – as conceptualised by the Constitutional Court and the legislature, thus not coinciding with the mere presence of a person in a given territory<sup>83</sup> – cannot be considered an adequate foundation on which to build a system of social rights. Indeed, the reciprocal view of solidarity promoted by the Court risks triggering a 'resurgence of the rhetoric of contract',<sup>84</sup> which is exacerbated in times of economic crisis, which challenge solidarity. Besides its exclusionary consequences, residence-based access to social rights generates logical and legal short circuit.

The territorial paradigm creates a sort of legal presumption against the foreigner, who is considered outside the social community. A foreigner can

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Rossi, Francesca Biondi dal Monte and Massimiliano Vrenna (eds), *La Governance dell'Immigrazione. Diritti, Politiche e Competenze* (Il Mulino 2013).

<sup>80</sup> Biondi dal Monte, *Dai Diritti Sociali alla Cittadinanza* (n 4).

<sup>81</sup> Luca Montanari, 'La Giurisprudenza Costituzionale in materia di Diritti degli Stranieri' [2019] (2) *Federalismi* <<https://www.federalismi.it/ ApplOpenFilePDF.cfm?artid=38274&dpath=document&dfile=25032019222142.pdf>> accessed 19 February 2022.

<sup>82</sup> Geddes (n 3).

<sup>83</sup> On this different understanding of the territorial paradigm (called 'ethical territoriality'), see Linda Bosniak, 'Being Here: Ethical Territoriality and the Rights of Immigrants' (2007) 8 *Theoretical Inquiries in Law* 389.

<sup>84</sup> Nancy Fraser and Linda Gordon, 'Civil Citizenship Against Social Citizenship? On the Ideology of Contract-Versus-Charity' in Bart van Steenberg (ed), *The Condition of Citizenship* (Sage 1994) 104.

only overcome this presumption and demonstrate his or her ability to contribute to the material and spiritual progress of the society by fulfilling a fixed list of legal requirements such as long-term residence (complemented by a regular residence permit), sufficient income, and/or the possession of a long-term residence permit. Only then can the foreigner be considered part of the social community and given access to social rights. However, a warped logic underlies this mechanism: the required elements are usually the final steps in a process of social inclusion, not the preconditions to undertake it.<sup>85</sup>

Thus, the contractual and contribution-based notion of solidarity underlying the territorial paradigm contradicts the very aim of social rights because it risks excluding from the community those potential members most in need of support. At the same time, it seems perfectly aligned with the logics surrounding migration control, where rights attribution (and social belonging) depends on a distinction between "wanted" and "unwanted" migrants. Similarly, the reasoning referring to *radicamento* is biased because it ties the attribution of social rights to the permanence of individuals in a given territory rather than to their necessities, giving unjustified preference to the 'sedentary indigent' over the 'mobile one'.<sup>86</sup>

There is also a legal contradiction. The Italian Constitution of 1948, with its list of fundamental rights, aims to place value on the individual within his or her whole network of social relationships. This was a revolutionary shift away from an old legal system that, drawing upon a logic of individualism,

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<sup>85</sup> Foreigners are required somehow to provide "diabolical proof": they can officially access the community (and become entitled to social rights) only if and when they demonstrate that they possess requirements only obtainable when they are already part of the community.

<sup>86</sup> ASGI (n 36) 23. The report observes that those more in need of support are more prone to move in search for better opportunities. Furthermore, the flexibility of the production process should also be taken into account. Indeed, corporate policies that rely on little production planning to easily and quickly respond to the evolution of market demands, along with state policies that encourage these trends in order to promote economic growth, exacerbate tendencies for the most vulnerable groups of migrants to be highly mobile. This evolving reality creates tension in the application of rigid existing legal categories and shows the difficulties of laws to capture and regulate dynamic and ever-changing phenomena.

countenanced only the hierarchical relationship between the authorities and the individual or private business agreements, neglecting important aspects of community life, which is imbued with the logic of 'the gift, the symbolic exchange, non-synallagmatic reciprocity'.<sup>87</sup> Residence-based access to social rights, as conceptualised above, endangers the solidarity enshrined in Article 2 of the Constitution, which puts forward a different idea of 'membership of the community' that transcends requirements of citizenship, legal status or prolonged residence.

On the basis of solidarity – on social ties and connections among persons who share the same territory and are bound by the same rights and duties – it is possible to advance an alternative approach to delineating the boundaries of 'social citizenship' and determine the attribution of social rights.<sup>88</sup> This conceptual shift is closely linked to a different understanding of the very concept of citizenship, which should be regarded not solely as a legal category – as a legal construction or legal status – but also as a process and 'a form of identification'.<sup>89</sup>

Some seeds that can blossom into new concepts of social belonging and solidarity-based access to social rights can be gathered from the case law of

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<sup>87</sup> Felice Giuffrè, 'I Doveri di Solidarietà Sociale' in Renato Balduzzi and others (eds), *I Doveri Costituzionali e la Prospettiva del Giudice delle Leggi. Atti del Convegno Annuale del Gruppo di Pisa. Acqui Terme 9-10 giugno 2006* (Giappichelli 2007) 37.

<sup>88</sup> In this respect, the concept of "border" shows its close relationship with the concept of citizenship and social belonging, being positioned 'at the core of the polis, not at its extremes'. Furthermore, 'Borders play an essential role within the process of citizenship construction (to be understood as a mix of social practices and subjective behaviours, not just as a formal concept) which is at the centre of the process of construction of the public sphere'. Monica Pasquino, 'Confine' in Caterina Botti (ed), *Le Etiche della Diversità Culturale* (Le lettere 2013) 247. See also Enrica Rigo, *Europa di Confine. Trasformazioni della Cittadinanza nell'Unione Allargata* (Booklet 2007).

<sup>89</sup> Biondi dal Monte, *Dai Diritti Sociali alla Cittadinanza* (n 4) 282, citing Sandro Mezzadra, *Diritto di Fuga. Migrazioni, Cittadinanza, Globalizzazione* (Ombre Corte 2006) 78, which in turn cites Chantal Mouffe, 'Democratic Citizenship and the Political Community' in Chantal Mouffe (ed), *Dimension of Racial Democracy, Pluralism, Citizenship, Community* (Verso 1992). For critiques of the concept of 'citizenship' regarded solely as a legal category, see Locchi (n 28) 574; Clelia Bartoli, *Razzisti per Legge* (Laterza 2012).



the Constitutional Court. The first reference point is Decision No. 107/2018, in which Regional law No. 6/2017 of the Veneto Region was contested by the state before the Constitutional Court. The regional law provided for preferential admission to nursery school for children of parents who had resided or worked in Veneto for 15 years, even on a non-continuous basis. The Court highlighted the multiple functions of nursery schools, which not only serve the purpose of educating children, but also play a social role in supporting low-income parents and especially working mothers. Drawing upon these considerations, the Court determined that the requirement of long-term residence was constitutionally illegitimate, as it is inconsistent with the 'social vocation' of nursery schools, which target all children, regardless of their parents' duration of stay, and all families, regardless of their economic situation.<sup>90</sup>

The Veneto Region's defence objected that the provision gave priority to those who had contributed most to the progress of the local community. However, against this argument, the Court replied that it was unreasonable to apply this criterion to select the beneficiaries of social rights and social protection measures, since it would end up limiting the access of those who were most in need of support, thus undermining the principle of substantial equality and solidarity. Indeed, making access to social protection measures conditional on the duration of stay and the economic contributions (in particular tax payments) made to the community created an unreasonable risk of excluding, for instance, those who had already contributed in another region or could not make a material contribution because they were unemployed.<sup>91</sup>

This line of argumentation, by severing all ties between social benefits and *past* contribution to the community, paves the way for another possible interpretative approach – one which places value on the foreigner's *future* contribution. To put it another way, the social belonging of foreigners to the community – and, therefore, their access to social rights – should be assessed not according to requirements that lay emphasis on the past (such as duration of residence), but rather according to criteria that can be predictive of a stable future link with the community. Such criteria could include employment

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<sup>90</sup> Corte cost 10 aprile 2018, n 107.

<sup>91</sup> Ibid para 3.3.

contracts, the number of children attending school, attendance of a language course or a training course, participation in social activities, membership in associations, and so on.<sup>92</sup>

Similar suggestions can also be derived from another recent judgment in which the Constitutional Court struck down Regional Law No. 16/2016 of Lombardy, which granted foreigners access to public housing only if they had been residing or employed in the region for at least 5 years.<sup>93</sup> Departing from its own earlier decisions,<sup>94</sup> the Court reasoned that long-term residence is a 'condition pertaining to the past', which cannot guarantee the future stability of the beneficiary. Rather, value should be attributed to factors that are indicative of a foreigner's wish to settle in a given community.<sup>95</sup> Furthermore, there is no reasonable connection between the demonstration of 'local roots' and the right to housing, which belongs to the 'essential requirements' whose fulfilment is necessary to ensure human dignity in both its individual and social expressions, as protected by the Constitution.<sup>96</sup>

Finally, another decision of the Constitutional Court points towards a possible redefinition of the concepts of citizenship and belonging. In Decision No. 119/2015, the Constitutional Court declared the unconstitutionality of Article 3 of Legislative Decree No. 77/2002, which establishes Italian citizenship as a requirement for entry into voluntary civil service. The Court stresses that 'the exclusion of foreigners from the

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<sup>92</sup> See Biondi dal Monte, 'Radicamento Territoriale e Accesso dei Minori agli Asili Nido' (n 48). See also Corte cost 2013, n 222 (n 63) para 6, which acknowledges the right of protection due to any foreigner who has 'legitimately built a strong relationship with the community where s/he lives and belongs, having established a stable working, family and private life there' (author's translation).

<sup>93</sup> Corte cost 28 gennaio 2020, n 44.

<sup>94</sup> In particular, Corte cost 2008, n 32 (n 47).

<sup>95</sup> Corte cost 2020, n 44 (n 93) para 3. Concerning this point, the decision mentions some data reported by ISTAT (National Institute of Statistics), according to which one-third of foreign families living in Italy cannot afford to buy a home, because they live below the poverty line. This inevitably increases mobility. *Ibid* para 2.

<sup>96</sup> *Ibid* para 3. See also *ibid* para 3.1, where the Constitutional court points out that the requirement of prolonged residence can be an element to be assessed when creating a waiting list, but it cannot give rise to a blanket denial of access to housing. Indeed, this would run contrary to the social function of public housing.

possibility of entering voluntary civil service, preventing them from engaging in projects of social utility and, consequently, from serving the common good, unjustifiably limits the full development of the human person and integration into the host community'.<sup>97</sup> The decision also stresses the close relationship between rights and duties, both of which lend substance to a 'second citizenship' that extends beyond the boundaries of formal citizenship, embracing all those who live in and share a certain territory.<sup>98</sup> This second citizenship gives rise both to rights, such as the right to receive social assistance,<sup>99</sup> and to duties, such as the duties of solidarity.<sup>100</sup>

## V. CONCLUDING REMARKS

As illustrated above, the Italian Constitutional Court has proven to be crucial in securing foreigners' social rights against restrictive legal provisions approved by the regional or national legislator. Its decisions have mostly been driven by the principles of non-discrimination and solidarity, which were given priority over other considerations such as budget constraints and political choices tied to the allocation of economic resources. However, in performing this 'counter-majoritarian role',<sup>101</sup> the Court has also exposed itself to criticism. Indeed, its reasoning does not always appear straightforward and coherent, especially when social rights do not serve "primary needs" or are not related to "fundamental inviolable rights". Outside of this realm, there is a grey area where the Court still deems the territorial paradigm a lawful criterion for selecting the beneficiaries of social measures. Hence, in some cases, foreigners' access to social rights remains anchored to requirements such as EU long-term residency status.

Difficulties in determining foreigners' access to social rights in a permanent and clear-cut way can be attributed to the jurisprudential case-by-case approach, as well as the main argumentative pattern exhibited by the Court

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<sup>97</sup> Corte cost 13 maggio 2015, n 119, para 2.4.1.

<sup>98</sup> Corte cost 10 maggio 1999, n 172.

<sup>99</sup> Constitution, art 38 (n 17).

<sup>100</sup> Ibid art 2; Giuffrè (n 87) 25. The correspondence between rights and duties is also enshrined in Article 2 of the Consolidated Law on Immigration (n 24), entitled 'Rights and Duties of Foreigners'.

<sup>101</sup> Bickel (n 11).

– namely, the reasonableness test, with its intrinsically flexible and dynamic character. Thus, while there is no doubt as to the Court's crucial role in securing foreigners' access to social rights, in all but a few decisions it has failed to offer the conceptual and interpretative tools that would enable us to identify once and for all who can benefit from which social rights. This makes it difficult to extract a coherent, definitive and all-encompassing picture from the jurisprudence, which has sometimes given rise to fragmented, sector-specific protection.

The complexity of this framework has been further exacerbated by some decisions of the Constitutional Court concerning jurisdictional disputes between the state and the regions. Here, regional provisions aimed at enhancing foreigners' social rights have been questioned by the state on the grounds of a lack of regional competence to regulate the matter. As discussed above, the Court has often ruled in favour of the regions, considering their regulations on foreigners' social rights to be constitutionally legitimate. However, in doing so, it has produced different standards of protection for third-country nationals across the country.<sup>102</sup>

These loopholes notwithstanding, the contribution of the Court in defining and redefining the community and the role of the foreigner within it should not be underestimated. For one thing, when looking at this fragmented picture, it is also important to consider the specific *constitutional* role of the Court and its limited scope. Indeed, as highlighted by one constitutional judge, the role performed by the Court on the question of foreigners' social

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<sup>102</sup> Carmela Salazar, 'Leggi regionali sui 'diritti degli immigrati', Corte costituzionale e 'vertigine della lista': considerazioni su alcune recenti questioni di costituzionalità proposte dal Governo in via principale' in Silvio Gambino and Guerino D'Ignazio (eds), *Immigrazione e diritti fondamentali* (Giuffrè 2010); Nicola Delvino and Sarah Spencer, *Irregular Migrants in Italy: Law and Policy on Entitlements to Services* (ESRC Centre on Migration, Policy and Society (COMPAS) University of Oxford 2014) <[https://www.compas.ox.ac.uk/wp-content/uploads/PR-2014-Irregular\\_Migrants\\_Italy.pdf](https://www.compas.ox.ac.uk/wp-content/uploads/PR-2014-Irregular_Migrants_Italy.pdf)> accessed 19 February 2022.

rights is to 'add pieces to a mosaic which cannot – and maybe must not – be completed by the Court on its own'.<sup>103</sup>

Furthermore, some of the Courts' decisions seem to offer an alternative logic to the citizenship or territorial paradigms. First, by embracing a forward-looking perspective, the Court's reasoning rejects the exclusionary approach of a welfare system that espouses the logic of migration control. Second, the decisions of the Constitutional Court also contribute to the debate on the exchange-versus-charity dichotomy that dominates current political choices on the access to social rights.<sup>104</sup> Indeed, these judgments seem to recognise the complexities of human relations, characterised by a dense interweaving of social ties. In this context, the participation of foreigners cannot be measured according to their status or, under a contractual-like logic, to the material contribution they make. In contrast to this logic, the "second citizenship" paradigm promoted by the Constitutional Court presupposes a coexistence between rights and duties as two sides of the same coin, which does not allow for the former to be subordinated to the latter.<sup>105</sup> With the focus on participation, this reasoning acknowledges the entire range of contributions a foreigner may offer to the community, including future and non-material contributions.<sup>106</sup>

The urgent challenge facing modern democracies is to identify strategies, interpretative tools and a strong normative basis for linking social

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<sup>103</sup> Silvana Sciarra, "'Migranti" e "Persone" al centro di alcune Pronunce della Corte Costituzionale sull'Accesso alle Prestazioni Sociali' (Consiglio di Stato, Rome, 26 May 2017) <[https://www.cortecostituzionale.it/documenti/interventi\\_presidente/Sciarra%20CdS%2026%20omaggio%202017.pdf](https://www.cortecostituzionale.it/documenti/interventi_presidente/Sciarra%20CdS%2026%20omaggio%202017.pdf)> accessed 4 June 2021. Indeed, after a long constitutional dispute, which required seven decisions striking down the same legislative provision, the Court asked the legislator to review the legislation in an organic and coherent fashion in order to prevent multiple declarations of unconstitutionality from undermining the principle of substantive equality. Corte cost 2015, n 230 (n 13).

<sup>104</sup> Fraser and Gordon (n 84).

<sup>105</sup> Erik Longo, 'Le relazioni come fattore costitutivo dei diritti sociali' [2014] (1) *Diritto e società* 71; Maurizio Fioravanti, *Art. 2 Costituzione Italiana* (Carocci 2017) 6-7.

<sup>106</sup> Following the reasoning of the Constitutional Court, giving birth can be considered a contribution to the community.

participation and entitlement to civil, social and political rights based on a language of 'solidarity, non-contractual reciprocity and interdependence'.<sup>107</sup> The Italian Constitutional Court seems to offer valuable suggestions on how to address this complex puzzle and constitutional conundrum – a conundrum which, needless to say, also concerns borders themselves.<sup>108</sup>

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<sup>107</sup> Fraser and Gordon (n 84) 105. See also Seyla Benhabib, *I Diritti degli Altri. Stranieri, Residenti, Cittadini* (Raffaello Cortina 2006) 38.

<sup>108</sup> On the strict link between the rights attributed to migrants already in the country and those who attempt to enter it, see the brilliant observations of Bosniak (n 83) which show the illusion of the distinction between 'border and interior' that dominates the liberal debate on immigration law.