TERRITORIES, PEOPLES, SOVEREIGNTY

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Abstract: Nation States have three defining characteristics: government of a territory, rapport with a group of people and ownership of a sovereign power. All three of these characteristics are undergoing changes. Several developments involve a redefinition of the "State" and produce numerous contradictions, which can only be solved if we consider the historicity of both the phenomenal essence and the conceptual essence of the State. We need to rethink and reconceptualise the State within the context of the new tendencies and transformations delineated by globalisation.

Keywords: state, nation, globalisation, sovereignty, political rights.

THE CHANGING STATE

The most widespread form of public power in our times is the Nation State. All of the 193 member States of the United Nations are formally Nation States, even if many of these are composed of populations having diverse nationalities (multi-nation States).

Nation States have three defining characteristics. The first is the government of a continuous territory (albeit there are States that also include overseas territories) that is well defined by borders. The second is a stable relationship with a group of people, often not homogenous, but united by the fact of being citizens. The third is the ownership of a sovereign power which is manifested internally towards its citizens and externally towards other countries[1].

All three of these characteristics are undergoing changes. Borders are becoming manipulable. Citizenship is losing importance. Exclusive sovereignty is becoming shared.

THE END OF TERRITORIES?

The idea of "nation" is associated with a territory demarcated by a border, a boundary within which the State exercises its sov-

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ereignty. Borders organise space, define the world and operate as a device of inclusion and of exclusion[2].

Some borders consist of lines, others are border zones or buffer zones. Borders are demarcated by natural elements (rivers, mountain ranges), defined by long-standing use or by international treaties. Borders are recognised by international law because Article 2.4 of the United Nations Charter requires the compliance of nations' "territorial integrity".

But territories and borders may weaken[3]. Communication passes over territories and cannot be completely kept under the control of the State (Internet). Some goods and services circulate freely thanks to free trade agreements. And regulatory power detaches itself from a specific territory[4].

In turn, borders are becoming more "porous" and "malleable": they are crossed, disappear, grow stronger, advance, retreat and redefine themselves. Borders are, in a word, subject to strong changes, dictated by diverse needs, some in the spirit of closure and some in the spirit of openness (elasticity of borders).

Every day, borders are crossed by billions of travellers and by an enormous quantity of goods. According to the data of the International Air Transport Association (IATA), there were 1.11 billion passengers on international flights in 2011 and there are expected to be 1.45 billion passengers in 2016: an increase of 5.3%. In 2014, the World Trade Organisation estimated that international trade amounted to 19 trillion dollars in goods and 5 trillion dollars in services. In the fifty years spanning 1950-2000, international trade multiplied 22 times.

In other cases, borders disappear: those between Syria and Iraq, in the zone under the de facto control of the so-called "Islamic State", no longer exist. The Islamic State has "shifting but definite borders" and occupies a territory that "coincides with portions of at least two other sovereign States, both in an advanced process of disintegration, namely Iraq and Syria"[5].

Some borders are strengthened. Ukraine became independent in 1991. In 2010, Ukraine reached an agreement with Russia for the demarcation of its border, but by 2014, only approximately 200 kilometres of a nearly 2,000 kilometre-long border had been demarcated. In April 2015, a decision was made to construct a wall along the entire length of the border. The wall should be completed in 2018.

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Lastly, borders may advance and retreat. There are examples of this in United States of America, Italy and Canada. In 1996, while the cartographic borders remained unchanged, for immigration purposes the United States' border with Mexico retreated 100 miles. Illegal immigrants taken within 100 miles of the cartographic border are treated as if they are at the border: they are expelled using a rapid procedure. The decision to expel cannot be challenged and can be taken without even considering possible "refugee" status, because national law does not apply outside of national territory[6]. Analogous standards were adopted by Australia in 2001 and 2005.

In other cases, borders are pushed forward. In 1991, the American coast guard, operating outside of their national waters, intercepted vessels transporting migrants fleeing from Haiti to Florida and took them back to Haiti, without confirming whether or not they were refugees[7]. In 2009, three Italian coast guard vessels stopped barges filled with migrants that were outside of Italian national waters, transferring them onto military vessels, returning them to Tripoli and delivering them to the Libyan authorities without the migrants being informed or identified[8]. Since 1999, on the basis of agreements with foreign authorities, Canadian authorities may carry out pre-inspections in foreign airports having departures towards Canadian destinations and have the power to either prohibit departure or permit passage for those requesting asylum.

Finally, the European Union is in the process drawing and redrawing its borders. In 2011, the "Zambrano" decision of the European Court of Justice made reference to "the Union's territory"[9]. Article 77.1.C of the Treaty on the Functioning of the European Union predicted an integrated system for the management of its external borders[10]. The Schengen Agreement, which went into effect in 1995, together with the Schengen Borders Code (Regulation (EC) No 562/2006) govern the management of external and internal borders by regulating the types of checks to be carried out, as well as by placing common rules on visas and the right to asylum[11]. In 2004, the European Border and Coast Guard Agency (Frontex) was created to manage operative cooperation at the external borders of the European Union's member States[12]. The Schengen Agreement consists of the 22 member countries of the European Union as well as four other countries (Iceland, Liech-

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tenstein, Norway and Switzerland). The European Commission is currently working to create a "European community border and coast guard".

The ongoing debate on the application of the Schengen Agreement focuses on the role internal borders should play with respect to external borders. Centrally located European States request that States on the periphery of the Union manage immigration, but the peripheral States ask that the European Union manage immigration and that the immigrants be distributed between the various European countries.

A version of the idea of "border" has reappeared: the notion of a "border zone" – not a line guarded by a police force, but rather a buffer zone controlled by several policing agents. This version of the idea of "border" has been experimented with in the past, such as during the rule of the Roman Empire.

Lastly, the borders of the Union are redrawing themselves in relation to different aspects of integration. Indeed, some European norms are not applicable to certain countries because the Union is an entity of "variable geometry".

One notices therefore a contradictory motion: the Nation States are opening themselves to globalisation (international travel and worldwide trade), but are also intensifying border control. They are accepting the de-territorialisation of power, but also the "comeback" of the territory.

A POPULATION OF RESIDENTS?

Nations are composed of citizens, members of a relatively stable group defined as "people" – which is recognisable by its own individual history, possesses certain identifying characteristics (therefore making them distinct from other nations)[13] and is relatively open[14].

However, Nations have changed from the moment in which a large part of its residents consist of persons born in other countries. These persons are referred to by many diverse names: non-citizen, alien, migrant, or economic, documented/undocumented, regular/irregular, skilled, temporary immigrant, illegal immigrant, asylum seeker or asylum shopper, refugee (with all of its variants, including climate refugee). These persons make up a quarter of

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the population of Australia, one fifth in Canada, more than one sixth in Austria, Sweden and Belgium and more than one tenth in the United States, Germany, France and the United Kingdom[15]. In 1960, 77 million people lived in a country other than the one in which they were born, and 150 million in 1990. In 2013, this number increased to 232 million; in 2015, 244 million (more than 3% of the world's population), of which 136 million were in developed countries[16].

In Italy, there are approximately 5 million legal foreign residents (8.1% of the resident population). They make up 10.8% of the workforce, 9% of the students in school, 8.2% of entrepreneurs/small business owners, and 8.5% of taxpayers (furnishing 5,6% of the total declared incomes and 5% of State revenues)[17].

The presence of such a high number of people coming from other countries causes various problems to arise. These problems will be discussed below.

1) What distinguishes and unifies their sense of identity? A territory, a common language, a common history and collective memory of this history[18], a common culture and principles, shared institutions? Are family ties or social bonds sufficient to become part of a national community?

2) Who is a citizen? The one who holds rights or rights and duties (serving the country, paying taxes, participating in political life of one's community, etc.)? Does citizenship consist of the right to have rights[19]? Is it founded on the correspondence between legal order and subject?[20]

3) Which of these elements are exclusive? Despite coming from different countries, is it not possible to live together in one territory, learn a foreign language, respect the institutions of another country and share a culture?

4) No national community is completely closed, but there are differing degrees of openness. One asks, on the basis of what criteria are people selected to be admitted into a community: on the basis of nationality (such as the recent reception of Syrian migrants in Germany), on the basis of education, of census? And how discretionary is this selection? Does such a selection only take into account the interests of the receiving community (such as in the American case of selective immigration, where trained professionals, scientists or those with higher learning are easily admitted, because they can contribute to the life of the national

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community more than those who have little or no training)? Are the interests of those asking to be received, fleeing from their homeland, also taken into account? Should the right to citizenship, as derived from international law, not be respected?[21] Should there be an international limit to the State powers denying a person citizenship – an act which essentially renders that person stateless? (See the *Rottmann* judgment of the Court of Justice of the European Union[22], *Pham v. Secretary of State for the Home Department* of the Supreme Court of the United Kingdom[23], and *Expelled Dominicans and Haitians* of the Inter-American Court of Human Rights[24]). On the contrary, can illegal immigration be considered a crime? (in 2010, the Italian Constitutional Court ruled on the crime of illegal immigration[25], but many decisions handed down by the Court of Justice of the European Union have ruled on the "criminalisation" of illegal entry by foreigners[26]).

5) To what extent does each State tolerate multiple membership (double or even triple citizenship) or grant to its own citizens a further type of membership (such as in the case of the United States where every naturalised person is both a citizen of the United States and of the federated state in which that person is resident)? Or, as in the case of the European Union, where citizens of member States are seen as holders of an additional citizenship: European citizenship (Article 8 of the Treaty of the European Union), albeit a "thin" citizenship?[27]

In short, with many residents coming from other countries, States become places that welcome not only citizens, but also residents, to whom must be given many of the rights which are guaranteed to its citizens (practically all, except political rights)[28]. This is why States cannot discriminate between persons[29], and cannot deny the recognition of human dignity[30], both because foreigners have human rights (guaranteed by international treaties) which are independent from the State and from national standards which open the legal orders to international law (the obligations of the national community with respects to the international community: Article 10 Italian Constitution, Article 14 ECHR[31]; Preamble, Articles 3, 31, 32 and 33 of the 1951 Refugee Convention). The result is a separation between rights and membership of the original community, the Nation; a devaluation of citizenship; the necessity to view the foreigner's rights through a prism other than that of citizenship, not reducing them to national law but to hu-

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man rights as recognised at the supranational level[32]; but also a destructive potential against the Constitution, which is the charter of the citizens and represents a national community.

The fact that only a minority of foreign residents (who have the right to acquire citizenship) actually request citizenship[33], demonstrates the emergence of a new form of State power territoriality. Except for the right to vote and political rights in general, foreigners enjoy the same rights as citizens[34].

The recognition of these rights is also linked to some conditions or duties (community of rights and duties: Article 2, Italian Constitution). The most widespread condition is that of "durational requirements" based on the principle of "the longer the stay the stronger the claim" (staying in the territory for at least 4 years, as proposed by the British Prime Minister Cameron in the United Kingdom, or for one year as proposed by the Christian Social Union of Bavaria in Germany). Undergoing an examination of civic integration (knowledge of the language and of society) was recognised as being a legitimate requirement[35]. The question of the length of stay (for a specific period of time) is also closely connected to the financing of public services through the tax system, or to the performance of civil service, as held by the Italian Constitutional Court in Judgment no. 119 of 2015, in relation to a law which excluded foreigners from such service even when legally resident on national territory[36]. According to the Court, this is a form of solidary participation in local community life, which cannot be reserved only for citizens[37] (the same should be said for providing reciprocal obligations, as was recently proposed)[38].

In conclusion, contradictions also occur in the personal dimension of the State. National communities, composed of citizens, defend themselves by closing themselves, but also choose to welcome and help non-citizens in the process of integration. Nevertheless, they are granted ownership of civil, economic and social rights[39] without being granted access to political rights.

SHARED SOVEREIGNTY?

According to the traditional point of view, the State is sovereign. Sovereignty has many meanings[40]: however, originally, it indicates the highest power, the last resort and the source of all

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other types of authority. The assertion that the State is sovereign has been long criticised as untrue – a "hypocrisy"[41].

In many parts of the world, State formations are created, promoted or facilitated from the top down – from the United Nations or from other States. It is sufficient to think of the interventions made by the UN in 2015 and 2016 to facilitate negotiations on and the political process of forming governments in States that had either "failed" or risked "failure", like Libya and Syria. The United Nations created The United Nations Support Mission in Libya (UNSMIL). The President of the United States, in his January 2016 State of the Union speech, observed that, "in today's world, we're threatened less by evil empires and more by failing States".

States are conditioned by standards and institutions that they themselves have helped to create and to which they have been subjected. After the Second World War, the United States stipulated around 700 treaties, of which they are a party[42]. In 2012-2013, 8,000 international organisations were surveyed[43]. There are 2,000 "global regulatory regimes" and 60,000 international private or non-governmental organisations. There are more than 200 supranational courts or quasi-judicial bodies. Thus, in the global space there is a rising number of standards, administrative procedures, bureaucracies and judgments, dictated and instituted in order to set down common rules for global markets, promote and protect universal rights, safeguard public property of worldwide value and to ensure the effectiveness of supranational legal orders[44].

Supranational action extends into diverse fields including guardianship of forests, inspection of fisheries, the regulation of water use, protection of the environment, food safety and standards, financial and accounting standards, the management of the Internet, the regulation of pharmacies, the protection of intellectual property, the protection of refugees, general criteria on labour issues, the regulation of competition, the financing of public works, the regulation of commerce, finance, insurance, banks and foreign investments, protection from terrorism, monitoring war and the arms trade, maritime and air travel, the postal service and telecommunications, the monitoring of nuclear energy use, money laundering, migration, sports, health and many other fields[45]. These and many other matters cannot only be regulated by the State

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because the dimension of the problems to be solved is supranational. Consider, for example, the subject of migration; it can be addressed solely with the aid of supranational organisations such as the International Organization for Migration (instituted in 1951, with 157 member States), thanks to regional cooperation (for example, of the European Union) as well as that of Nation States.

In conclusion, supranational standards and institutions are independent from the State and influence the State. State sovereignty is shared (and therefore, by definition, is no longer sovereign) insomuch as the State powers are redefined, divided and reallocated, with a common assumption of responsibility. In this way, States can perform tasks in areas that previously were unattainable (one thinks of global warming or the fight against international terrorism), while still being bound by higher decisions, of which they often become only executors.

IMPLICATIONS AND CONTRADICTIONS

The reported developments involve a redefinition of the State and produce numerous contradictions.

First of all, the territory, which seems to lose importance as borders become more elastic and "malleable", reasserts itself and regains importance in two different ways. One is the rediscovery and reinforcement of borders, when immigration reaches unacceptable levels. Another way in which territory regains importance is as an indicator of membership – inasmuch as the citizens of a foreign State, by the fact of being physically present in the adopted State, enjoy the civil, social and economic rights assured to its citizens.

This paradox is followed by a second paradox: national democracies are democracies of citizens, not of residents, because the collectivity of that territory distinguishes itself in two parts: citizens with political rights and residents devoid of such rights. Territorial communities become divided: civic, economic and social rights unite the communities, and political rights divide them. Some States mitigate this contradiction by assigning, under some conditions, even residents the right to vote for local institutions. What remains open is the problem of the failed asymmetry

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between those who actually make the decisions (parliaments and governments), representatives of the citizens, and the recipients of the decisions, which also include foreigners without the right to vote, violating the basic principle of democracy *quod omens tangit ab omnibus approbetur* ("that which regards everyone, should be approved by all").

Thirdly, while States seek to standardise their own entry regulations with those of other States, inasmuch as migration is no longer a phenomenon controllable only on a national level, what stands out is the way in which States give residents rights, from social rights (the fruition of institutions for well-being, health, education and work) to civil and political rights (principally those pertaining to naturalisation procedures), because these rights are considered to be closely tied to sovereignty.

Finally, the State is where representative democracy has developed. If the State becomes a subsidiary of sovereign organisms, does democracy weaken? If sovereignty is shared and State duties are passed on to supranational public powers, democratic controls on exercising these duties will no longer be possible in a direct mode, but only indirectly, through the State and will therefore be less efficient. In the global legal space, it is sought to mitigate this deficit of democracy through the multiplication of institutes and procedures of "deliberative democracy". This is not enough, however, to make up for the absence of representative democracy.

The observations put forward confirm a general conclusion that has been already reached by scholars of the State, but often forgotten by jurists – the historicity of the phenomenon of the State, not only its phenomenal essence, but even its conceptual essence[46]. Not only the State changes, but also our understanding of the State. If it were needed, one could remember one of the most well-known concepts of the State, that formulated by Hans Kelsen. In numerous works written between the 1920s and the 1950s, he argued that the essence of the State consisted of a centralised legal system[47]. In his autobiography, the author of this very well-known theory of the State observed that, far from being a universally valid and applicable theory, it had arisen within a context that was both limited and historically determined, conditioning its formation[48]. This proves the erroneous conclusion drawn by one of the greatest historians of the State, Leopold van Ranke, who claimed that "States are divine thoughts"[49], unless we accept

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that even God can change his mind depending on the circumstances. In a known statement by the jurist and politician Johann Caspar Bluntschli, it also demonstrates the mistakenness of the idea of the necessary division of the world into States and the necessary parallelism between State and Nation. According to Bluntschli:

> Every Nation is legitimised to construct a State. Just as humanity is divided into a certain number of Nations, so the world shall be divided into many States. For every Nation, one State. For every State, a national entity[50].

The theories of dissipation and disappearance of the State are hasty, beginning with that expressed by Sapieha in Schiller's unfinished drama, *Demetrius,* Act I[51].

We are ultimately left with an important and grandiose task for the study of law: to rethink and reconceptualise the State within the context of the new tendencies and transformations delineated here: internal changes deriving from shifting borders and from the redefinition of the personal basis of the State (made up of the people), and external changes, deriving from the integration of the State into higher functional unities which exercise a shared sovereignty.

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NOTES

[1] With reference to European States, see C. Tilly, *Reflections on the History of European State-Making*, in C. Tilly (edited by), *The Formation of National States in Western Europe*, Princeton, N.J., Princeton University Press, 1975.

[2] See S. Mezzadra, B. Neilson, *Border as Method, or, the Multiplication of Labor*, Durham, N.C., Duke University press, 2013.

[3] See L. Lebon, *La territorialité et l'Union européenne*, Brussels, Bruylant, 2015.

[4] See C. Brölmann, *Deterritorialization in International Law: Moving away from the Divide between National and International Law*, in J. Nijman, A. Nollkaemper (edited by), *New perspectives on the Divide between National and International Law*, Oxford, Oxford University Press, 2007, pp. 84-109. For the European Union, consider the conclusion of the Court of Justice in the *Eurocontrol* case (case C-29/76, 14 October 1976).

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[5] A. Vedaschi, *Da al-Qā'ida all'Is: il terrorismo internazionale si è fatto Stato?*, in "Rivista trimestrale di diritto pubblico", n. 1, 2016, pp. 41-80.

[6] See A. Shachar, *The Shifting Border of Immigration Regulation*, in "Stanford Journal of Civic Rights and Civil Liberties", vol. 3, n. 2, 2007, pp. 165-193.

[7] See the discussion on the decision of the the Supreme Court of the United States, 509 U.S. 155 (1993).

[8] See the discussion on the decision of the European Court of Human Rights, App. n. 27765/09 (23 February 2012).

[9] European Court of Justice, Case C-34/09, 8 March 2011, par. 44.

[10] See G. Licastro, *Verso un "sistema integrato di gestione delle frontiere esterne"?*, in "Diritto comunitario e degli scambi internazionali", vol. 52, n. 4, 2013, pp. 705-709.

[11] On discipline in Europe, see F. Rimoli (ed.), *Immigrazione e integrazione. Dalla prospettiva globale alle realtà locali*, 2 vols., Naples, Editoriale Scientifica, 2014; and K. Hailbronner, D. Thym (eds), *EU Immigration and Asylum Law*, II ed., Baden-Baden, Nomos, 2016. On European politics, see European Commission, *Communication from the Commission to the European Parliament and the Council on the State of the Play of Implementation of the Priority Actions under the European Agenda of Migration*, 12 February 2016, Com(2016)85 final.

[12] See Mezzadra, Neilson (2013), and M. Savino, *La crisi dei migranti: l'Europa oltre gli Stati-nazione?*, in "Giornale di diritto amministrativo", 2015, 6, pp. 729-730. On Frontex, see G. Campesi, *Polizia della frontiera. Frontex e la produzione dello spazio europeo* (Roma: DeriveApprodi, 2015).

[13] See P. Weil, *Le sens de la République*, Paris, Grasset, 2015, pp. 72-76.

[14] From 1868, "being born in the United States" means "being an American citizen" (*ius soli*). In France, in the *Ancien Régime*, citizenship followed the criteria of residence. With the French Revolution it became a human right, independent of the State: the Napoleonic Code (1803) introduced the principle whereby nationality is transmitted by heredity (*ius sanguinis*). One can obtain it also after five years of marriage with a French citizen (see Weil 2015: 30-31).

[15] It is interesting to consider the pressure put on national legal orders due to immigration with reference to the problems arising in the United State of America. Until 1929, entering the United States without authorisation was not a crime. After 1929 it was considered a crime, which attracted increasingly severe punishments (see D.A. Slansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, in "New Criminal Law Review", vol. 15, n. 2, 2012, pp. 157-223). There were only 9 prosecutions against illegal immigrants in 1997. There were 90,000 in 2009. There were 40,000 deportations in 2005, 393,000 in 2009. Up until 2014, 4.5 million illegal immigrants had been deported overall.

[16] UN, *Trends in International Migrants Stock: The 2015 Revision*, New York, 2015; Undesa, *International Migration Report*, New York, 2015, p. 3. See also the research of the Migration Policy Institute. Some other data may be interesting: in the United States there are 11 million illegal immigrants out of a population of 325 million inhabitants (Weil, *Le sens*, p. 151). In the European Union (500 million inhabitants), in 2014, 625,000 requests for asylum were registered. In France (65 million inhabitants), after 2007, between 180,000 and 210,000 legal immigrants entered each year, and almost 25,000 to 40,000 illegal migrants (*ibidem*, pp. 146-148). Hosting and giving asylum, however, does not mean integrating and granting citizenship. Every year, in France between 25,000 and 40,000 immigrants are granted citizenship (*ibidem*, p. 15). For the latest data, see M. Livi Bacci, *Le popolazioni islamiche in Europa*, in "il Mulino", n. 2, 2015, pp. 303-310. The manner in which one acquires citizenship, loses citizenship, and can hold more than one citizenship differs from country to country. The requisites concern generally age, the duration of the stay, the level of education, the financial resources and marriage. For a comparative analysis, see Weil, *Le sens*, p. 132, and E. Grosso, *Una cittadinanza funzionale. Ma a cosa?*, in "Materiali per una storia della cultura giuridica", a. XLV, n. 2, 2015, pp. 482 ss.

[17] See Fondazione Moressa, *Rapporto annuale sull'economia dell'immigrazione*, Bologna, Il Mulino, 2015, *passim*.

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[18] See Weil, *Le sens*, pp. 67-68.

[19] On H. Arendt's well-known expression, see N. Oman, *Hanna Arendt's "Right to Have Rights": A Philosophical Context for Human Security*, in "Journal of Human Rights", vol. 9, n. 3, 2010, pp. 279-302.

[20] See P. Mindus, *Ancora sulla teoria funzionale della cittadinanza. Risposta ai critici*, in "Materiali per una storia della cultura giuridica", a. XLV, n. 2, 2015, pp. 521-544.

[21] Article 15 of the *Universal Declaration of Human Rights* provides that "[e]veryone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". Furthermore, there are international conventions for reducing the number of "stateless persons" (a list on the website of the U.S. Department of State: http://www.state.gov/j/prm/policyissues/issues/c50242.htm).

[22] European Court of Justice, Case C-135/2008 of 2 March 2010.

[23] Supreme Court of the United Kingdom, UKSC 19 of 25 March 2015.

[24] 28 August 2014.

[25] Italian Constitutional Court, Judgments No. 249 and No. 250 of 2010.

[26] On the subject, see also the *El Dridi* judgment, or those handed down by the Court of Justice of the European Union, Case C-61/11 of 28 April 2011, as well as *Achughbabian*, Case C-329/11 of 6 December 2011, *Sagor*, Case C-430/11 of 6 Decembrer 2012, and *Celaj*, Case C-290/14 of 1 October 2015.

[27] See E. Fumero, F. Strumia, *Stranieri integrati e cittadini emarginati? Profili evolutivi di una nozione sociale della cittadinanza europea*, in "Materiali per una storia della cultura giuridica", a. XLV, n. 2, 2015, p. 426.

[28] A. Morrone, *Le forme di cittadinanza nel Terzo Millennio*, in "Quaderni costituzionali", a. XXXV, n. 2, 2015, pp. 303, 314.

[29] See the decision of the Supreme Court of the United States, *Zadvidas v. Davis*, 533 U.S. 678, 693 (2001), according to which the clause on Due Process applies to each "person" in the United States including foreigners, independently of whether their presence is illegal, temporary or permanent. See also Inter-American Court of Human Rights, *Vélez Loor v. Panama*, 23 November 2010 and the Court of Justice of the European Union, *El Dridi*.

[30] Inter-American Court of Human Rights, *Advisory Opinion OC – 18/03* requested by the United Mexican States, Sept. 17, 2003 (the right to work as guarantee of dignity) and Spanish Constitutional Court, decision n. 236/2007, 7 November 2007 (the right of access to non-obligatory education for illegal immigrants, guaranteed to ensure the respect of human dignity). See also Supreme Court of the United States, *Mathews v. Diaz* and *Ambach v. Norwich*, 426 U.S. 67 (1976) and 441 U.S. 68 (1979), as well as Constitutional Court of South Africa, *Union of Refugee Women*, CCT 39/06 (12 December 2006).

[31] Judgments n. 187 of 2010 and n. 329 of 2011.

[32] See D. Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship*, Baltimore, Md., The Johns Hopkins University Press, 1997, pp. 73, 107 ff., 127 ff.; and M. Savino, *Le libertà degli altri. La regolazione amministrativa dei flussi migratori*, Milan, Giuffrè, 2012, pp. 17-18, 22, 27, 41, 46. See also C. Joppke, *Citizenship and Immigration*, Cambridge, Polity, 2010.

[33] In the United States, less than 20% of Mexican immigrants are legal and in Germany less than 10% of immigrants intend to acquire German citizenship. What is more, both in the United States and in other countries, like Canada, the announcement that the government could have not acknowledged rights to immigrants sparked a race towards naturalisation (see Jacobson, *Rights across Borders*, p. 218).

[34] See A.B. Sajoo, *A Review of David Jacobson, "Rights Across Borders: Immigration and the Decline of Citizenship"*, in "McGill Law Journal", vol. 43, 1998, p. 217.

[35] Court of Justice of the European Union, Case C-153/14 of 9 July 2015, on entry and stay for family reunification on the basis of Article 7.2 of Directive 2003/86 of 22 September 2003 (regarding Dutch laws enacted in the year 2000).

[36] On the judgment, and on the general case law of the Italian Constitutional Court, see M. Cartabia, *Gli "immigrati" nella giurisprudenza costituzionale: titolari di diritti e*

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protagonisti della solidarietà, in C. Panzera, A. Rauti, C. Salazar, A. Spadaro (edited by), *Quattro lezioni sugli stranieri*, Naples, Jovene, 2016, pp. 3-31.

[37] See S. Polimeni, *Un imprevedibile circuito virtuoso. Disciplina dell'immigration regime ed esigenze di sviluppo locale (Notarella a margine della l. reg. calabrese n. 18/2009)*, unpublished, p. 11 of manuscript.

[38] For an examination of the different membership conditionality structures, see G. Baldi, S.W. Goodman, *Migrants into Members: Social Rights, Civic Requirements, and Citizenship in Western Europe*, in "West European Politics", vol. 38, n. 6, 2015, pp. 1152-1173. See also Q. Camerlengo, L. Rampa, *I diritti sociali fra istituti giuridici e analisi economica*, in "Quaderni costituzionali", a. XXXV, n. 1, 2015, pp. 59-86.

[39] See S. Cassese, *I diritti sociali degli "altri"*, in "Rivista del diritto della sicurezza sociale", a. XV, n. 4, 2015, pp. 677-685.

[40] See D. Grimm, *Souveränitat: Herkunft und Zukunft eines Schlusselbegriffs*, Berlin, Berlin University Press, 2009; English transl. *Sovereignty: The Origin and Future of a Political and Legal Concept*, New York, Columbia University Press, 2015, pp. 3 ss.

[41] See S.D. Krasner, *Sovereignty: Organized Hypocrisy*, Princeton, N.J., Princeton University Press, 1999.

[42] See S. Breyer, *The Court and the World: American Law and the New Global Realities*, New York, Knopf, 2015, p. 197.

[43] See *ibidem*.

[44] See L. Casini, *The Expansion of the Material Scope of Global Law*, in S. Cassese (edited by), *Research Handbook on Global Administrative Law*, London, Elgar, 2016, pp. 25 ff., 28 ff.

[45] See S. Cassese, *Chi governa il mondo?*, Bologna, Il Mulino, 2013, pp. 15 ss.

[46] See M. Weber, *Staatssoziologie*, a cura di J. Winckelmann, Berlin, Duncker und Humblot, 1966; O. Brunner, *Land und Herrschaft. Grundragen der territorialen Verfassungsgeschichte Österreichs im Mittelalter*, Baden bei Wien, Rohrer, 1965; English transl. *Land and Lordship: Structures of Governance in Medieval Austria*, Philadelphia, University of Pennsylvania Press, 1995; Italian transl. *Terra e potere. Strutture pre-statuali e premoderne nella storia costituzionale dell'Austria medievale*, introduction by P. Schiera, Milan, Giuffrè, 1983; O. Hintze, *Wesen und Wandlung des modernen Staats*, in *Sitzungsberichte der Preussischen Akademie der Wissenschaften*, Berlin, de Gruyter, 1931, p. 790; see also *The Historical Essays of Otto Hintze*, introduction by F. Gilbert, New York, Oxford University Press, 1975; B. Badie, P. Birnbaum, *Sociologie de l'État*, Paris, Grasset, 1979, p. 243.

[47] H. Kelsen, *General Theory of Law and State*, Cambridge, Mass., Harvard University Press, 1949.

[48] Id., *Autobiographie*, 1947, in Id., *Werke*, I, Tübingen, Mohr Siebeck, 2007. On the dependance of the Kelsenian formula of time and space, see T. Olechowski, *Biographical Researches on Hans Kelsen in the Years 1881-1920*, Kelsen Working Papers, www. univie.ac.at/kelsen/workingpapers/ biography_1881_1920.pdf.

[49] See L. von Ranke, *Politisches Gespräch* (1836), online in Projekt Gutenberg-DE, cap. 1, http://gutenberg.spiegel.de/buch/-3012/1, and reedited Berlin, Duncker und Humblot, 2005.

[50] J.C. Bluntschli, *Allgemeine Staatslehre*, V ed., Stuttgart, Cotta, 1875, p. 107. I thank Olivier Beaud who brought this work to my attention.

[51] See F. Schiller, *Demetrius* (1857), online in Projeckt Gutenberg-DE, Ch. 1, http://gutenberg.spiegel.de/buch/demetrius-3337/1.

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