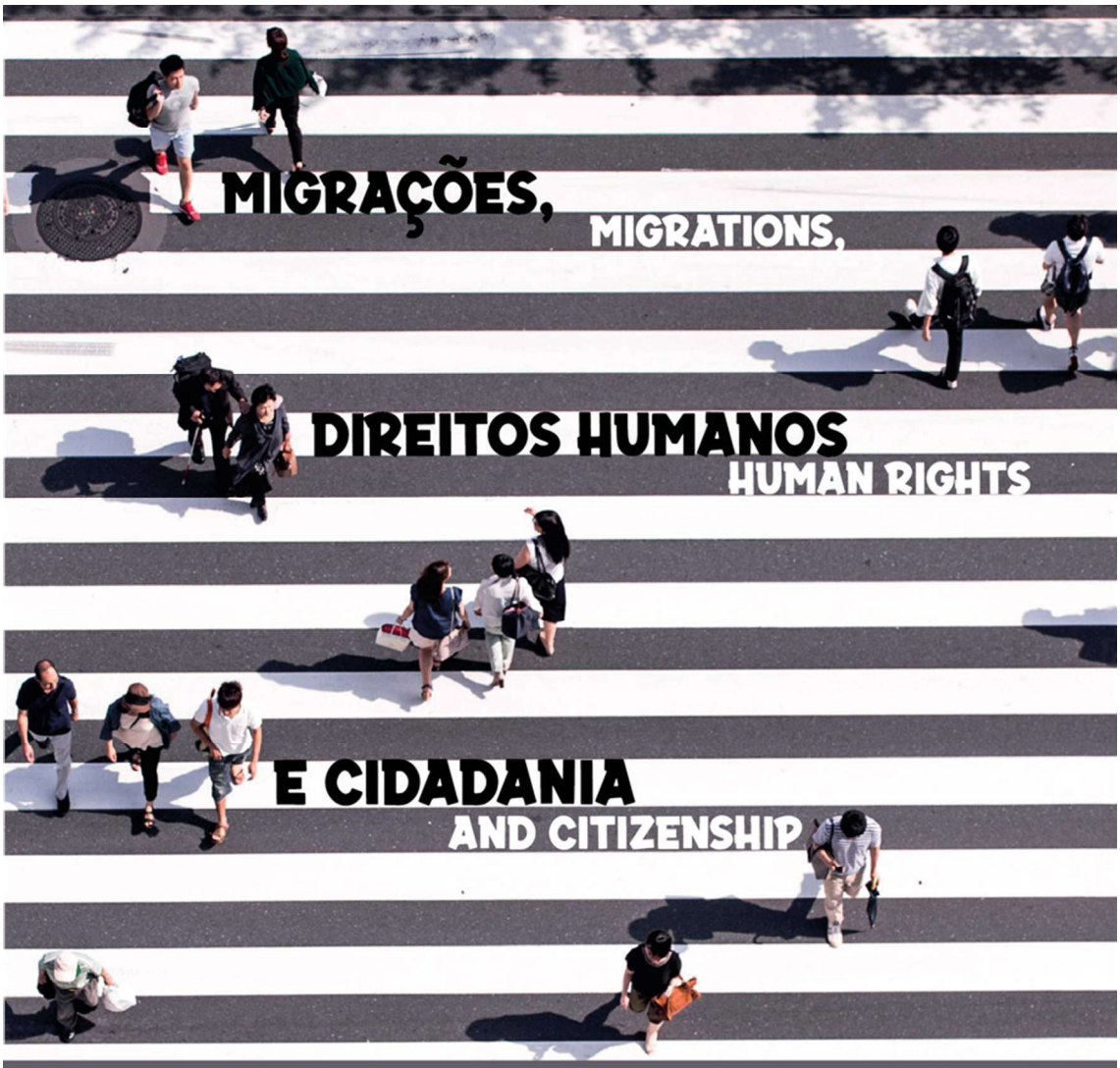

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MIGRAÇÕES, DIREITOS HUMANOS E CIDADANIA

MIGRATIONS, HUMAN RIGHTS AND CITIZENSHIP

Coordenadoras
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Índice

Between inclusion and exclusion: citizenship at crossroad?*

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Kamilla Galicz[1]

Summary: Migration changes the classical understanding of State sovereignty and its main pillars. This paper focuses on the concept of citizenship, key element to define the group of subjects to the supreme authority within a circumscribed territory. It investigates the way in which nowadays this concept has changed, focusing on processes of fragmentation and multiplication, whereby fragmentation points to the conferral of citizenship rights also to non-citizens, while multiplication describes the complex legal conditions of the individual subject to multiple legal orders. In this perspective, the paper offers three examples: it seeks to explore such processes of transformation through the analysis of the project of Lusophone citizenship at international level, EU citizenship at supranational level and an Italian draft law on citizenship *jure scholae* at national level. Ultimately, an attempt is made to offer an alternative understanding of citizenship in light of social integration.

Keywords: Citizenship; Nation-State; Migration; Transformation; Human Rights.

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1. Introduction

Migratory flows, like other cross-border phenomena, are eroding the classical, Westphalian assumption of State sovereignty.[2] Not only geographical borders are becoming more and more "porous" but also those between legal orders,[3] leading to a situation best characterized by the "unavoidable interconnectedness of legalities".[4] This process deeply affects citizenship, key element to define the group of subjects under the supreme authority within a circumscribed territory. Citizenship, indeed, is a Janus-faced concept; it is based on the universal equality of individuals within a particular nation-state.[5] It has both a functional dimension and an identitarian one. Its functional dimension vests individuals with claims to have equal access to goods and services provided by the State to pursue a path of individual self-realization and participation in collective self-government, while its identitarian dimension circumscribes who may enjoy the related rights (and shall fulfil the corresponding duties) and, consequently, who is left outside.[6]

The egalitarian understanding of citizenship doesn't raise any question as long as basic welfare needs are provided and the right holders

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[2] Cfr. Neil Walker, "Late Sovereignty in the European Union", in Neil Walker, *Sovereignty in Transition*, Oxford-Portland: Hart, 2003, 6 ff.; Ber Van Roermund, "Sovereignty: Unpopular and Popular", *Ibid.*, 34 ff.

[3] Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, 3rd Ed., Cambridge: Cambridge University Press, 2020, 519.

[4] Gianluigi Palombella, "Theory, Realities, and Promises of Inter-Legality: A Manifesto", in Gianluigi Palombella, Jan Klabbers, *The Challenge of Inter-legality*, Cambridge: Cambridge University Press, 2021, 366.

[5] For the purposes of this paper, the term citizenship is preferred over nationality, by highlighting the importance of full membership within a state, instead of the international protection on account of such membership *vis-à-vis* other states. For more, see International Law Association Committee on Feminism and International Law, 'Final Report on Women's Equality and Nationality in International Law' (2000). Report of a conference held in London, International Law Association, London, accessible at https://www.unhcr.org/3dc7cccf4.pdf, 12, last accessed on 30.03.2023. Alice Edwards, "The meaning of nationality in international law in an era of human rights. Procedural and substantive aspects", in Alice Edwards, Laura van Waas, *Nationality and Statelessness under International Law*, Cambridge: Cambridge University Press, 2014, 12-14.

[6] Michel Rosenfeld, *The Identity of the Constitutional Subject. Selfhood, Citizenship, Culture, and Community*, London: Routledge, 2010, 211 ff.

constitute a monolithic group. Nevertheless, the traditional concept of citizenship is put under stress by mass migration, which poses a threat to the sufficient fulfilment of material conditions and introduce an element of diversity in the unitary image of the right holders.[7] As a consequence, nowadays, different conceptualisations of citizenship co-exist.[8] For the purposes of this paper, emphasis is put on the way in which the notion has changed through processes of fragmentation and multiplication. In this perspective, fragmentation points to the conferral of certain rights traditionally preserved for citizens to non-citizens, which dismantles the functional dimension of citizenship. Multiplication describes the legal conditions of the individual parallelly subject to multiple legal orders, highlighting how the overlapping of different citizenships change the identitarian dimension of the concept.[9]

This paper claims that fragmentation and multiplication are "double-edged swords", i.e., they might either broaden the access to traditional citizenship rights and duties and integrate non-citizens, or strengthen a uniform understanding of the citizenry, followed by discriminatory patterns based on the exclusion of non-citizens from the enjoyment of rights and fulfilment of duties. For this purpose, three examples are proposed. At international level, Section 2 offers a brief analysis of the so-called Lusophone citizenship, a project promoted by the Community of Portuguese Language Countries (*Comunidade dos Países de Língua Portuguesa*, CPLP), yet currently at a standstill, seeking to identify the obstacles hindering the project. At supranational level, Section 3 explores whether it may be possible to interpret the citizenship of the European Union (EU) using a value-based approach in light of Art. 2 of the Treaty on European Union (TEU). At national level, Section 4 examines a recent Italian draft law regarding naturalisation *jure scholae*, pointing to an inclusive conceptualisation of citizenship linked to social rights.

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[7] Michel Rosenfeld, *The Identity of the Constitutional Subject*, 2010, 221 ff.

[8] In this regard, one may distinguish multiple forms of citizenship, such as global, supranational, postcolonial and even feminist or queer citizenship. For an exhaustive analysis, see Ayelet Shachar et al., *The Oxford Handbook of Citizenship*, Oxford: Oxford University Press, 2017.

[9] Dimitry Kochenov, "Inter-Legality – Citizenship – Inter-Citizenship", in Gianluigi Palombella, Jan Klabbers (eds.), *The Challenge of Inter-legality*, 133-157.

At present, these examples point to socio-political phenomena working in the background, which are mainly attempts to transform, to modernise the traditional notion of citizenship, legacy of the Westphalian world order. As counterreaction, several States, induced by a sense of threat, are trying to preserve their discretionary power to shape their populations and confer rights and duties only to citizens.[10] To do so, they apply a number of techniques, among which this paper considers the normative ones, such as introducing restrictive laws, or showing "passive resistance" by refusing to adapt the legislative framework to current demographic realities. Ultimately, the paper seeks to understand whether the core elements of citizenship have *actually* changed in light of the tensions between mass migration, human rights movement, and parochial nation-state reactions. Section 5 summarizes the conclusions and offers an alternative understanding of citizenship connected to social integration.

2. Changing the Traditional Vantage Point: Lusophone Citizenship

Among the wide range of contemporary forms of citizenship, the first example to analyse is the so-called Lusophone citizenship, i.e., the special status comprising rights and duties conferred to citizens of Portuguese-speaking countries, for the following reasons. First, it provides an excellent approach to understand the notion of citizenship shedding light on the complex interstate relations in the post-colonial era. In this respect, it combines the liberal, European tradition based on the equality of citizens with the rather different, if not actually opposite vantage point of ex-colonies.[11] Second, it encapsulates the tensions between the inclusionary and exclusionary nature of citizenship, offering useful food for thought on whether the concept originally linked to the nation-state may be successfully transposed to the international level. Third, since it has been largely inspired by the

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[10] Thomas Alexander Aleinikoff, "Inherent Instability. Immigration and Constitutional Democracies", in Mark A. Graber, Sanford Levinson, Mark Tushnet, *Constitutional Democracy in Crisis?* Oxford: Oxford University Press, 2018, 477 ff.

[11] Kamal Shadiq, "Postcolonial Citizenship", in Ayelet Shachar et al., *The Oxford Handbook of Citizenship*., 178-204.

citizenship of the European Union, the second example of this paper, it reveals interesting dynamics between different legal orders.

At present, Lusophone citizenship is project promoted by the so-called Community of the Portuguese-speaking Countries (*Comunidade dos Países de Língua Portuguesa*, CPLP), an international organization established in 1996 under the rules of classic public international law. Similar to the functioning of the Commonwealth and the Francophonie, the CPLP was designed to fill the empty space left in interstate relations after the collapse of the Portuguese Empire and the gain of independence of ex-colonies in Africa.[12] Emphasising the common historic-cultural heritage and especially the uniting force of the Portuguese language, the Community's primary aim is to promote integration in linguistic and cultural terms.[13] Nevertheless, since its foundation it has been pursuing a wider set of goals and scope of activities, boosting cooperation in other fields, e.g., economics, the judiciary, environmental and health protection, and human rights as well.[14]

For the purposes of this paper, it is necessary to focus on how the legal framework of intra-communitarian movement of citizens has evolved over nearly three decades of cooperation. The starting point is the first objective of the Founding Declaration on "the strengthening of *human relations, solidarity and fraternity between all the peoples* [in plural] who have the Portuguese language as one of the bases of their *specific identity*, and, in this regard, adopting measures which facilitate the circulation of citizens of Member States in the CPLP space" (italics

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[12] For a historical analysis, see Dário de Castro Alves, "A Comunidade dos Países de Língua Portuguesa", *Nação e Defesa*, 74 (1995) 79–91. For a critical perspective, see António Pinto Ribeiro, "Para acabar de vez com a lusofonia", *Lusotopie*, 17/2 (2018) 220-226. For a comparative analysis, see Elisabete Azevedo-Harman, Inês Gonçalves, "CPLP, Commonwealth e Francofonia", *Nova Cidadania*, verão 2011, 36-43.

[13] The Preamble of Founding Declaration of the CPLP explicitly foresees to "consolidating the *national and plurinational cultural reality* that gives Portuguese Speaking Countries *their own identity*, reflecting the *special relationship existing between them* and the experience accumulated over years of fruitful consultation and cooperation", confirming that Portuguese language "is a *privileged means of disseminating cultural creation* among Portuguese-speaking *peoples* and of projecting their *cultural values* internationally, in an open and universalist perspective" (italics added, transl. by A.) In addition, see Art. 4 and Chapter III of the Treaty on the Community of Portuguese Language Countries (CPLP Treaty).

[14] For an exhaustive list of aims, see the objectives specified by the Founding Declaration of the CPLP, established in Lisbon, on the 17 July 1996.

added, transl. by A.) This formulation clearly resembles the idealistic narrative which has surrounded the foundation of the Community, but tells little about the real dynamics between both its peoples and Member States.[15] It shall be read in light of the so-called Guiding Principles enshrined in Art. 5 of the CPLP Treaty, with special regard to the sovereign equality of Member States, respect for national identity, and reciprocity of treatment, on which the functioning of the whole Community shall be based.[16]

Following the agreement reached at the Praia Conference in 1998, a special working group was set up at the Maputo Conference in 2000 to develop and coordinate cooperation on freedom of movement and Lusophone citizenship within the CPLP. Next, the 2002 Conference in Brasilia adopted five conventions on the promotion of freedom of movement within the Community.[17] The agreements provide for specific categories of visas, their issue, renewal and procedural exemptions from taxes, which allow CPLP nationals to enter and reside in all Member States.[18] Lastly, the Mobility Agreement was approved on 16 July 2021 (on the symbolical occasion of the 25th "birthday" of the Community) to provide a framework within which the Member States shall concretize through bilateral agreements the substantive and procedural conditions of free movement.[19] This last agreement has been

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[15] As Cahen critically points out, the denomination of the Community of Portuguese-speaking *Peoples* was promoted, and discourses focused more on the mere *institutionalisation* of the CPLP, rather than its *foundation* or *constitution*, since the Community has been long existed regardless of the absence of a formal institutional framework. Cfr. Michel Cahen, "1996-2016 – A CPLP, uma organização para quê?", *Portuguese Studies Review*, 23/1 (2015) 68 ff; José Filipe Pinto, "Da CPLP à Comunidade Lusófona: o futuro da lusofonia", *Revista Angolana de Sociologia*, 7 (2011) 115 ff.

[16] The choice of words has been inspired by Art. F of the Maastricht Treaty which established the founding values of the European integration (today in Art. 2 TEU). On the "frequent mimicry of the European model" see Patrícia Jerónimo, "A Comunidade dos Países de Língua Portuguesa, hoje: Fará sentido tratá-la como uma organização de direitos humanos?", AAVV, *Estudos em Homenagem ao Professor Doutor Wladimir Brito*. Braga: Almedina, 2019.

[17] José Leitão, *Estudo sobre Cidadania e Circulação no Espaço da CPLP*, CPLP, 2009, 3 ff.

[18] For an exhaustive list of such agreements: https://www.cplp.org/Default.aspx?ID=3872, last accessed 30.03.2023.

[19] Just like in case of the Founding Declaration, the solemn language of the Preamble is quite telling: "Noting that, in order to give greater substance to the Community idea, mobility within the CPLP should aim to cover not only certain profes-

relatively quickly ratified by all Member States within one year and a half after its approval.[20]

In comparison to these agreements, the project of the Lusophone citizenship has faced a number of obstacles. From the beginning, a special working group was called for the creation of a citizenship status similar to the European one, which would both strengthen the sense of collective belonging and facilitate intra-Community movement. The issue was raised at the Maputo Conference in 2000 and a draft framework convention was discussed at the 2002 Conference, but Mozambique and Angola expressed reservations, arguing that the conditions for progress were not yet in place. In June 2007, the then Secretary General Luís Fonseca instructed the group to consider the 2002 draft as a set of guidelines on the basis of which a final version would be prepared for the 2008 Council of Ministers.[21] Despite the efforts of multiple decades and renewed commitments, nothing binding at CPLP level has been adopted yet, which raises the question on the actual feasibility and desirability of the project.[22]

Despite its slow realisation across the Community, the project of Lusophone citizenship has already influenced the laws of some Member States both at constitutional and ordinary legislative levels. In this perspective, one may note an interesting heterogeneity of amendments in national legal orders and interpret them as "normative reactions" to such project. Through the study of these reactions, one may conceptualise Lusophone citizenship as one of the results, still in progress, of the fragmentation and multiplication processes that the concept of citizenship is undergoing at international level. For the purposes of this contribution, emphasis is put on Portuguese law for the following reasons. First, as centre of the former Empire, Portugal has a genuine interest of preserving the relations with its ex-colonies, therefore, it has

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sional categories but *all citizens of the Member States of the CPLP*, thus contributing to the strengthening of the *common identity of the CPLP*" (italics added, transl. by A.).

[20] Last, Equatorial Guinea ratified it in late 2022. Segretariado Executivo da CPLP, *Guiné Equatorial deposita ratificação do "Acordo sobre a Mobilidade entre os Estados-Membros da CPLP*, 03.11.2022, accessible at https://secretariadoexecutivo.cplp.org/comunicacao/noticias/noticia-detalhe/?news=7251, last accessed on 30.03.2023.

[21] José Leitão, *Estudo sobre Cidadania e Circulação no Espaço da CPLP*, 8-15; 67 ff.

[22] Cfr. XI Conferência de Chefes de Estado e de Governo da CPLP, *Declaração sobre as Pessoas e a Mobilidade na CPLP*. Santa Maria, 17-18.07.2018.

always been the main promoter of the CPLP.[23] Second, in proportion to its population, it is the main destination of intra-communitarian migratory fluxes, primarily due to its membership in the European Union, offering thus further opportunities for citizens coming from Portuguese-speaking countries.[24]

The conferral of rights otherwise not recognised to foreigners to Lusophone citizens is explicitly enshrined in Art. 15 (3) of the Constitution as amended in 2001.[25] This provision, though, subjects the conferral to reciprocity conditions, which at present are in place only with Brazil. As set forth in the Treaty of Friendship, a bilateral agreement signed with Brazil in 2000, and the Decree-law n. 154/2003, two legal statuses are available for Brazilians with permanent residence: the so-called status of equal rights and obligations and the status of equal *political* rights. Brazilians with general status of equal rights and obligations may vote and stand for local elections, while those who have regularly resided for at least three years may vote and stand for regional and general elections as well and apply for all public offices of technical nature.[26] In general, Portuguese law on local elections is rather inclusive, conferring the right to vote also to other third-country nationals under the reciprocity clause, requiring though a longer residence in the country.[27]

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[23] Cfr. António Pinto Ribeiro, "Para acabar de vez com a lusofonia", 220-226; Moisés de Lemos Martins, "Globalization and Lusophone world. Implications for Citizenship", Manuel Pinto, Helena Sousa, *Communication and Citizenship: Rethinking crisis and change*, Coimbra: Grácio, 2011, 75-84.

[24] Antônio Walber Matias Muniz et al., "Migrações, circulação e cidadania lusófona em discussão no âmbito da comunidade dos países da língua portuguesa", *Brazilian Journal of Development*, 6/8 (2020) 60844 ff.

[25] Art. 15 (3) of the Portuguese Constitution: "Save for access to appointment to the offices of President of the Republic, President of the Assembly of the Republic, Prime Minister and President of any of the supreme courts, and for service in the armed forces and the diplomatic corps, rights that are not otherwise granted to foreigners are accorded, as laid down by law and under reciprocal terms, to the citizens of Portuguese-speaking states who reside permanently in Portugal". Similar provision might be found in Art. 24 (3) of the Constitution of Cape Verde, without referring to the reciprocity clause.

[26] Ana Rita Gil, Nuno Piçarra, *Report on Citizenship Law: Portugal*. EUI, Robert Schuman Centre for Advanced Studies, GLOBALCIT, February 2020, 28 ff.

[27] The reciprocity stands with the following third countries: Argentina, Chile, Colombia, Iceland, Norway, Peru, Uruguay and Venezuela and New Zealand. A. R. Gil, N. Piçarra, *Report on Citizenship Law: Portugal*, 29.

The conferral of specific political rights upon reciprocity provides a quasi-citizen status without requiring the loss of the original nationality or the acquisition of another one, subjecting the legal conditions of these individuals under multiple legal orders. Such process of multiplication has shaped the rules on naturalisation as well. In this perspective, the impact of Lusophone citizenship may be analysed along inclusion-oriented and exclusion-centred tendencies: while the 1994 amendment of the Nationality Act had softened the criteria for acquisition for citizens coming from Portuguese-speaking countries,[28] the 2006 amendment eliminated such special treatment to respect the non-discrimination clause of the European Convention on Nationality.[29] In this regard, concerns were raised on the compatibility with Art. 15 of the Constitution which allows a privileged treatment of Lusophone (and EU) citizens.[30]

Lusophone citizenship, indeed, points to changes the concept of citizenship is currently undergoing, affecting national laws on the legal status of non-citizens and the acquisition of citizenship. Based on the analysis of Portuguese law, one may conclude that fragmentation and multiplication processes are of rather inclusive nature, leading to an extension of rights also towards other non-citizens who otherwise might be left out of such privileges. To complete the picture, though, one shall highlight that the legal orders of other CPLP Member States, especially the Portuguese-speaking African countries have resisted to the project of Lusophone citizenship for long, not exchanging the reciprocity clause as set forth in Portuguese law.[31] In fact, such normative passivity of the ex-colonies may be considered as a deliberate act of legislators not to adopt the necessary laws.[32] It is also a sign of why the CPLP project has been for long at standstill, which shall be carefully studied in order to revitalize the Community and enhance cooperation.

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[28] Art. 1 da Lei n.º 25/94 de 19 de Agosto Altera a Lei n.º 37/81, de 3 de Outubro.

[29] Art. 1 da Lei Orgânica n.º 2/2006 de 17 de Abril, Quarta alteração à Lei n.º 37/81, de 3 de Outubro.

[30] Ana Rita Gil, Nuno Piçarra, *Report on Citizenship Law: Portugal*, 29-30.

[31] For a comparative analysis of national laws in PALOP countries, see Bronwen Manby, "The nationality laws of the Lusophone states in Africa", *E-Boletim Lei & Justiça*, 3 (2019) 14-34.

[32] This attitude is absolutely in line with the general position of ex-colonies towards citizenship regulation. Cfr. Kamal Shadiq, *Postcolonial Citizenship*, 178-204.

Exchanging reciprocity clause offered by Portuguese law might be worth considering for the following reasons. First, as stated above, if the CPLP wants to enhance Lusophone cooperation and eventually conveying it to integration as understood in EU terms (which is frequently claimed), a further harmonisation of laws on movement and citizenship is needed. In this regard, a rethinking of the intra-communitarian relations is appropriate to get rid of the hindrances of the colonial era and guarantee the sovereign equality between the Member States, as enshrined in the Guiding Principles of the CPLP Treaty. Second, from a functional point of view, reciprocity is attractive because it paves the way towards the EU, since – even without acquiring Portuguese citizenship – third-country nationals regularly residing in an EU Member States for 5 years are granted the status of long-term residents when the criteria are met, which basically guarantees equal treatment under the conditions set by EU law.[33] This leads to the next example: the EU citizenship.

3. On EU Citizenship: Equal Treatment of Whom?

With regard to the transformation processes of citizenship enfolding at supranational level, this Section aims to offer a critical analysis of the citizenship of the European Union. Infinite is the academic literature dedicated to the understanding of its origins embedded in the pre-Maastricht phase of integration and its transformation to a more political conceptualisation in the wider context of the EU constitutionalisation process.[34] For the purposes of this paper, an alternative reconceptualization is put forward in light of the fragmentation and multiplication of the concept of citizenship. Therefore, it is appropriate to assess whether EU citizenship has been emancipated from the prevalently market-oriented context in which it was conceived by adopting a value-based approach. In this view, an attempt is made to

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[33] Cfr. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[34] On the EU constitutional discourse, see Joseph Weiler, "The Transformation of Europe", *The Yale Law Journal*, 100/8 (1991) 2403-2483; Miguel Poiares Maduro, Marlene Wind, *The Transformation of Europe. Twenty-Five Years On*, Cambridge: Cambridge University Press, 2017. On EU citizenship, see Martin Steinfeld, *Fissures in EU Citizenship. The Deconstruction and Reconstruction of the Legal Evolution of EU Citizenship,* Cambridge: Cambridge University Press, 2022.

explore the connections between Article 20 TFEU and the founding values enshrined in Article 2 TEU, especially fundamental rights.

EU citizenship is a peculiar example of the way in which the concept of citizenship has changed for a number of reasons. First, its nature may stem from the singularities of the "new legal order" instituted by the European integration.[35] Similar to the fundamental rights protection and other principles of EU law, its evolution has been strongly marked by the case-law of the Court of Justice. Nowadays, EU citizenship is a composite concept based on the dynamic, yet often ambiguous interpretation of legal provisions adopted within the quasi-constitutional framework of Art. 20 TFEU.[36] Second, envisaged as a successful symbol of the EU, it has influenced the different dimensions of citizenship emerging worldwide and it has become a model for other regional integration processes, as highlighted in the previous Section. Nonetheless, one may argue that, beyond the appearances, EU citizenship might contribute to the exclusion of certain categories of individuals from "the genuine enjoyment of rights" attached to the status it confers.[37]

In the context of globalisation, EU citizenship might be the best example of the way in which traditional citizenship rights have become accessible to non-citizens. In this regard, it remains an anomaly, being the only one successful model of citizenship regulation beyond the nation-state.[38] Due to the market-based rationale laying behind the concept, its core element is the right to free movement, i.e., the

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[35] As stated in Judgment of the Court of 5 February 1963, *Van Gend & Loos*, Case 26-62. Cfr. par. 23 of AG Maduro's Opinion delivered on 30 September 2009 in case C-135/08, *Rottmann*: "[…] European citizenship is more than a body of rights which, in themselves, could be granted even to those who do not possess it. It presupposes the existence of a political relationship between European citizens, although it is not a relationship of belonging to a people. On the contrary, that political relationship unites the peoples of Europe […]".

[36] Joe Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism", in Paul Craig, Gráinne de Búrca, *The Evolution of EU Law*, 3rd Ed., Oxford Oxford University Press, 2021, 615 ff.

[37] Dimitry Kochenov, "EU Citizenship: Some Systemic Constitutional Implications", N. Cambien, Dimitry Kochenov, E. Muir, *European Citizenship under Stress*, Brill, 2020, 20 ff.

[38] Dimitry Kochenov, Justin Lindeboom, *Pluralism Through Its Denial: The Success of EU Citizenship*. University of Groningen Faculty of Law Research Paper Series, n. 1 (2018) 16 ff.

Member State citizen's right to enter the territory of another Member State and the right to reside and work there upon far less stringent conditions as for third-country nationals.[39] This has hugely affected the nexus between EU population and the territory of Member States since every single citizen is encouraged to exercise this freedom for at least a short period of time.[40] In contrast to anti-immigration claims spreading across the EU, in several Member States, the largest foreigner community is that of citizens coming from another Member State, a fact often neglected even in academic debates on (im)migration regulation.[41]

On the one hand, one might argue that the right of free movement of even "static" EU citizens has paved the way for an easier recognition of the right to reside for third-country nationals as well, and several judgements of the CJEU starting from *Ruiz Zambrano* confirm this argument – to some extent, upon certain conditions.[42] The Court of Justice declared that such right of residence has a derived nature under Art. 20 TFEU, i.e., it may be claimed "only if, in the absence of the grant of such a right of residence, both the third-country national and the Union citizen, as a family member, would be obliged to leave the territory of the European Union".[43] For this to happen, the EU citizen shall be dependent on the third-country national to an extent that

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[39] In this regard, cfr. Dimitry Kochenov, "The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?" *International and Comparative Law Quarterly*, 62/1 (2013) 107 ff; Martijn van den Brink, "The Problem with Market Citizenship and the Beauty of Free Movement", in Dimitry Kochenov et al., *The Internal Market and the Future of European Integration. Essays in Honour of Laurence W. Gormley*, Cambridge: Cambridge University Press, 2019, 246 ff.

[40] Dimitry Kochenov, Justin Lindeboom, *Pluralism Through Its Denial: The Success of EU Citizenship*, 13 ff.

[41] E.g., in Italy, out of appr. 5 million non-citizen residents ca. 1 million are from Romania. ISTAT, *Stranieri residenti in Italia al 1o gennaio 2022, Cittadinanza*, accessible at http://dati.istat.it/Index.aspx?DataSetCode=DCIS_POPSTRRES1, last accessed on 30.03.2023.

[42] On Zambrano and the following case-law, see more recently, Hester Kroeze, Peter Van Elsuwege, "Revisiting Ruiz Zambrano: A Never Ending Story?", *European Journal of Migration and Law*, 23 (2021) 1-12; Stephen Coutts, "Expulsion and Article 20 TFEU: Some Practical and Conceptual Issues", *Ibid.*, 29-47.

[43] In the most recent case-law, see Judgment of the Court (Fifth Chamber) of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real v RH*, Case C-836/18, par. 41; Judgment of the Court (Fourth Chamber) of 5 May 2022, *Subdelegación del Gobierno en Toledo v XU and QP*, Joined Cases C-451/19 and C-532/19, para. 42.

the removal of the latter would oblige the former to leave the EU as a whole. In the last two decades, the Court has been shaping its case-law with a "stone-by-stone approach",[44] and some judgements are clearly milestones on the scope of the right, the nature of dependency, or conflicting interests, such as public order or the capacity of social welfare systems.[45]

On the other hand, EU law might penetrate national legal orders in purely internal situations only in very exceptional circumstances. The general discourse on the right of free movement has prevalently revolved around the figure of "good citizen", i.e., who is economically active, has exercised this freedom and contributed to boost the integration.[46] Nonetheless, little attention had been paid to immobile EU citizens who do not to exercise such right for a number of reasons and are more frequently in conditions of vulnerability. From their vantage point, many concepts of EU law seem to be quite vague, and often they are not familiar with the basic entitlements recognised by the supranational legal order.[47] To guarantee a greater social inclusion of EU citizenship, different proposals have been put forward to link Art. 20 TFEU with the founding values of Art. 2 TEU, in combination with Art. 6 (3) TEU.

Among these proposals, the so-called reverse Solange theory coined by the Heidelberg group deserves particular attention,[48] which triggered heated debate on the importance of fundamental rights protection within the EU.[49] This theory offers an innovative reading for

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[44] Koen Lenaerts, "EU Citizenship and the European Court of Justice's "Stone-by-stone" Approach", *International Comparative Jurisprudence*, 1 (2015) 1.

[45] For a comprehensive analysis of the milestone judgements in the prism of the Judgment of 27 February 2020, see Christina Neier, "Residence right under Article 20 TFEU not dependent on sufficient resources: Subdelegación del Gobierno en Ciudad Reals", in *Common Market Law Review*, 58/2 (2021) 549-570.

[46] Dimitry Kochenov, *Inter-Legality – Citizenship – Inter-Citizenship*, 144 ff.

[47] For instance, as the EUROBAROMETER survey on the Charter revealed in 2019, around 40% of the respondents have heard of the Charter, and only 12 % was familiar with its content. Cfr. European Commission, *Special Eurobarometer 487b: Awareness of the Charter of Fundamental Rights of the European Union*, June 2019.

[48] Armin von Bogdandy et al., "Reverse Solange – Protecting The Essence of Fundamental Rights Against EU Member States", *Common Market Law Review*, 49/2 (2012) 489-520.

[49] See the debate on *Rettungsschirm für Grundrechte*, in *Verfassungsblog*, February-April 2012, accessible at https://verfassungsblog.de/category/debates/rescue-english/, last accessed on 30.03.2023.

Art. 2 TEU and at the same time seeks to fill the protection gap left by the restricted nature of Art. 51 (1) of the Charter of Fundamental Rights of the European Union (Charter). It suggests that beyond the scope of the Charter it is in the competence of Member States to protect fundamental rights as long as it may be presumed that Member States ensure the essence of such rights as enshrined in Art. 2 TEU.[50] Should this presumption be rebutted in case of systemic violation of fundamental rights by the Member State, individuals, in their status as EU citizens, are entitled to invoke EU law before national courts. This proposal assumes that EU citizenship and the protection of fundamental rights are two mutually strengthening concepts having the same objective, namely, to tackle the persistent democratic deficit by bringing the EU closer to its own citizens.[51]

For the purposes of this paper, the relevant critiques highlight the boundedness of citizenship in general, which characterizes by nature the EU citizenship as well. On the one hand, inherent to every individual and constructed on human dignity, fundamental rights tend to provide a universal minimum of guarantees and thus overcome the parochial perspective of the nation-state. On the other hand, the identitarian dimension of citizenship is deeply rooted and still revolves around the distinction between insiders (*us*) and outsiders (*them*).[52] In this perspective, being additional to Member State nationalities, EU citizenship is by no means an exception, since it relies on the acquisition criteria laid down by national laws.[53] Therefore, nowadays there are 27 laws pawing quite different ways towards EU citizenship which though, with the words of the Court of Justice as proclaimed solemnly

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[50] Cfr. Armin von Bogdandy et al., *Reverse Solange*, 497 ff; 509 ff; Jan Wouters, "Revisiting Art. 2 TEU: A True Union of Values?", *European Papers*, 5/1 (2020) 255-277.

[51] On the argumentation against critiques, see A. von Bogdandy et al., *Reverse Solange*, 514 ff.

[52] Cfr. Dimitry Kochenov, "Von Bogdandy's 'Reverse Solange': Some Criticism of an Important Proposal", in Maximilian Steinbeis, Alexandra Kemmerer and Christoph Möllers, *Gebändigte Macht: Verfassung im europäischen Nationalstaat. Verfassungsblog II. Recht im Kontext,* Baden-Baden: Nomos, 2014; Martijn Van den Brink, "EU citizenship and (fundamental) rights: Empirical, normative, and conceptual problems", *European Law Journal*, 25 (2019) 21-36.

[53] Dimitry Kochenov, Justin Lindeboom, *Pluralism Through Its Denial: The Success of EU Citizenship*, 10 ff.

in Grzelczyk, "is destined to be the fundamental status of nationals of the Member States".[54] Nevertheless, the question emerges what such *fundamental* status might mean in light of the wording of the Treaty centred around the *additional* nature of EU citizenship.

In this regard, the non-exhaustive list of rights enshrined in Art. 20 (2) TFEU might give some hints. As Kalaitzaki suggested, the "inter alia" expression should be interpreted in compliance with Art. 2 TEU and Art. 6 (3) TEU, according to which fundamental rights "shall constitute general principles of the Union's law". Therefore, Art. 2 TEU might be used as a "safety valve", including in the list only the essential core, a minimum circle of fundamental rights that may be traced back to the constitutional traditions common to all Member States. Once the scope of application of the respective fundamental right, either enshrined in the Charter or working as a general principle, is assessed, its compatibility with the *Zambrano* doctrine shall be determined. The main question to answer is whether the interference in the respective right constitutes a mere inconvenience or amounts to a deprivation of the genuine enjoyment of its substance.[55] Arguably, it is an interesting proposal, yet it does not seem to bring enough clarity to the *Zambrano* doctrine on the genuine enjoyment of the substance of rights conferred by virtue of EU citizenship.[56]

To conclude, one might argue that EU citizenship still revolves around two dichotomies (EU citizens/third country nationals, mobile/immobile EU citizens). As for the fragmentation process underlying behind the status, the conferral of core citizenship rights is greatly dependent upon the exercise of the freedom of movement, providing protection under Art. 20 TFEU only in very exceptional circumstances, when the EU citizen is obliged to leave the territory of the EU as a whole. As for the multiplication of legal conditions, the

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[54] Judgment of the Court of 20 September 2001, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve,* Case C-184/99, par. 31, pointing to an aspiration rather than to the actual situation. Cfr. Joe Shaw, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism,* 611.

[55] Katerina Kalaitzaki, "EU Citizenship as a Means of Broadening the Application of EU Fundamental Rights: Developments and Limits", in Dimitry Kochenov et al., *The European Citizenship under Stress*, 58 ff.

[56] Martijn van den Brink, "Is It Time to Abolish the Substance of EU Citizenship Rights Test?", *European Journal of Migration and Law*, 23 (2021) 19 ff.

dual membership within a community of peoples envisaged in *Van Gend en Loos* widens the gap between EU citizens and third-country nationals, and still lacks solid foundations, validly raising the question whether the founding values of Art. 2 TEU are *actually common* both to the Member States and their peoples. Citizenship as a normative tool to confer rights based on the distinction between them-us is still deeply rooted in European legal culture, despite all the progress made in the protection of fundamental rights at EU level. This is not surprising at all, considering the amount of time needed for a conceptual paradigm shift in a given society. For EU citizenship to become the "fundamental status" envisaged by the Court of Justice, this change of perspective shall be reached not in a single, but in 27 societies with huge political, socio-cultural and economic differences among each other.

4. On the Nexus with Social Rights: Citizenship and the Role of School

In the EU context, the feasibility to link citizenship and human rights has been discussed, highlighting that while the former is based on the dichotomy of right holders and outsiders, the latter promotes the idea to provide a universal set of guarantees to everyone.[57] For the purposes of this Section, further observations shall be made with particular regard to social rights, which vest individuals with legally valid claims and charging States with equivalent duties.[58] Interpreted in light of human dignity and substantial equality, the essential core of these rights shall be guaranteed also to non-citizens. This is particularly true for the right to education, which recognises the child as the main holder, a subject requiring special treatment because of his or her vulnerable condition due to minor age. It is a peculiar right, since it entails an obligation on behalf of the minor to attend school for a

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[57] Alice Edwards, *The meaning of nationality in international law in an era of human rights,* 11-43.

[58] Authoritative doctrine has dealt with the nature of social rights. For the purposes of this paper, see UN Committee on Economic, Social and Cultural Rights, *GC. No. 3, The nature of States parties' obligations (art. 2, para. 1, of the Covenant).* 5th Session, 14 Dec 1990; *GC. No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the Covenant).* E/C.12/GC/20, 42nd Session, 2 July 2009.

certain period of time set by law, which translates into a claim towards the State to guarantee access to education for all.[59]

In fact, school plays a dual role, by contributing, on the one hand, to build a national identity, and, on the other hand, by providing a forum for different idioms, cultures and values. In other words, it equally plays an important role in forming a monolithic idea of the citizenry and creating a sense of belonging for both those who are citizens and those who come from a migratory background. This second role has already been recognised by several European States which have amended their nationality laws to grant citizenship on the basis of school attendance in young age.[60] For the purposes of this paper, a recent draft law proposed in the previous Italian legislative period is examined, as part of a long series of initiatives to reform Law No. 91 of 5 February 1992 (Nationality Law), adopted thirty years ago.[61] It aimed to introduce a new form of naturalisation, whose beneficiaries would have been foreign minors who have completed an educational path or vocational training course in Italy.[62]

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[59] Cfr. UN Committee on Economic, Social and Cultural Rights, *GC. No. 13, The right to education (art. 13 of the Covenant)*. E/C.12/1999/10, 21st Session, 8 Dec 1999; UN Committee on the Rights of the Child, *GC No. 1, Annex IX, Article 29 (1): The Aims of Education*. CRC/GC/2001/1, 17 Apr 2001; UN Committee on the Rights of the Child and UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *JGC No. 4, State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return.* CMW/C/GC/4-CRC/C/GC/23, 16 Nov 2017.

[60] Cfr. EUI Global Citizenship Observatory, GLOBALCIT Citizenship Law Dataset, comprising citizenship laws in force in 190 states as of 1 January 2020, accessible at https://globalcit.eu/databases/globalcit-citizenship-law-dataset/, last accessed on 30.03.2023.

[61] Daniele Porena, "Le buone ragioni dello ius culturae: note a margine dell'ennesimo tentativo di revisione della legge sulla cittadinanza", *Rivista AIC*, 4 (2020) 231-235. Compared to the original version of the draft, the text published at the end of June 2022 contains a substantial reduction of the proposed changes. Cfr. Boldrini and others, Modifiche alla legge 5 febbraio 1992, n. 91, recante nuove norme sulla cittadinanza (105), Dossier n° 52 - Schede di lettura. 23 ottobre 2018, accessible at http://documenti.camera.it/leg18/dossier/pdf/AC0171.pdf?_1664289894329, last accessed on 30.03.2023.

[62] Italian legislation establishes particularly restrictive conditions on granting citizenship, since - despite the reforms carried out and the proposals for changes that have certainly not been lacking in recent years - it continues to be based on the traditional concept of citizenship *iure sanguinis*, with residual cases based on *ius solii*. On the evolution of Italian legislation, see Bruno Barel, "Cittadinanza", in Paolo

More specifically, the draft law addressed foreign minors who, firstly, were born in Italy or, secondly, entered Italy before the age of twelve, requiring them to have official residence as well as regular attendance, in the national territory, for at least five years of one or more school cycles at institutions belonging to the national education system or of vocational education and training courses suitable for obtaining a vocational qualification. In the case of attendance at primary school, the draft law foresaw the additional criterion of successful completion. As regards the acquisition procedure, key element of the draft was the declaration of will of a parent legally residing in Italy or of the person exercising parental responsibility, in any case by the attainment of the age of majority of the beneficiary. In absence of such declaration, he/she could have applied for citizenship within two years after reaching the age of majority.[63]

The draft law would have brought significant benefits to a huge number of children of non-Italian parents, who, despite being born or growing up in Italy, reach the age of majority without becoming citizens. It took into account the discrepancy that exists, on the one hand, between Article 38 of Legislative Decree no. 286 of 25 July 1998 (Immigration Act) and Article 45 of Presidential Decree no. 394 of 31 August 1999 (its implementing decree), read in light of Art. 34 of the Constitution, which establish the right-duty of education to all minors present in the national territory and, on the other hand, the fact that reaching the age of majority for many non-citizens entails the obligation to legitimise their residence. Despite the clear objective of making Italian citizenship accessible to a wider set of beneficiaries, certain requirements raised critical issues, such as the one concerning official residence for the minor and the parent making the declaration.[64]

Morozzo della Rocca (a cura di), *Immigrazione, asilo e cittadinanza*, 5th Ed., Santarcangelo di Romagna: Maggioli, 2021, 380-423.

[63] Camera dei deputati, XVIII Legislatura, Modifiche alla legge 5 febbraio 1992, n. 91, recante nuove norme sulla cittadinanza A.C. 105 e abb.-A. n. 52/2. 29 giugno 2022. It is necessary to highlight that the draft law would have complemented an already existing provision of the Nationality Law. According to Art. 4 (2), those who have been born in Italy from non-Italian parents, and have resided legally in Italy without interruption, may ask for citizenship within one year after they have reached the major age.

[64] Ennio Codini, *Ius scholae: Luci e ombre di un progetto,* Milano: Fondazione ISMU, maggio 2022, 4-5. The analysis is based on the text published in March 2022 with subtle changes from the text at the end of June 2022.

In a wider context, the draft law was not the first one promoting naturalisation based on access to education, and compared to previous proposals, it seemed an important step forward, not only seeking to adapt citizenship prerequisites to current school realities, but also containing less stringent procedural elements. According to recent statistics, indeed, there are around 860 000 pupils in elementary and high schools without Italian citizenship, i.e., nearly 10% of the student population.[65] Nonetheless, it was not adopted and since the previous legislation was concluded, it should be presented once again to carry on the parliamentary work (which has not happened yet). Therefore, it emerges the legitimate question why it has failed similarly to all previous drafts. It is important to reveal the *raison d'être* of the Italian legislator's passivity compared to other European societies shaped by substantial migratory flows which seem more open to adopt either a multicultural model, e.g., the United Kingdom, or an assimilationist approach, such as France.[66]

When analysing the citizenship law of any country, one shall bear in mind the wider legislative context, including the laws on immigration and asylum as well. Therefore, with regard to Italian immigration and asylum law, one shall seek to understand the failure of the draft law described above in light of the multiple amendments adopted in recent years, which have followed a clear path to refrain, and even criminalise immigration in Italy with a number of techniques.[67] Such instruments include the restriction and sanctioning of search and rescue activities at sea, the continuous reshuffling of reception conditions, the limitation of access to asylum with changes either in substantive law (such as the elimination of the national form of protection based

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[65] Ministero dell'Istruzione, *Gli alunni con cittadinanza non italiana nell'anno scolastico 2018/2019*. maggio 2020. A number which has certainly increased due to the arrival of minors fleeing from Ukraine. As of June 2022, there were around 27 000 minors welcomed in educational institutions ranging from kindergarten to high school. Cfr. Ministero dell'Istruzione, *Rilevazione accoglienza scolastica studenti ucraini.* 13.06.2022.

[66] Daniele Porena, *Il problema della cittadinanza. Diritti, sovranità e democrazia*, Giappichelli: Torino, 2011, 24-69.

[67] Of such tendency was a clear example the Decree-Law n. 113 of 4 October 2018, baptized as "Decreto Salvini" after the Minister of Interior in office who promoted the restrictions contained in the decree. For more, see Luca Masera, "La *crimmigration* nel Decreto Salvini", *La legislazione penale*, 24.07.2019, 1-46.

on humanitarian grounds), or in procedural law (such as the elimination of the second-instance judicial phase of the asylum procedure).[68] Considering the changes in the parliamentary forces after the elections in September 2022,[69] it does not seem plausible that the draft law will be reproposed during the current legislative period.

The Italian proposal points to the underlying dynamics between the right to education and citizenship.[70] This right, indeed, may equally erode or strengthen the identitarian dimension of citizenship, by promoting either diversity and inclusion or a monolithic notion of the citizenry. In these terms, the draft law is a clear example of the tension between the need to adapt citizenship law to the current demographic trends and the insistence on a traditional understanding of school reality, charged with the role of unitary nation-building. As regards fragmentation, it foresaw the conferral of the essential core of the right to education also to non-citizens based on the principle of substantial equality enshrined in Art. 3, para. 2 of the Constitution.[71] As regards multiplication, it recognized that physical presence on national territory directly implies the duty of school attendance for all minors, extending the scope of the Italian legal order to non-citizens. To conclude, one shall hope that in the near future there will be room for an evolutionary, social rights-based understanding of citizenship in a less hostile normative environment.

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[68] For a punctual analysis of the amendments of both substantive and procedural law see Gianluca Famiglietti, *La richiedente protezione internazionale davanti ai suoi "giudici"*, Torino: Giappichelli, 2021.

[69] In fact, one of the first laws passed, Decree-Law n. 1/2023, of 2 January 2023, concerns the restriction on search and rescue activities performed by NGO vessels, which raised sharp criticism on behalf of the Council of Europe. See Letter of the Commissioner for Human Rights of the Council of Europe to the Minister of Interior of Italy, Strasbourg, 26.01.2023, accessible at https://rm.coe.int/commhr-2023--3-letter-to-italy-minister-of-the-interior-en/1680a9f455, last accessed 30.03.2023.

[70] For more on this in the Italian context, see Giuditta Matucci, "Il diritto/dovere all'inclusione scolastica", presentato al Seminario del Gruppo di Pisa: "La Doverosità Dei Diritti: Analisi Di Un Ossimoro Costituzionale?" Università Degli Studi "Suor Orsona Benincasa" Di Napoli. 18.10.2018.

[71] Elena Valentina Zonca, *Cittadinanza sociale e diritti degli stranieri. Profili comparatistici*, Trieste: Wolters Kluver, CEDAM, 2016, 80-105. For a comparative analysis of the English and French model, see *Ibid*., 24-79.

5. Citizenship: A Stage Towards Social Integration

This paper has analysed the changes that the concept of citizenship has undergone in the era of globalisation, especially, in light of mass migration and human rights movements. It has been suggested that, through the process of fragmentation, classic citizenship rights have been conferred to non-citizens, while through process of multiplication, one may belong to multiple legal orders which compete to rule on his/her legal conditions. To this end, three examples were examined at international, supranational and national level. In this regard, one may argue that both Lusophone citizenship, in its form as an ongoing project up to nowadays, and EU citizenship theoretically aim to broaden the group of beneficiaries entitled to the enjoyment of rights conferred by each status. Nevertheless, being additional to Member State citizenships, they do not substantially change the underlying rationale of the concept, which still revolves around setting the perimeter of the group of right holders. In this light, one may conclude that, despite all the phenomena of the globalised world, citizenship, understood as a tool to get access to a certain community and the set of rights and duties attached to the membership in that community, still resists.

Therefore, great responsibility falls on decisionmakers to decide on whom to include and whom to exclude from the enjoyment of such rights. In this perspective, the example of the Italian draft law recently submitted and failed is quite telling. Indeed, citizenship should not be seen as a reward to be obtained upon successful completion of a school term, and not even as the end point, rather as a stage towards social integration. Indeed, it may be conceptualised as an advanced but not the final stage of the path that the individual must take in order to integrate into the society. An advanced stage insofar as it confirms the path already completed since the entry into the national territory and allows one's voice to be heard also at a political level,[72] but not conclusive because it does not automatically entail integration into the society.[73] In this sense, citizenship might be one, but not the only one means that, with other elements, such as long-term residence, linguistic integra-

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[72] Cfr. Ennio Codini, *Ius scholae: Luci e ombre di un progetto*. Milano: Fondazione ISMU, maggio 2022, 10.

[73] Cfr. Étienne Balibar, *Noi cittadini d'Europa? Le frontiere, lo stato il popolo*. Roma: Manifestolibri, 2001, 157.

tion, right to participate in the political decision-making, may reaffirm the individual's position in the society and, on the other side, enrich the society itself. But only the society "capable of future", i.e., which is open enough for transformation by appreciating the diversities.