

Title: The Scope and the Legal Limits of the 'Immigration Federalism': Some Comparative Remarks from the American, Belgian and the Italian Experiences

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Abstract:

Traditionally, immigration has generally being conceived of as a matter to be dealt with by the national legislator. However, immigration federalism - that is, the regulatory role that sub-national territorial units, enjoying legislative powers, experience with regard to issues related to immigration policy - has become a very sensitive issue in many countries.

By focussing on the comparison of three legal systems (the USA, Belgium and Italy), this article highlights three main issues challenged by the emergence of immigration federalism: the division of powers, access to welfare and cultural-linguistic integration in the context of multinational states.

The comparative analysis reveals one important difference between these countries. While in the US immigration is interpreted as a federal reserved power - allowing the federal authorities to regulate, not only, the entry and stay of aliens, but also their rights and duties, to the point of encroaching on State matters - this does not occur in both Italy and Belgium.

As a consequence, in these two countries sub-national units have had more chances to freely develop immigration-related policies. In the Italian case this has occurred especially in the field of welfare, while in Belgium it has emerged in the linguistic integration policy. At the same time, however, the judiciary has used the principle of equality and the protection of fundamental rights to ensure a certain level of territorial harmonisation, and contrast discriminatory approaches by the sub-national units. Both models present some inconsistencies.

In the final part of the essay, we suggest the development of cooperative federalism as an alternative means of structuring territorial relations within the immigration field. This solution seems more consistent with the idea that immigration is not in itself a jurisdiction, but constitutes a policy, composed of measures falling under various constitutional jurisdictions, which are vested in both the national and the sub-national tiers of government.

**THE SCOPE AND THE LEGAL LIMITS OF THE ‘IMMIGRATION
FEDERALISM’: SOME COMPARATIVE REMARKS FROM THE AMERICAN,
BELGIAN AND THE ITALIAN EXPERIENCES**

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1. INTRODUCTION

It is commonly argued that globalisation has led to the weakening of the regulatory role of the State in favour of supranational or international organisations, without simultaneously preventing sub-national territorial units from strengthening their role as promoters of territorial specificities through their regulatory functions. A new label has even been coined in order to describe this, namely “glocalisation”.

In this context, it is germane to examine the issue of ‘immigration federalism’, that is, the regulatory role that sub-national territorial units, enjoying legislative powers, experience with regard to issues related to immigration policy.

Traditionally, immigration has generally been conceived of as a matter to be dealt with by the national legislator. This is consistent with the idea that the power to decide who may or may not enter the country derives from the sovereignty principle, which pertains to the national authorities.

However, at least in the European context, international and supranational legal orders are increasingly providing limits to the discretion of national States with relation to immigration policy and the legal status of aliens. Take, for example, the increasing measures the EU has taken in relation to third-country nationals in recent years. This is especially evident since the Amsterdam treaty ‘communitarised’ the relevant policy area.¹

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as interpreted and applied by the European Court of Human Rights (ECtHR), also deserves due consideration. Although relatively few provisions of the ECHR are explicitly directed towards aliens, it is important to emphasize that the Convention applies to all individuals who are subject to the jurisdiction of the States that are parties to the Convention.²

These short remarks demonstrate how, at least in Europe, international and supranational forces may influence national decisions concerning immigration measures or the legal status of aliens.

Less attention has been paid to the role that sub-national units perform with regard to immigration policy. However, it is increasingly frequent for sub-national units to act in this area.

In the US, the Supreme Court has recently deemed illegitimate an Arizona statute that empowers state and local officials to stop individuals suspected to be illegal immigrants.

Both Flanders and Catalonia have recently passed acts imposing compulsory linguistic and civic courses upon immigrants. Failure to attend such courses is sanctioned either by an administrative fine or by legal constraints to the renewal of the permit of stay.

The Italian Constitutional Court has already settled a variety of cases concerning the constitutionality of regional statutes dealing with immigration issues.

¹ This is now regulated in Title V, ch 2, arts 77-80, of the TFEU. See Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, OUP 2011).

² See Bruno Nascimbene and Chiara Favilli, ‘Straniero (tutela internazionale)’, in Sabino Cassese (ed) *Dizionario Diritto Pubblico* (Giuffrè 2006) 5804; Vincent Chetail (ed), *Mondialisation, Migration et Droits de l’Homme: Le Droit International en Question* (Bruylant 2007).

This paper aims at focussing attention on ‘immigration federalism’ in three relevant States, namely the USA, Italy and Belgium. The choice of these States is due to the fact that issues pertaining to “immigration federalism” are currently very sensitive in each of these jurisdictions. However, meaningful institutional differences characterise the three States. It can thus be recalled that whereas the USA represents an example of a federal State constituted from the aggregation of previously independent States, in the case of Italy and Belgium we face two legal orders where decentralisation occurred in the context of a previously unitary State. At the same time, the Belgian federalisation process is due to the need to preserve cultural and linguistic sub-national territorial identities (of the Walloon and the Flemish nations), a feature that it does not share with the US and to a large extent with Italy as well. Finally, both Italy and Belgium are part of the EU and are signatory parties of the ECHR, a feature that is evidently not shared by the USA.

All of these aspects – ie the type of federalism, the minority linguistic issue and the legal influence exercised by supranational and international legal orders – constitute grounds that may influence “immigration federalism”, rendering it an interesting topic for a comparative analysis.

The three national experiences will thus be evaluated taking into account three dimensions of ‘immigration federalism’: namely the division of powers, the emergence of a ‘regional social citizenship’ and the emergence of a ‘cultural regional citizenship’.

This paper suggests that immigration as such cannot be considered as a matter in itself but rather as a policy composed of measures falling under several different constitutional jurisdictions. Immigration can be assessed as if it were a shared policy, where the role of sub-national units varies in relation to the specific area that can be connected to the immigration policy label.

The development of ‘immigration federalism’ does not only involve the division of powers. The massive influx of immigrant newcomers alters the relationship between the sub-national units’ authorities and the individuals falling under their jurisdiction. Whereas the idea of the relationship between the public authorities of a national State and the relevant people is based upon the notion of citizenship, as a rule, there is no formal instrument to describe the relationship between the authorities of sub-national units and the individual.³ However, in order to determine to which persons a regional act is applied, sub-national units must utilise some criteria that link those persons to the territory. Amongst these, residence is becoming increasingly important, especially in areas, such as welfare, that are strictly concerned with individuals.

³ Some federal states have federal citizenship status, as well as state citizenship status. However, whereas at the beginning of federations, federal citizenship is usually derivative of the existing state citizenship, such systems tend to be abandoned at a later juncture: citizenship in a sub-national unit follows from the fact of being a national citizen residing in the relevant sub-national unit. This is the case of the US, with the insertion in the Constitution of the XIV Amendment after the Civil War. Thus, since currently the status of state citizenship, where it formally exists, derives from being a *national* citizen residing in the relevant state unit, it is not a suitable instrument to describe the ties of *non-national citizens* with a sub-national unit, according to the perspective considered in this contribution. On the issue, see Christoph Schönberger, ‘European Citizenship as Federal Citizenship – Some Citizenship Lessons of Comparative Federalism’, in *Citizenship in the European Union/Citoyenneté dans l’Union Européenne*, (Esperia Publications LTD, European Public Law Series 2007) 61; Olivier Beaud, ‘The Question of Nationality within A Federation: a Neglected Issue in Nationality Law’ in Randall Hansen and Patrick Weil (eds), *Dual Nationality, Social Rights and Federal citizenship in the U.S. and Europe - The Reinvention of Citizenship* (Berghahn Books 2002) 314; Peter H Schuck, ‘Citizenship in Federal Systems’ (2000) 48 A J Comp L 195.

Thus, the more the sub-national units are called to deal with policies related to the individuals, the more that residence becomes a means of stressing the sense of belonging to the given sub-national unit. This sense of regional territorial belonging becomes even stronger in cases of multinational states where the *raison d'être* of the decentralised form of government is the preservation of the cultural identity of the persons inhabiting that territory.

In such cases, we may say that residence is the functional equivalent of a sort of 'regional' citizenship, to the limited extent of expressing the idea of a relationship of 'belonging' between the person and his territorial unit.⁴

There are at least two areas where this can be easily noted.

The first of these is welfare. Since welfare rights, especially when they are financed via general taxation, are dependent upon budgetary resources, the sub-national units have an interest in limiting the regional welfare eligibility to persons showing a genuine link with the territory. Thus, residence in the given sub-national territory as a precondition for being awarded social benefits is not enough, and tends to be coupled with a long-term residence requirement that discriminates against newcomers, and particularly new immigrants.

The second area where the sense of belonging to a regional territorial area may be significant is language. We refer here to those countries characterised by a multinational structure, or where linguistic-national minorities are established. Those sub-national units where a national component or minority is mainly settled (thus constituting a 'majority' with respect to that territory) may feel the need to preserve their cultural homogeneity and distinctiveness with respect to new immigrants, especially when the latter are deeply motivated to learn the 'majoritarian' language.⁵

Both 'social' and 'cultural regional citizenships' may be developed through instruments aimed at protecting the autochthonous communities, and at discouraging immigrants from settling in the relevant sub-national unit. Questions may thus arise in relation to the respect of fundamental rights and the principle of equality. Since the enforcement of these principles is conferred to the judiciary, both at the national and at the international/supranational level, attention must be paid to their role in this regard.

The comparative analysis performed herein will show an important difference emerging from the comparison of the US case with the two European countries. This is essentially based on a different conception of what immigration, as an issue strictly related to the national sovereignty principle, should mean for the purpose of the division of powers.

⁴ See, in the Italian legal scholarship, Federico Dinelli, 'La Stagione della Residenza: Analisi di un Istituto Giuridico in Espansione' [2010] *Diritto Amministrativo* 639, Stefano Sicardi, 'Essere di quel Luogo. Brevi Considerazioni sul Significato di Territorio e di Appartenenza Territoriale' [2003] *Politica del Diritto* 115.

⁵ It is certainly disputable to apply the findings made above in the text to the case of Dutch, since this is currently the language spoken by the majority of the people in Belgium. However, Flemish finds itself in a somewhat unfavourable position in respect to the French language, spoken by the minority in the State, and in any case, Flemish is a minority language in the Brussels region.

With regard to the concept of national minority as applied to the Belgian case, it is very useful to read the *Opinion of the Venice Commission on possible groups of persons to which the Framework Convention for the protection of national minorities could be applied in Belgium* (Venice Commission, 8-9 march 2002) where Dutch speakers are considered as a national minority in the sense of the Framework Convention in the French-language region, but not at the State level.

In US, immigration is interpreted as a federal reserved power, allowing the federal authorities to intervene not only in the area of the regulation of the entry and the stay of aliens, but also in the area of the rights and duties that the aliens enjoy, even if this could lead to encroachment upon matters normally reserved to sub-national units. The justifications for this wide federal power are based upon the fact that the legal treatment of aliens may become an issue involving international liability, or, at least, potentially affecting international relations, as well as the fact that integrating people in a common nation is essentially a national interest. As a consequence, it is mainly up to the national legislator to shape the 'immigration federalism'. Sub-national units are allowed to enact measures in this field as long as federal law does not intervene by extensively regulating the matter or as long as sub-national actions do not stand as an obstacle to objectives laid down by federal law.

On the contrary, both the Italian and the Belgian Constitutional Courts have refused to conceive of the legal status of aliens as an autonomous standing power clause that enables the national legislator to intervene in areas otherwise reserved to the sub-national units. As a consequence, sub-national units have had more chances to freely develop immigration-related policies, potentially undermining coherence at national level. However, judicial enforcement of the equality principle and the protection of fundamental rights emerged as a means for the judiciary to guarantee a certain territorial harmonisation, as well as representing a means of combating discriminatory approaches by the sub-national units.

Both models present some inconsistencies.

In the final part of the essay, we suggest the development of cooperative federalism as an alternative means of structuring territorial relations within immigration. This solution seems more consistent with the idea that immigration is not, in itself, a jurisdiction, but rather a policy composed of measures falling under several different constitutional jurisdictions, which are vested in both the national and the sub-national tiers of government.

2. THE DIVISION OF POWERS ISSUE

Traditionally, the division of powers between national and sub-national units in relation to the immigration field has been essentially based on the idea that, whereas conditions of entry and residence of immigrants should be dealt exclusively by the national authorities, both the treatment of aliens, once legally admitted, and their integration are issues to be dealt with by the sub-national units.⁶

This dividing line has shown some inadequacies. On the one hand, it prevents sub-national units from expressing their views on issues related to immigration that are crucial for their public interests (for instance the admission of immigrants according to the labour needs of the relevant regional territory). On the other hand, it does not consider that the legal status of aliens with regards to the rights that they enjoy (especially welfare rights) constitutes part of any integration project that the national level has an interest in shaping.

The aim of this paragraph is to provide the reader with some references to the division of powers issue and its relation to immigration policy in the relevant legal orders.

⁶ See Tomas Hammar, *Democracy and the Nation State* (Averbury 1990) regarding the distinction between 'policies of immigration' – to be reserved to the national level – and 'policies for immigrants' – to be reserved to the sub-national level.

2.1 USA

The US Constitution does not explicitly grant the federal legislator any powers in relation to immigration as such.⁷ The only constitutional clauses that may be considered as generally referring to the field are the naturalization clause of art 1 (8) sec 4, and the migration clause contained in art 1 (9) sec 1. This provision, however, has a specific historical reason, namely the compromise reached at the beginning of the XIX century to allow the southern states to maintain slavery. Thus, the reference to migration included in this clause does not have any current legal effects.

Lacking a federal statute dealing with immigration, and with no specific constitutional clause reserving immigration to the federal level, many member states in the XIX century enacted measures in order to regulate immigration.⁸ Usually, these were restrictive measures with a discriminatory effect towards newcomers.

Despite the lack of a specific provision granting the federal legislator the relevant power, in 1849 the Supreme Court struck down two statutes from New York and Massachusetts, which imposed a levy upon foreigner passengers landing in their ports. The Supreme Court based its decision on the commerce clause, thus considering these measures as a restriction to interstate commerce.⁹

In a subsequent decision, the Supreme Court explicitly stated that the regulation of the entry and the stay of aliens in the national territory is 'an incident of sovereignty belonging to the government of the US'. As a consequence, the Court granted the federal legislator a broad power to deal with immigration issues, and exercised the greatest judicial deference with regard to its political decisions in the field (so-called *plenary power doctrine*).¹⁰

Finally, in *Chy Lung v Freeman*, the Supreme Court derived the federal power to deal with the field of immigration from the federal powers related to foreign affairs. According to the Supreme Court, immigration is a matter to be vested in the federal legislator, since the legal treatment of aliens may become a reason of concern for the international legal order and thus the federal government may be called upon to answer for it.¹¹

The aforementioned US Supreme Court decisions clarified that immigration is, in principle, a matter reserved to the federal level. However, it was not clear whether the federal

⁷ See, generally, Thomas Alexander A Aleinikoff, David A Martin, Hiroshi Motomura and Maryellen Fullerton, *Immigration and Citizenship* (Thomson/West 2008). On the immigration federalism see also Peter J Spiro, 'The States and Immigration in an Era of Demi-Sovereignities' (1994) 35 Virginia J Intern L 121; Cristina M Rodriguez, 'The Significance of Local in Immigration Regulation' (2008) 106 Michigan L Rev 567; Clare Huntington, 'The Constitutional Dimension of Immigration Federalism' (2008) 61 Vanderbilt L Rev 787, who deems immigration as a *de facto* shared power; Peter H Schuck, 'Taking Immigration Federalism Seriously' [2007] U Chicago L Forum 57. For critical views on the role of the member states in the immigration policy, see Michael J Wishnie, 'Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism' in (2001) 76 NY U L Rev 493; Linda S Bosniak, 'Immigrants, Preemption and Equality' (1994) 35 Virginia J Intl L 179; Hiroshi Motomura, 'Immigration Outside the Law' (2008) 108 Columbia L Rev 2027.

⁸ See Gerald L Neuman, 'The Lost Century of American Integration Law (1776-1875)' (1993) 93 Columbia L Rev 1833; Hiroshi Motomura, *Americans in Waiting. The Lost Story of Immigration and Citizenship in the United States*, (OUP 2006).

⁹ See *The Passenger cases*, 48 US (7 How) 283, 512-513, 12 L.Ed. 702 (1849).

¹⁰ *Chae Chan Ping v US* 130 US 581, 604 (1889)

¹¹ *Chy Lung v Freeman*, 92 US 275, 23 L.Ed. 550 (1875).

immigration power was limited to the core meaning of immigration policy – ie the conditions for entry and stay and the removal of aliens – or whether it extended to cover other immigration-related areas, such as the legal status of aliens once legally admitted (the so called *alienage law*). Moreover, even admitting that the federal level has the power to deal with immigration, would it follow that any state is precluded from enacting provisions involving the classification of aliens? Or, would a state statute be vitiated insofar as it is effectively incompatible with the federal law?

These questions were answered years later, at a time when the federal legislator had already approved a comprehensive regulatory scheme on immigration law, namely the *Immigration Nationality Act* (INA).¹²

In 1971, in *Graham v Richardson*, the Supreme Court struck down two state statutes by means of which Pennsylvania and Arizona had purported to limit the award of state welfare entitlements, respectively only to American citizens resident in Pennsylvania, and to American citizens and aliens, providing that the latter had at least a 15-year legal residence in Arizona.¹³

The US Supreme Court decision relied on both an equal protection and a pre-emption analysis.

As to the pre-emption analysis, the Supreme Court held that the two state acts were pre-empted by the INA regulatory scheme insofar as ‘state laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the federal government’. According to the Court, once aliens are admitted into the United States, they have a right to enter and reside in any state. Thus, any state measure that may place a burden on them, so to discourage them from settling in a given state, is ergo unconstitutional.

This decision seems to suggest that the federal power in the field of immigration covers immigration in its narrow sense as well as the legal status of aliens. State law is admissible only insofar as it does not hamper relevant federal law.

This issue was later reconsidered by the Supreme Court, which refined the pre-emption test to be used.

In *De Canas v Bica*, the Supreme Court upheld a Californian statute, which made it a civil offence for an employer to hire illegal aliens.¹⁴ The Supreme Court based its reasoning on the distinction to be made based on whether the measure challenged falls under immigration law or under alienage law.

The facts that aliens are the subject of a state statute does not make it a regulation of immigration which is essentially a determination of who should or should not be admitted into the Country and the condition under which a legal entrant may remain’, the Court stated. It also added ‘the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by the constitutional power, whether latent or exercised.

¹² See the Immigration Nationality Act 1952, now codified in Title 8 of the United States Code.

¹³ *Graham v Richardson*, 403 U.S. 365, (1971).

¹⁴ *De Canas v Bica*, 424 US 351, (1976). At that time, no sanctions were imposed by the federal legislator in cases where an employer hired illegal immigrants. As a consequence of the Supreme Court decision, in 1986, an amendment to the relevant federal legislation was inserted so to provide for such sanctions. This had the effect of precluding the measures of state legislators in the area.

The federal legislator may, in principle, deal with immigration and alienage as well. What seems to change is the pre-emption test applied in order to determine whether the state measure is legitimate or whether it is interfering with the federal powers.

According to the Court, the federal law may pre-empt state acts in the immigration field in three different ways.

The first of these occurs when the state statute tries to regulate the conditions for entry and residence in the country. Any state regulation falling into this area is *per se* unconstitutional, whether the federal legislator has legislated or not.

The second instance occurs when the Congress intended to 'occupy the field'. This may occur when there is intent to ouster the state intervention. This intent can be expressed or inferred by the pervasive nature of the federal regulation, which does not leave any room for concurring state interventions.

Finally, the third instance (the so-called *conflict or implied pre-emption*) occurs when the state law 'stands as an obstacle to the accomplishment and execution of the full proposed and objective of Congress'.

It may be said that *De Canas* excluded that the INA had 'occup[ie]d' the field' in relation to both immigration and alienage laws. This means that, apart from the few cases where a state regulation attempts to substitute federal regulation concerning aliens' entry and stay in the country, the pre-emption test to be applied should be the conflict/implied one: the conflict between a state statute and a federal statute should be evaluated in concrete terms, favouring the best interpretation for the safeguarding of both statutes.

In *De Canas*, the Court applied the conflict pre-emption test. The Court recognised that California intended to pursue a legitimate aim, namely to deter irregular immigrants from entering its territory. The Supreme Court deemed that the federal law did not prevent a state from imposing a sanction upon an employer who hires illegal immigrants, thus upholding the Californian statute.

In the light of *De Canas* decision and the above three pre-emption tests, it is useful to evaluate the legitimacy of several statutes, recently passed by some US states, which aim at deterring the presence of illegal immigrants.

To this extent, we may note that in the debate concerning immigration federalism, there has been a policy focus shift: whereas, until 1996, member states have concentrated their efforts upon the issue of immigrants as beneficiaries of state welfare benefits, in the last few years, they have been more inclined to take measures against illegal immigration.¹⁵

This goal has been pursued through an increase in limitations to possibilities for people to enter into a contractual agreement with illegal aliens, and via measures allowing state and

¹⁵ See Michael J Wishnie, 'Welfare Reform after a Decade: Integration, Exclusion, and Immigration Federalism', in Michael E Fix (ed) *Immigrants and Welfare – The impact on Welfare Reform on America's Newcomers* (Russel Sage Foundation - Migration Policy Institute 2009) 69.

local police to stop and detain illegal immigrants in order to facilitate their removal, which is a federal procedure.¹⁶

The *Arizona Support Our Law Enforcement and Safe Neighbourhoods Act* fits this scheme and has represented a model for other state measures in the field.¹⁷ On the one hand, this statute makes it a misdemeanour for a person to be unlawfully present in the US and knowingly apply for work, solicit work in a public space or perform work as an employee or independent contractor in the state. On the other hand, it provides state and local authorities with the duty of determining the immigration status of the person they stop, detain or arrest, whenever a reasonable suspicion exists that the person is an unlawful immigrant in the US. It also enables police officers to arrest a person when they have probable cause to believe the arrested person has committed any public offense that renders that person removable from the US.

The INA presents some inconsistencies as to if and when states can perform any action in enforcing the federal removal procedure. It explicitly provides for the possibility of deputizing state or local authorities' officers to perform the functions of federal immigration officers, provided that states or local units enter into written agreements with the Federal Attorney General. The agreements are intended to set the legal framework according to which functions are to be performed.¹⁸ Moreover, the 8 USC sec 1252 lett c) provision expressly authorises state and local officials to arrest unlawfully present aliens only after confirmation of their illegal status by the competent federal authorities and in the limited cases the alien has re-entered the Country after leaving it or being deported following the commission of a felony.

A systematic reading of these provisions seems to suggest that states have no authority to enforce federal immigration law unless they act in pursuance with the 8 USC sec 1252 lett c) provision or within the conditions provided by a written agreement passed with the federal executive.

However, the INA also provides a saving clause according to which the lack of a previous written agreement between a state and the Attorney General does not prevent that state

¹⁶ See Rodriguez, 'The Significance of Local in Immigration' (n 7) 591-592, who makes a distinction based on whether the State or the local unit measure directly or indirectly enforces the federal removal procedure of illegal aliens.

It must be noted, however, that cases of states or local authorities maintaining opposite policies occur, thus favouring illegal immigrant communities settled in their territories. This is the case with the so-called *sanctuary law*. As a reaction to states and local units enacting measures which forbade state or local public officers to pass information to federal immigration officers on the aliens they contacted by reason of their office, the federal legislator introduced a provision in the *Illegal Immigration Reform and Immigrant Responsibility Act* (IIRIRA) – now codified in Title 8 USC 1373 a) – forbidding state and local authorities from passing such measures. In spite of this, many states and local units maintained their policies. For an overview of the relevant measures still in force, see *Laws, Resolutions and Policies Instituted across the US Limiting Enforcement of Immigration Laws by State and Local Authorities*, (updated until 2008), available at <www.nilc.org> accessed 02 January 2013.

¹⁷ Among others, see in Alabama the *Beason-Hammon Alabama Taxpayer and Citizen Protection Act*, Ala. Laws. Act 2011-535, House Bill (H.B. 56); in *Utah, the Illegal Immigration Enforcement Act*, House Bill 497 and the *Utah Immigration Accountability and Enforcement Act*, House Bill 116; in Georgia the *Illegal Immigration Reform and Enforcement Act* del 2011, House Bill 87.

¹⁸ This legal framework was introduced by the 1996 *Illegal Immigration Reform and Immigration Responsibility Act*. It is now codified in the Title 8 of the US Code sec 1357 lett g), 1-9.

‘(from) co-operat[ing] with the Attorney General in the identification, apprehension, detention or removal of aliens not lawfully present in the US’.¹⁹

Within this statutory framework, we shall now consider the case of the Arizona statute. Following a suit brought by the US federal government to enjoin the Arizona statute before it took effect, the Ninth Circuit Court of Appeal considered the Arizona provisions unconstitutional.²⁰

The petition for a *writ of certiorari* submitted by the Arizona governor against the Ninth Circuit Court of Appeal decision was accepted by the Supreme Court, which delivered its decision by way of a majority.²¹

The opinion of the majority begins by recalling that the national legislator undoubtedly has a broad power over immigration and alien status, based on the Constitutional naturalisation clause (art I (8) sec 4 US Constitution) and on the inherent sovereign powers to control and conduct foreign relations. At the same time, the Court admits that states, too, have an interest in deterring illegal immigration, especially when this causes effective public order concerns, as it is the case in Arizona. State measures in this field can be justified on the grounds of state policing powers, which are reminiscent of their original sovereign status.

However, the fact that the police powers are an inherent component of state sovereignty does not alter the pre-emption test usually applied when determining whether or not federal law must supersede state law. This is the main point of contrast between the majority opinion and some of the dissenters’ opinions. According to Justice Scalia, the fact that the Arizona statute is an exercise of the still-existing inherent state sovereign powers implies that Federal immigration law may pre-empt state law only if it is expressly declared to do so.²² Explicit pre-emption is then required. On the contrary, the majority of the Court deemed that even in the area of illegal immigration, state measures may implicitly be pre-empted by federal law whenever they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Hence, the Court held that most of the Arizona statutory provisions conflicted with the relevant federal law. In relation to the provision allowing state officers to detain illegal immigrants, the Court highlighted that, as a general rule, it is not a crime for a removable alien to remain in the United States. Removal is a civil matter where a broad discretion is accorded to the federal administration, which may decide whether to pursue it or not. According to the Court, the Arizona statute is illegitimate, since it encroaches upon the wide discretion entrusted to the federal government insofar as it authorizes state officers to decide whether or not an alien should be detained for removal.

The decision seems to be in line with the previous well-settled line of cases where the Supreme Court accorded a broad margin of discretion to the federal legislator when dealing with both immigration and the legality of aliens. Although the Court admits that member states may intervene in the field of immigration in its narrow meaning, as a consequence of their police power, and although it states that ‘the historic police powers of the states’ are

¹⁹ See art 8 U.S.C. para 1357 g), (10).

²⁰ *U.S. v Arizona*, 641 F.3d 339 (9th Circuit, 2011).

²¹ See *Arizona et Al. v United States*, 567 U.S. (2012) 25 June 2012.

²² See Justice Scalia’s dissenting opinion, para 8 ‘We are talking about a federal law going to the core of state sovereignty: the power to exclude. Like elimination of the States’ other inherent sovereign power, immunity from suit, elimination of the States’ sovereign power to exclude requires that “Congress ...unequivocally expres[s] its intent to abrogate” ... Implicit “field pre-emption” will not do’.

not superseded «unless that was the clear and manifest purpose of Congress», it finally held that federal law pre-empts state law, even where it is not explicitly stated that it should do so. Consequently, a state autonomous power in dealing with the detention of illegal immigrants for the federal removal procedure is inadmissible. States may act in this area only within the limits prescribed by the written agreements that they conclude with the federal government, in pursuance of the relevant provisions established by the INA.

Thus, only mechanisms of cooperative federalism may allow States to have a role in the immigration policy, as it is narrowly considered, notwithstanding the fact these mechanisms have not proved to be effective.

2.2 Belgium

Before taking into consideration the division of power issue concerning immigration policy in Belgium, it is germane to briefly outline some of the salient features of this federal system. According to art 1 of its Constitution, Belgium is a federal State made up of Communities and Regions. The former are the Flemish Community, the French Community and the German-speaking Community, the latter are the Walloon Region, the Flemish Region and the Brussels Capital Region, which are superimposed upon the three Communities. Both Communities and Regions are granted legislative powers.

The Constitution also recognises the existence of four linguistic regions, the territorial boundaries of which are set in a legislative act that can be amended only according to a special legislative procedure requiring a qualified majority.²³ The linguistic regions, to which any local Belgian municipality belongs to, are: the French-speaking region, the Dutch-speaking region, the German-speaking region and the bilingual region of Brussels Capital.

Linguistic regions are not public entities but merely territorial delimitations serving to determine the use of the official language in the relevant territory and to delimitate, to a certain extent, the territorial scope of application of the Communities' measures, as we shall soon specify. The rule of monolingualism applies in the three single language regions while the rule of bilingualism applies in the Brussels Capital Region.²⁴

Currently, the powers vested in the Regions and Communities are enumerated and listed partly in the Constitution, and partly in the 1980 Special Act on Institutional Reform (hereinafter the 1980 Special Act).²⁵ Accordingly, the federal legislator retains legislative powers in all matters that have not been expressly conferred to the Regions and the Communities, as well as in those other areas expressly reserved to the federal legislator by both the Constitution text and the 1980 Special Act.²⁶

²³ See art 4 of the Constitution, to be read in conjunction with arts 2-8, *Lois coordonnées le 18 juillet 1966 sur l'emploi des langues en matière administrative*.

²⁴ A few municipalities (so-called *communes à facilité ou à statut (linguistique) special*) have special regulations with a view to protecting their minorities, enabling them to use an official language other than that of the language zone in which the municipality stands.

²⁵ In relation to the Région de Bruxelles capitale and to the German-speaking Community, the powers of these sub-national units are established, respectively, by the *Loi spéciale du 12 janvier 1989 sur les institutions bruxelloises*, and by the *loi de réformes institutionnelles du 31 décembre 1983*. In both cases the two acts make substantially reference to the division of powers established in the 1980 Special Act.

²⁶ This applies as long as art 35 of the Belgian Constitution would be effectively implemented.

The three Regions exert their competences according to a territorial principle. This means their measures apply only within the relevant regional territory as defined in the Constitution and in the 1980 Special Act.

As far as the three Communities are concerned, their competences are prescribed by the Constitution at arts 127, 128, 129 and 130, and are further defined by the 1980 Special Act. The exercise of these powers is not exclusively based upon a territorial principle. In fact, all three Communities exert their powers in the territory of the three unilingual linguistic regions in the field of linguistic, cultural, educational and personal-related matters. However, in the Brussels bilingual region, both the Flemish and the French Communities are competent in relation to the above-mentioned matters.²⁷ Since in Brussels no sub-nationality exists in order to determine who is Dutch-speaking and who is French-speaking, the two communities are competent to act with regard to any institutions – and not with regard to the individuals – which, either by virtue of their activities or of their organisation, are deemed to belong to one of the two communities.

Returning to the matter of powers of the Belgian sub-national units in the immigration field, we should consider now the provisions of the 1980 Special Act.

Accordingly, art 5 (II) 3 grants the Communities the legislative powers in relation to the reception and integration of immigrants, and art 6 (IX) 3 grants the Regions the executive powers vis-à-vis the issuing of work permits to immigrants.

These are the only provisions explicitly giving Regions and Communities powers in the field of immigration policy, but other areas may also be relevant for our study. In this regard, it should be recalled that Communities are granted powers in relation to matters related to the person, and that Regions are competent in the field of housing, including social housing. When dealing with these issues, Regions and Communities may also include aliens in the personal scope of their measures.

We will now consider the explicit and the implicit powers of the Belgian sub-national units regarding immigration policy.

2.2.1 Explicit Powers Regarding Immigration Policy

As previously noted, the 1980 Special Act explicitly confers upon the Communities the power to deal with the reception and integration of immigrants.²⁸ In 1993, the French Community shifted these powers, respectively, to the Walloon Region and to the *Commission Communautaire Française* that exerts the relevant powers in relation to the Brussels bilingual region.

The attribution and the exercise of such competences were not a source of problems until 2003, when the so-called ‘*inburgering*’ decree was approved by the Flemish community.²⁹

The other power within immigration policy that the Belgian federal legal system grants to its sub-national units relates to the issuing of work-permits by Regions.

²⁷ Art 129 of the Belgian constitution grants the federal legislator the power to deal with language matters in the Brussels Capital region and in some municipalities with special linguistic status.

²⁸ See Art 5 (II) (3°) 1980 Special Act.

²⁹ We will take the *inburgering* decree into further consideration in the final part of this paper, when addressing the cultural regional citizenship issue.

Indeed, regional intervention in this field has represented a source of problems.

According to a federal 1999 statute, the regional authorities are responsible for the delivery of authorisation for employment. Before delivering such an authorisation, a thorough examination of the regional employment market must be carried out, in order to verify that no Belgian national is suitable for employment in the position in question. Moreover, requests for an employment authorisation and work permit are examined only if a third-country national comes from one of the countries having a bilateral agreement with Belgium. However, such conditions do not apply to certain categories, such as highly skilled workers.

It is then up to the regional authorities to verify whether the different conditions, required prior to the issuing of the working permit have been fulfilled. Moreover, the competent regional Ministry of Labour can deliver the work permit even in cases where the above-mentioned nationality and labour force conditions are lacking for certain special social reasons.

The enforcement of this power brought about significant regional differentiation. As a consequence, in 1992/1993, on the occasion of a wide reform of the federal Constitution and of the 1980 Special Act, the idea of re-federalising the relevant power emerged, so as to have a more uniform application. This did not occur, but the 1980 Special Act was amended in order to oblige Regions to conclude a cooperation agreement with the federal authorities before they exercise their competence.³⁰

The parliamentary *travaux préparatoires* concerning the drafting of the (inserted) art 92 *bis* lett c) provision are particularly meaningful. The need for a coordinating framework among the different territorial levels is justified by the necessity of having a more effective implementation. The agreement should define a common socio-economic pattern to be considered by the Regions when delivering the work-permits, taking into consideration the establishment of an annual quota of work permits, if so required.³¹

Such an agreement was concluded between the regional and the federal authorities in 1995, but never officially published. However, scholars highlight that the agreement fell shorter the requirements demanded by the special legislation. This agreement provides only a common coordinating framework in order to develop common inspecting instruments. However, it does not supply any common reference for the definition of the socio-economic framework and of the yearly quota of migrant workers. Moreover, the agreement does not

³⁰ According to some scholars, the requirement of a binding cooperation agreement can be seen as an alternative way to achieve re-federalisation of the power in those cases where the exercise of power by the federated units, has resulted in a markedly uneven application. See Johanne Poirier, 'Le droit public survivra-t-il à sa contractualisation ? - Les cas des accords de coopération dans le système fédéral belge' [2006] Rev Dr ULB, 261, 278-279. See also Hugues Dumont, 'L'Etat Belge résistera-t-il à sa contractualisation - Considérations critiques sur le mode belge des accords de coopération' [2006] Rev Dr ULB, 315.

³¹ See *proposition de loi spéciale visant à achever la structure fédérale de l'Etat*, Doc. Sen, 1992-1993, n. 558/5, pp. 453-454 : 'La coordination entre, d'une part, l'autorité fédérale qui est compétente pour délivrer des permis de séjour et pour déterminer les normes relatives à l'emploi de travailleurs étrangers et, d'autre part, les Régions qui sont compétentes pour délivrer des permis de travail peut être considérablement améliorée en imposant l'obligation de conclure un accord de coopération, reprenant, entre autre, les éléments suivants : a) le cadre socio-économique dans lequel les permis de travail peuvent être délivrés, avec fixation éventuelle d'un contingent ; b) dispositions assurant une application uniforme de la réglementation en matière de permis de travail sur l'ensemble du territoire, c) mesures visant à réaliser une application cohérente de la réglementation en matière de cartes de travail par rapport à la réglementation des permis de séjour ; d) la mise au point d'un système d'échange d'information, e) l'élaboration d'un système de control adéquat, entre autres, en vue de limiter l'application de la technique dite de rotation'.

define provisions guaranteeing a uniform application of federal law. In short, the agreement is considered as unsuitable for the purposes of reaching any form of substantial harmonisation in the delivery of the work permits. Thus, an uneven application in this area continues, notwithstanding the approval of the agreement.³²

2.2.2 Implicit Powers Regarding Immigration Policy: The Case of Welfare.

According to art 128 of the Belgian Constitution, Communities are granted powers in matters related to the person. In the parliamentary debates, these were intended to cover matters closely connected with the lives of individuals in their communities.

A clear definition and listing of matters related to the person are not found in the Belgian Constitution, but are rather described in the 1980 Special Act. With regard to social matters, the 1980 Special Act accords competence relating to social security to the federal level, and that relating to social assistance to the Communities. However, even within the social assistance field, important branches have been arrogated to the federal level. According to art 5 of the 1980 Special Act, this is the case for some social assistance allowances, which apply generally to needy persons - such as the rights to subsistence income (originally *minimum de moyens d'existence*, in 2002 repealed and replaced with the *droit au revenu d'intégration*³³) and the so-called *aide sociale*³⁴ - and of other social assistance benefits, which are tailored to specific categories of persons - such as the guaranteed income for the elderly³⁵ and the allowances for disabled persons.³⁶

The federal attribution of legislative power, not only in the social security field, but also in large branches of the social assistance domain, was probably considered necessary to preserve a sense of common national belonging.

Due to the aforementioned division of competences, Communities have not played a relevant role in the field of welfare thus far. As a consequence, the issue of immigrants' eligibility for social entitlements has been primarily addressed by the federal legislator.

However, in 1999, the issue of welfare federalism was accorded new emphasis following the adoption of the Flemish Community decree concerning a care insurance scheme.³⁷ This is a universal insurance scheme for care dependency funded with lump-sum contributions. It is compulsory for anyone over the age of twenty-five who lives in Flanders. For residents in the Brussels area, this scheme is optional.³⁸

³² See Mieke Van de Putte and Jan Clement, 'Het migrantenbeleid', in Geert Van Haegendoren and Bruno Seutin (eds) *De bevoegdheidsverdeling in het federale België* (die Keure, 2000) 75, quoted by Jean-Thierry Debry, 'Les accords de coopération obligatoires' in [2003] *Chroniques de Droit Public* 209.

³³ See *loi du 2 août 1974 instituant le droit à un minimum de moyens d'existence* repealed by *loi du 26 mai 2002 concernant le droit à l'intégration sociale*

³⁴ See *loi du 8 juillet 1976 organique des centres public d'aide sociale*. The "*aide sociale*" is a social assistance benefit aiming at enabling each person to conduct a life compatible with the principle of human dignity. It is not necessarily provided in form of stable financial aid. It may comprise medical or a material aid. Nonetheless, the practice was to provide it mostly in the form of a monetary sum equivalent to that of a subsistence income.

³⁵ See *loi du 22 mars 2001 instituant la garantie de revenus aux personnes âgées*

³⁶ See *loi 27 février 1987 relative aux allocations aux personnes handicapées*.

³⁷ *Décret du 30 Mars 1999* in *Moniteur belge* 28 mai 1999.

³⁸ See the volume Bea Cantillon, Patricia Popelier and Ninke Mussche (eds), *Social Federalism: the Creation of a Layered Welfare State – The Belgian Case* (Intersentia 2011).

This was the first time that a Belgian sub-national entity had supplemented the federal social security system with an entirely autonomous branch of social protection.³⁹ Because of this, the Flemish insurance scheme was a cause of serious concern for the French Community and the Walloon Region that saw the Flemish care insurance scheme as a threat to the federal social security system.

The Flemish decree raised objections on two different grounds.

The first concerned the issue as to whether the Flemish Community had the competence to deal with the matter. This relates to the fact that, as previously noted, in the Belgian legal system, the division of competences in relation to social matters is not clear: on the one hand, the federal level retains powers in the field of social security and in large branches of social assistance; on the other hand, Communities are vested with a general power to deal with social assistance.⁴⁰

The second issue raised by the Flemish decree concerned its *ratione personae* scope of application. The Flemish decree originally applied only to persons residing in Flanders or in the Brussels Capital Region, in the latter case on a voluntarily basis. The choice of the place of residence criterion, instead of the place of employment, as a means of determining the persons to whom this decree applied, was deemed to better fit the principle of territorial exclusivity that underpins the Belgian federal system of the allocation of territorial powers. In line with the case law of the Constitutional Court, this principle implies that the object of any Community measure must be located within the territory for which that legislator is competent, in such a way as to exclude any potential extraterritorial effect. Because of this, residence was thought to represent the most suitable criterion. The residence criterion did not cause problems vis-à-vis the internal territorial distribution of powers. However, it did it in relation to European Union law, since the Flemish care insurance scheme was considered to constitute a social security benefit in the sense of Regulation 1408/71⁴¹ which determines the applicable social security system to European Union workers exerting freedom of movement within the EU according to the *lex labor loci* criterion.⁴²

Both issues were addressed by the Constitutional Court.

³⁹ The point is highlighted by Bea Cantillon, 'On the Possibilities and Limitations of a Layered Social Security System in Belgium – Considerations from a Social Efficacy perspective', in Cantillon, Popelier, Mussche (eds), *Social federalism* (n 38) 72.

⁴⁰ See Jan Velaers, 'Social Federalism and the Distribution of Competences in Belgium', in Cantillon, Popelier, Mussche (eds), *Social federalism* (n 38) 137. See also Marc Joassart, Pierre Joassart, 'La Répartition des Compétences en Matière de Sécurité Sociale: L'Érosion Progressive de la Compétence Fédérale' [2006] *Revue Belge de Droit cNstitutionnelle*, 167.

⁴¹ Regulation (EEC) 1408/71/EEC of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2, repealed by Regulation (EC) no 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, [2004] OJ L166/1.

⁴² The Flemish authority had already introduced some amendments to the decree with the aim of rendering it consistent with the EEC 1408/71 Regulation, as a consequence of the beginning of an infringement procedure by the European Commission. See for further details, Steven Vansteenkiste, 'La Sécurité Sociale Flamande, Belge et Européenne – Aspects Juridiques de l'Assurance-Dépendance en Droit Belge et Européen', in [2004] *Revue Belge de Sécurité Sociale*, 35; Herwig Verschuere, 'La Régionalisation de la Sécurité Sociale en Belgique à la Lumière de l'Arrêt de la Cour de Justice Européenne Portant sur l'Assurance-Soins Flamande' [2008] *Revue Belge de Sécurité Sociale*, 173.

As to the first, in 2001, the Constitutional Court recognised the Flemish region's power to adopt the decree.⁴³ The Court took the view that in welfare matters, federal and Communities' powers are to be seen as parallel. Thus, a social scheme can fall either under the social security competence pertaining to the federal authority or under the social assistance competence of the Communities. The two can co-exist, no matter how they are financed.⁴⁴

As to the second issue, following an ECJ Decision⁴⁵ on a preliminary ruling request issued by the Belgian Constitutional Court, this latter admitted that the Flemish care insurance scheme discriminated against those persons working in Flanders but living in the Walloon Region, insofar as they previously exerted their EU freedom of movement. The criterion of the *lex labor loci* could apply only to these cases.⁴⁶ However the Court recognised that the use of this criterion represented a derogation from the territoriality principle. It could be constitutionally accepted only insofar as it was imposed by EU law, and it applied to a small category of persons. The residence criterion was considered as the sole criterion that could satisfy the constitutional prohibition of extraterritorial effect of regional and Community acts.

Thus, the saga of the Flemish decree concerning the care insurance scheme made two things clear. First, the Communities are free to develop their own social security/social assistance scheme alongside the federal legislator. Second, the criterion the Communities must follow in order to determine the personal scope of the social assistance/security measures is residency. In fact, this is, according to the Constitutional Court, the only means of avoiding any otherwise impermissible extraterritorial effects of the relevant acts.⁴⁷

These findings thus represent the framework within which Belgian welfare federalism may further develop. Within this context, the issue of aliens' eligibility to welfare entitlements from sub-national units may become more relevant. Even now, however, the issue is not being neglected by the federated legislators. The issue will be examined later in connection with the limits stemming from the principle of equality and non-discrimination.

2.2.3 The Powers Reserved to the Federal Authorities: The Case of the Legal Status of Aliens as an Autonomous Standing Power Clause

According to the division of powers to be found in the Belgian legal system, all powers not explicitly conferred to sub-national units are vested in the federal legislator. Thus, the federal State retains all powers concerning the conditions for entry, residing, and aliens removing⁴⁸.

⁴³ See Belgian Constitutional Court decision n 33/2001. For a critical reading, see Xavier Delgrange, 'La Cour d'Arbitrage Momifie la Compétence Fédérale en Matière de Sécurité Sociale' in [2001] *Revue Belge de Droit Constitutionnel*, 216.

⁴⁴ See Velaers, *Social Federalism* (n 40) 138.

⁴⁵ Case C-212/06, *Government of the French Community and Walloon Region Government v Flemish Government*, [2008] ECR I-1683.

⁴⁶ These are EU citizens or the Belgian nationals, the latter, insofar as they returned back to Belgium after exerting their freedom of movement in another EU Member State. See Belgian Constitutional Court, decision 11/2009, para B 14.

⁴⁷ According to Velaers, *Social federalism* (n 40) 138, the choice of residence can be further justified by considering that residence 'in person related matters is conducive to a system of solidarity between residents of the same region'.

⁴⁸ See *loi du 15 décembre 1980, sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*.

Yet, we may wonder whether an explicit federal power to deal with the fundamental rights of aliens is provided for in the Belgian legal system.

To this extent, it should be noted that art 191 of the Belgian Constitution – a provision dating back to the 1831 Liberal Constitution – establishes the principle according to which aliens are substantively equal to Belgian nationals in the enjoyment of rights and freedoms, unless otherwise stipulated by the law (*loi*).⁴⁹ The explicit reference to the term *loi* gave rise to the problem as to whether Regions and Communities had the power to take measures dealing with alien rights and freedoms. The legislative acts passed by Regions and Communities are defined as decrees or ordinances, not *loi*.

The Constitutional Court held that in cases where the Constitution uses the term *loi*, it means that the constituent power wanted to reserve the relevant matter to the federal legislator, provided that the relevant provision was inserted after 1970, when the process of federation began. Otherwise – and this is the case of art 191 of the Belgian Constitution which was inserted in the 1831 Constitution – the term *loi* may refer to sub-national units' legislative measures, provided that the 1980 Special Act *expressly* and *precisely* assigns the relevant power to the federate units⁵⁰.

As far as immigration is concerned, the 1980 Special Act on institutional reforms, as noted above, grants the Communities and the Regions powers respectively in the field of the integration of immigrants and in the delivery of work permits, but it does not make any reference to their role in dealing with the legal status of aliens. Some authors have argued then that art 191 of the Belgian Constitution should be considered as a power clause reserving to the federal level the power to deal with the civil and social rights of the aliens.⁵¹

Such an interpretation has not been adopted by the Constitutional Court and the Council of State.⁵² As a consequence of the 1994 Constitutional amendments, which expressly call upon the sub-national units to deal with fundamental rights issues⁵³, the Constitutional Court has finally stated that fundamental rights protection does not constitute a jurisdiction, but rather an objective that all the territorial units are called to pursue within their relevant constitutionally entrusted jurisdictions⁵⁴. This finding has certainly undermined the idea that the legal status of aliens with regard to the fundamental rights

⁴⁹ See Pascal Boucquey, 'La Cour d'Arbitrage et la Protection des Droits Fondamentaux de l'Étranger' in [1996] *Annales de Droit de Louvain*, 289.

⁵⁰ This is known in the Belgian legal system as '*la théorie des matières réservées*'. See Belgian Constitutional Court, decision 35/2003, para B(12)(6). See Mark Uyttendaele, *Précis de Droit Constitutionnel Belge – Regards sur un Système Institutionnel Paradoxal* (Bruylant 2005) 956-965.

⁵¹ See Sébastien Van Drooghenbroeck, 'L'Article 191 de la Constitution' in [2006] *Revue Belge de Droit Constitutionnel*, 305, 309, who speaks of a 'gommage pur et simple de la dimension répartitrice de compétences de l'article 191', which he nonetheless justifies for systematic motives and reasons of coherence. However, the same author has mainly relied on this argument to deem the Flemish *inburgering* decree illegitimate. The author considers that the 1980 Special Act on institutional reform gave the Communities the power to enact integration measures for immigrants, provided that they were based on a voluntary scheme. Since the Flemish *inburgering* decree provides for compulsory integration measures, it falls outside the scope of the 1980 Special Act provisions, and the Flemish Community lacked the power to enact it. See Sébastien Van Drooghenbroeck, 'Fédéralisme, Droits Fondamentaux et Citoyenneté: Les Certitudes à l'Épreuve de l'*Inburgering*' in Eva Brems and Ruth Stockx (eds), *Recht en minderheden. De ene diversiteit is de andere niet* (Die Keure 2006) 257. See also for a similar view, Matthieu Lys, 'Les Droits Constitutionnels des Étrangers' in Marc Verdussen and Nicolas Bombled (eds), *Les Droits Constitutionnels en Belgique* (Bruylant 2011) 607.

⁵² See Belgian Constitutional Court decision 62/98. For further references to the relevant case law see Van Drooghenbroeck, 'L'article 191' (n 50) 309-310.

⁵³ See for example arts 22 (2), 22 bis, 23 of the Belgian Constitution.

⁵⁴ See Belgian Constitutional Court decisions 124/99 and 124/2000.

they enjoy could be considered as a matter that only the federal legislator is entitled to deal with *per se*.

2.3 Italy

The Italian Regions started dealing with issues related to immigration in the 1980s. Lacking a comprehensive immigration national statute, regional measures were especially directed towards the integration of migrants. This was carried out by regulating aliens' access to regional welfare and through the establishment of advisory bodies where migrants were represented. These measures were deemed to fall under the regional powers on social assistance, which at that time was an area of competence that was shared with the national legislator.

The attention regarding immigration issues acquired a new emphasis at the beginning of the new millennium, when the Italian regions were called to adopt their "*statuto di autonomia*". According to art 123 of the Italian Constitution, inserted in 1999, the "*statuto di autonomia*" is a regional act, to be passed with a special majority and procedure, which lays down the form of government and the basic principles for the organisation of each individual Region and the conduct of its business.

Thus, the "*statuto of autonomia*" is intended to have a specific content. Nonetheless, Regions considered their "*statuto of autonomia*" as a sort of political manifesto wherein to outline the general aims of the regional authorities. Within this framework, references were often made to regional immigrant integration, and to the extension of the right to vote at the local elections to immigrants.⁵⁵ This occurred despite the fact that the regulation of the right to vote at local elections is a matter reserved to the national level, and that a constitutional amendment is deemed necessary in order to allow immigrants to vote.

A claim was thus brought before the Constitutional Court by the national government, asking the court to declare void these and other similar provisions containing references to general political aims on that the grounds Regions were lacking any competences in these areas. The Constitutional Court rejected the claim, deeming that these provisions did not have any legal force (despite their inclusion in a statute) rendering them merely political commitments.⁵⁶

Meanwhile in 1998, the national legislator passed a comprehensive statute on immigration law (hereafter, the 1998 Immigration Act)⁵⁷, dealing not only with the entry and stay of immigrants, but also with their civil and social rights.

According to the statute, the enjoyment of social rights is dependent upon the legal or illegal status of the immigrant and on the length of his permit of stay. More precisely, art 41 of the 1998 Immigration Act prescribes an equal treatment principle between nationals and immigrants in the enjoyment of social assistance entitlements, provided that the immigrant

⁵⁵ See Andrea Gentilini, 'Statuti e Leggi Regionali in Materia di Migrazioni', in *Osservatorio sulla Legislazione, Rapporto 2010 sulla Legislazione tra Stato, Regione e UE, Tomo II, Tendenze e Problemi della Legislazione Regionale* (Camera dei Deputati 2010) 199.

⁵⁶ See Italian Constitutional Court decision n 372/2004 in relation to art 3 (6) of the Tuscany *Statuto di Autonomia* which states 'la Regione promuove, nel rispetto dei principi costituzionali, l'estensione del diritto di voto agli immigrati'.

⁵⁷ See d lgs n 286/1998, *Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione giuridica dello straniero*, in GU n 191, 18 August 1998.

is legally present in the Italian territory with a permit of stay of at least one year. Art 42, which concerns access to social housing, provides for equal treatment between nationals and foreigners, provided that the latter are workers, legally present in the national territory with a permit of stay of at least two years. The Regions are explicitly called to collaborate with the State, and to act in the areas falling under their jurisdiction (mainly in the field of welfare) provided that they respect the provisions set out in the national law.

The 1998 Immigration Act reflected the system of the powers of territorial allocation as it was established, originally, in the 1948 Italian Constitution. According to the original text of the 1948 Italian Constitution, the Regions were granted only legislative powers in specifically enumerated matters. Moreover, the legislative powers that they were accorded were shared competences, meaning that the Regions could act only within the framework of, and with due respect accorded to, the fundamental principles established by the national legislator in relation to each shared matter. Thus, as far as immigration policy is concerned, the specific requirements concerning welfare eligibility, laid out in arts 41 and 42 of the 1998 Immigration Act, were considered by the national legislator as fundamental principles, which could not be bypassed by the regional legislator.

The 1998 Immigration Act was more reluctant to provide a role for the regional actors vis-à-vis immigration policy, particularly with regard to the regulation of immigrants' entry and expulsion. However, in 2001, an amendment to the 1998 Immigration Act stated that the decree setting the number of immigrants to be admitted annually into the country could be adopted only following consultation with the Regions concerning the need for migrant workers at the regional level.

In 2001, the Constitution was amended in order to strengthen the Regions' powers. Art 117 of the Italian Constitution deals with the division of powers with regard to the legislative function. It provides two lists. The first enumerates those powers that are granted to the national legislature. The second deals with those matters – defined as concurrent – where regional measures can be enacted within the limits of the fundamental principles laid down by the national legislator. Finally, matters that are not enumerated in either of the two lists are vested in the Regions.

As to immigration policy, the 2001 constitutional amendment has somehow blurred the previously-established dividing line: on the one hand, the new constitutional provisions seem to confer full powers to national State in addressing not only immigration (art 117 (2) lett b Cost) but also asylum and the legal status of non-European citizens (art 117 (2) lett a Cost); on the other hand, Regions now dispose of full powers in matters such as housing and welfare assistance. The national State also retains the exclusive power to determine the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory (art 117 (2) lett m Cost).

Following the 2001 constitutional amendment, some Regions began passing legislative acts dealing with aliens' access to regional welfare, in some cases providing different rules than those established in the 1998 Immigration Act.

In 2005, the national government brought an action before the Constitutional Court, claiming that the Regions were not empowered to deal with aliens' access to regional welfare, since the new art 117 of the Constitution granted the national legislator all powers in relation to immigration policy.

The Constitutional Court nonetheless confirmed the legitimacy of the aforementioned regional measures.⁵⁸ It interpreted the two jurisdictions reserved to the national level, namely regarding immigration and the legal status of non-EU citizens, as constituting a single power, allowing the national level to deal only with the conditions of entry and residency. Therefore, the Court excluded that the “legal status of non EU citizens” (art 117, 2, lett a Cost) might represent a legal base allowing the national legislator to take measures in areas that would otherwise fall under the exclusive regional legislative competences, as is the case of social assistance and social housing. This allows Regions to deal with the eligibility of aliens for welfare entitlements, as long as this falls under their current powers.

To this extent, it is remarkable that the choices made by the Italian regional legislators, thus far, have not been always consistent with those undertaken by the national legislator. In some cases (Campania, Toscana), regional statutes provide public benefits to be eligible even to irregular immigrants, thus questioning the very idea that integration should concern only regular migrants. In some other cases, regional statutes provides for requirements that are stricter than those originally foreseen in the 1998 Immigration Act when awarding social assistance benefits or social housing.

These inconsistencies between regional and national law have been assessed by the Constitutional Court as primarily involving respect for the equality principle and fundamental rights.

3. THE ‘SOCIAL REGIONAL CITIZENSHIP’ DIMENSION

Social assistance is based upon the idea of collective solidarity. Because of this, it constitutes a useful field to be explored in order to verify the attitude that the sub-national units (and the State in general) have towards the newcomers. Are these considered as a part of the relevant regional community and thus beneficiaries of its social solidarity instruments?

‘Social welfare citizenship’ is, then, primarily a question of equality and non-discrimination, namely to what extent sub-national units may make the award of regional social benefits conditional on the grounds of nationality or because of long-term residence in the relevant sub-national territory.

To this extent, it is frequently submitted that after World War II, nationality, as a condition for the enjoyment of fundamental constitutional rights, has progressively lost importance.

Hence, fundamental constitutional rights are to be considered as pertaining to the individual as such, rather than to the citizen.⁵⁹

Whereas this move is evident with regard to civil fundamental rights, things become more nuanced in relation to social assistance rights.⁶⁰ Their awarding has traditionally been made conditional upon the fact that the needy person possessed the nationality of the given State.

⁵⁸ See Italian Constitutional Court decisions 300/2005 and 156/2006.

⁵⁹ See in the Italian legal literature, Paolo Carrozza, ‘Nazione’ in *Digesto Discipline Pubblicistiche* (UTET 1995) vol 10, 787.

⁶⁰ Things are different for social security as long as this is based on benefits funded, at least in part, from the contributions of workers’ earned income. No nationality requirements usually applies. See A Math, *La Protection Sociale des Ressortissants d’Etats Tiers dans l’Union Européenne. Vers un Citoyenneté Sociale de Résidence*, Institut de Recherche Économiques et Sociales (IRES), 3/2001, 4.

Within this context, the input emanating from the European supranational and international judicial institutions are significant.

Regarding the EU, the EC Treaty enshrined the principle of non-discrimination on the basis of nationality, to be applied in all areas falling within the Community's competences. This principle has been substantially applied to EU citizen workers (and their family members), exerting their rights to move and to reside in another EU Member State.⁶¹

It is the ECJ that has progressively recognised the right to move and reside freely within the territory of EU as a genuine independent right, inherent to the status of the Union citizen.⁶² According to the ECJ, a Union citizen – even if non-economically active – who is lawfully resident in one of the host Member States, can rely on art 18 TFEU and may claim equal treatment in all situations which fall within the scope *ratione materiae* of EU law. However, asking for social assistance may ultimately result in his removal from the host country insofar as this may be considered as a proof that he does not possess sufficient economic resources and that he has become a burden for the welfare of the relevant State.⁶³

Thus, the principle of equal treatment between EU citizens and the nationals of the host EU Member State has been finally extended to non-economically active EU citizens. This has not occurred in relation to third-country nationals, however. With reference to the latter, a principle of equal treatment with the nationals of the host State is foreseen only in relation to certain categories of qualified aliens, namely the long-term immigrant residents and the refugees or beneficiaries of international protection, and it does not apply generally but only in relation to the matters and according to the specific conditions set out in the relevant EU secondary law.⁶⁴

⁶¹ See Regulation (EEC) 1612/68/EEC of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] JO L257/2, whose art 7 guarantees social security and social assistance to EU workers – and to their relatives – on equal terms with the nationals of the host Member States.

⁶² See Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-70912, para 81.

⁶³ See Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691; Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573, para 30. The conditions for the exercise of the right of EU citizens and their families to move and reside freely within the territory of the Member States are now set out in Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family member to move and to reside freely within the territory of the member State amending Regulation 1612/68/EEC and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77. According to the Directive, Union citizens are only entitled to reside in the host Member State for more than three months if they are either economically active or have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance cover in that State. Although the Directive provides a codification of previous secondary EU law and ECJ case law, there have been signs in the ECJ case law of possible tensions between the Directive and the interpretation of the relevant Treaty provisions (arts 18 and 21 TFEU). In fact, the Court seemed to suggest the need for a case-by-case assessment of whether the Union citizen constitutes an unreasonable burden, according to the proportionality principle. See Michael Dougan 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 2 E L Rev, 613. However, some scholars have emphasized a possible change of approach in the latter ECJ case law. See Siofra O'Leary, 'Free Movement of Persons and Services', in Paul Craig and Gráinne de Burca, *The Evolution of EU Law* (2nd edn, OUP 2011) who, by reference to the *Förster* case (case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507) notes: 'The Court's position in *Förster* is surprising not simply because it suggests that a directive can renege on or restrict the jurisprudential *acquis* established with reference to the Treaty, but also because it contradicts the Court's initial assessment of the relationship between Directive 2004/38 and the existing *acquis*'.

⁶⁴ With regard to the social assistance field, see arts 11 (1) lett d) and 11 (4) of the Directive 2003/109/EC of the Council of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44 and Article 28 of the Directive 2004/83/EC of the Council of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees

One may wonder whether directive 2000/43/CE, introducing the principle of non-discrimination irrespective of race and ethnic origin, could apply in case of discrimination based upon nationality, insofar as a condition based on nationality may turn out to constitute an indirect form of discrimination because of race and ethnic origins.⁶⁵

To this extent, it should be noted that the directive itself excludes from its scope any classification based on nationality.⁶⁶ Recently, the ECJ has denied that directive 2000/43/CE could apply in case of legal classifications based on nationality.⁶⁷ The Court, however, explicitly considered neither the possibility that a nationality requirement could amount to a form of indirect discrimination because of ethnic origins, nor whether, in the light of the ECtHR case law, a prohibition of discrimination on grounds of nationality can be regarded as a general principle of the EU legal order.

Setting aside the EU law and the ECJ case-law, attention should be drawn to the ECtHR,⁶⁸ the European judicial body that pushes to the greatest degree toward considering nationality as an illegitimate criterion to judge eligibility for the receipt of social benefits.

It was in the *Gaygusuz v Austria* case⁶⁹ that for the first time the Court gave a broad reading to the notion of pecuniary rights for the purposes of art 1 of the Protocol Number 1 of the ECHR in such a manner so as to apply it to social benefits, whether contributory or not.⁷⁰ Once the Court had included the social benefits category into the realm of pecuniary rights, it could apply art 14 of the ECHR, which provides for non-discrimination in the enjoyment of rights and freedoms set forth in the ECHR, on several grounds, amongst which is included that of nationality. The Court then held that a difference in treatment grounded on nationality may be accepted only in narrow circumstances. According to the Court, 'very weighty reasons would have to put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention'.⁷¹

or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12. See also Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343/1, in which the right to equal treatment, according to art 12, is strictly linked to the third country nationals' legal residence and to their worker status. Moreover, the right to equal treatment applies to specified fields whose scope of application Member States are empowered to limit within certain conditions.

⁶⁵ Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origins [2000] OJ L180/22.

⁶⁶ Directive 2000/43/EC, art 3(2).

⁶⁷ Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* (ECJ - 24 April 2012).

⁶⁸ See generally on the anti-discrimination principle set in the Convention and its recent evolutions: Oddny M Armadóttir, *Equality and Non-Discrimination under the European Convention of Human Rights* (Nijhoff Publishers 2003); Françoise Tulkens, 'L'Évolution du Principe de Non-Discrimination à la Lumière de la Jurisprudence de la Cour Européenne des Droits de l'Homme' in Jean Yves Carlier (ed) *L'Étranger Face au Droit* (Bruylant 2010) 193.

⁶⁹ *Gaygusuz v Austria* App no 17371/90 (ECHR, 16 September 1996).

⁷⁰ See *Koua Poirrez v France*, App no 40892/98 (ECHR, 30 September 2003); *Stec and others v UK*, App no 65731/01 – 65900/01, (ECHR, 12 April 2006). For comments and further bibliographic indications on these decisions, see Elise Dermine, Mikaël Glorieux, Steve Gilson, *Aperçu des Droits Sociaux des Étrangers en Belgique et Questionnements Actuels* in Carlier *L'étranger face au droit* (n 68) 549.

⁷¹ See *Gaygusuz v Austria* (n 69) para 42; *Koua Poirrez v France* (n 70) para 46.

The above-mentioned ECtHR case law has exerted a notable influence in the European national Constitutional Courts, leading some of them to consider classifications based on nationality as intrinsically ‘suspect’ and thus mostly impermissible.⁷²

Some questions still remain open to debate. The ECtHR did not expressly consider whether the strict scrutiny review also applies to classifications based on the different legal status of aliens. Thus, it might be submitted that the length of the immigrant stay in the host State could be a ground for the ECtHR to evaluate the legitimacy of a national measure limiting welfare entitlements to those aliens having a genuine link with the territory of the host State, such as long-term immigrants.

Thus, whereas nationality as such is increasingly being considered as a suspect criterion, a less conclusive statement can be made with reference to cases where the award of a social assistance benefit is made conditional upon the length of the legal stay of the immigrant in question.

Clearly, this framework influences the capacity of sub-national units to deal with the issue. Regional social assistance entitlements are generally provided to persons residing in the territory of the given sub-national unit. A social benefits limitation to the nationals residing in the given territorial unit would be inadmissible in the light of the aforementioned ECtHR case law. Thus, due to the tendency to consider nationality as a suspect criterion, those sub-national units wishing to limit social assistance benefits to their autochthonous communities may be pushed towards using a long-term residency requirement. However, if a durational residency requirement condition is generally applied to all individuals, thus including EU citizens, it may turn out to be an indirect form of discrimination against the latter, thus potentially breaching EU law.⁷³

Within this framework, we will now consider the cases of the relevant States taken into consideration in our comparison.

3.1 USA

The case of welfare immigration federalism in the US legal order involves both a division of competences and an equal treatment issues. In the already mentioned *Graham v Richardson* case, the Supreme Court relied on both a pre-emption and an equal protection analysis to strike down two State statutes limiting the eligibility of aliens to welfare entitlements.

Focussing here on the equal protection analysis, the Supreme Court sets the principle according to which any State classification, based on *alienage*, is intrinsically suspected of breaching the XIV Constitutional Amendment, and is thus subject to the rigorous strict scrutiny test. According to the Supreme Court, legal immigrants are to be considered as ‘a discrete and insular minority’, since they do not enjoy the right to vote. Because of this, any *alienage* classification has to be considered as inherently suspect.⁷⁴

⁷² See, for a representative example, decision 187/2010 of the Italian Constitutional Court.

⁷³ Although traditionally the ECJ has considered residence as a suspect criterion, deeming it a way to indirectly discriminate against EU citizens exerting their right to free movement, in more recent years a line of cases emerge in which the Court held residence requirements to be valid. This has been applied especially in cases of social assistance benefits required by non-economically active EU citizens. See Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119 and Case C-158/07 *Förster* [2008] ECR I-8507 both referring to social benefit asked by EU students.

⁷⁴ *Graham v Richardson*, 403 U.S. 365, (1971).

The *Graham v Richardson* case led to the supposition that a strict scrutiny test could be applied even in those cases where an *alienage* classification had been enforced by the federal legislator. However, this was not the solution applied by the Supreme Court. In *Matherus v Diaz* the Supreme Court upheld a federal law restricting the eligibility of immigrants to welfare entitlements.⁷⁵ The Court here applied a rationale test and it explicitly stated that, as a consequence of the great discretion that federal legislator enjoys in relation to immigration field (the so-called plenary power doctrine), *alienage* federal classifications are not subject to the strict scrutiny test, while State *alienage* classifications are.

In the 1990s, the issue of welfare immigration federalism became salient again following a Californian legislative proposition aiming at reducing welfare entitlements for irregular immigrants. The proposed bill was successfully challenged before a local federal court.⁷⁶

In 1996, the federal legislator enacted the *Personal Responsibility and Work Opportunity Reconciliation Act* (PRWORA). The PRWORA was intended to constitute a comprehensive reform of the federal funded welfare programs, with the aim of providing the States with more discretion in dealing with their implementation.

One of the main changes introduced by the PRWORA concerns immigrants' access to federal and State-funded welfare programs.⁷⁷ The PRWORA establishes that legal permanent immigrants, who entered the US after 1996, are no longer eligible for most of the *federally*-funded programs unless they can fulfil a five-year legal residence requirement. However, States are empowered to modify the eligibility conditions in order to cover immigrants otherwise excluded by the federal assistance program. If they decide to do so, they must cover the costs.⁷⁸

PRWORA also deals with the State capacity to define the conditions of immigrants' access to State-funded welfare programs. On the one hand, it explicitly authorises States to determine whether permanent immigrants are eligible to receive State welfare benefits. On the other hand, it prohibits States from providing welfare allowances to illegal migrants, unless the States themselves decide to explicitly derogate from it.⁷⁹

The enactment of the PRWORA made it clear that the federal power on immigration issues is not limited to the entry and the stay of immigrants, but that it may also cover their legal status, even in areas otherwise reserved to States.

Moreover, the PRWORA has had the effect of allowing States to circumvent the limitations that the Supreme Court set in the *Graham* decision with regard to State *alienage* classifications. The PRWORA, then, shifted the political decision and the cost of discriminating against qualified aliens from national level to State level.

Following the PRWORA enactment, the federal courts took different views with regard to the effects produced by the federal statute on the State capacity to introduce *alienage* classifications in awarding State welfare benefits. According to some decisions, due to the great discretion the federal legislator enjoys in the immigration field, it may decide to structure the immigration policy in such a manner as to leave it up to the States to decide whether to discriminate or not against immigrants when awarding social assistance

⁷⁵ *Matherus v Diaz*, 426 US 67 (1976).

⁷⁶ See *League of United Latin American Citizen v Wilson*, 908 F. Suppl. 755 (C.D. Cal 1995).

⁷⁷ See Wishnie 'Welfare Reform after a Decade' (n 15) 69.

⁷⁸ The PWORA has been codified in the US Code. The relevant provisions we refer to in the text are now contained in Title 8 of the USC paras 1612-1613

⁷⁹ See Title 8 U.S.C. 1622 and 1624.

benefits.⁸⁰ On the contrary, others posit the opposite, deeming that the PRWORA cannot bypass the Supreme Court's position in the *Graham* decision.⁸¹

As a matter of fact, relatively few States passed laws restricting qualified aliens' welfare entitlements, and generally accepted to supplement the associated costs, but a change of policy is likely to take place due to the recent budget crisis some of the States have to cope with.⁸²

3.2 Belgium

The Belgian Constitutional Court has scrutinised the constitutionality of federal statutes restricting aliens' access to welfare entitlements several times, mostly for supposed breaches of the equality principle. The fact the relevant legal classifications were federal is consistent with the leading role played by the national legislator in welfare policy, as we noted earlier in the text. Nevertheless, we will shortly refer to these decisions, since they can give important insights concerning the limits stemming from the equality principle in relation to the subnational units' activity.

The Belgian federal legislator provides for a substantial division in relation to the eligibility of aliens to social assistance benefits.⁸³ Whereas the so called *aide sociale* is granted to the individual as such,⁸⁴ thus including immigrants,⁸⁵ other social assistance measures (ie the right to subsistence income,⁸⁶ guaranteed income for the elderly,⁸⁷ allowances for the disabled persons⁸⁸) have been primarily reserved to Belgian citizens and to those aliens that can be assimilated to the status of nationals such as EU workers, refugees or stateless persons. More recently, these social benefits – with the exception of the guaranteed income for the elderly – have been extended to long-term immigrants, in part as a consequence of decisions of the Belgian Constitutional Court.

The Belgian Constitutional Court has assessed the constitutionality of these limitations based on the grounds of nationality on a number of occasions.

⁸⁰ cf *Soskin v Reinertson*, 353 F.3d 1242 (10th Cir. 2004)

⁸¹ cf. *Aliessa v Novello*, 96 N.Y.2d 418, (N.Y. 2001).

⁸² See Wishnie, 'Welfare Reform after a Decade' (n 15) 69-70.

⁸³ For a short overview of the main social assistance measures provided for the Belgian legal system, see part II, B of this paper.

⁸⁴ See art 1 of *loi du 8 juillet 1976 organique de centres public d'aide sociale*.

⁸⁵ Only legal immigrants are entitled to full *aide sociale*, whereas in case of illegal migrants, only medical care is provided. The case of the asylum seekers is different. They are entitled to receive a material form of assistance, insofar as they reside in a federal centre during the period necessary to define their status as refugees or other beneficiaries of international protection.

⁸⁶ See art 1 (1) *loi du 2 aout 1974 instituant le droit à un minimum de moyens d'existence*, This statute was repealed by *loi du 26 mai 2002 concernant le droit à l'intégration sociale* whose art 3.3 extended the right to subsistence income to registered long-term immigrant residents.

⁸⁷ See art 4 of *loi du 22 mars 2001 instituant la garantie de revenus aux personnes âgées*. This social benefit has not been extended by the legislator to the registered long-term immigrant residents. The Belgian Constitutional Court has considered this exclusion as legitimate (69/2010).

⁸⁸ See art 4, *loi 27 février 1987 relative aux allocations aux personnes handicapées*. In 2009, following a Constitutional Court decision - 153/2007 - (see later the text), art 4 has been amended to cover registered long term immigrant residents.

Generally, the Constitutional Court has been keen on according a more generous reading to the personal scope of the *aide sociale*, in some cases extending it to categories of immigrants not originally included.⁸⁹

As far as the other social assistance benefits are concerned, the court has taken the view that the equal treatment principle between the Belgian citizens and the third-country nationals should apply only in relation to registered long-term immigrant residents,⁹⁰ and not in relation to the other categories of immigrants who are legally present in the State.⁹¹

According to the Court, the following reasons justify this limitation. First, legal migrants who are not long-term residents are nonetheless eligible for the *aide sociale* scheme.⁹² Second, the Constitutional Court stresses the fact that the relevant social assistance benefits are paid by general taxation and not by contributions on earned income. Budget concerns may thus justify that the beneficiaries are identified in those having a genuine link with the national territory, i.e. nationals or registered long-term immigrants residents.⁹³

The attitude of the Belgian Constitutional Court does not seem perfectly in line with the ECtHR case-law.

The ECtHR applies what we may call “a pure non-discrimination approach”. This means that nationality is *per se* a suspect criterion, the use of which can be upheld only in narrow situations. The fact the relevant social benefit is contributory does not have any consequence *vis-à-vis* the application of the relevant ECHR provisions, as well as the fact that the applicant is already the beneficiary of other social assistance benefits.

More questionable is the matter of whether the length of the legal stay of the immigrant or his connections with the host State may influence the standard of the scrutiny. Although the Court speaks of nationality as a suspect criterion as such, no matter whether the immigrant is a long-term resident or not, in the decisions taken so far, the applicant had such meaningful attachments to the host State that made him almost equivalent to a national.

⁸⁹ See for example decision 106/2003, concerning the awarding of the *aide sociale* to non-accompanied minors. Further references in Hugo Mormont and Katrin Stangherlin (eds) *Aide Sociale – Intégration Sociale* (La Chartre 2011) 117.

⁹⁰ These are the so-called *étrangers établis ou les étrangers qui sont inscrits au registre de la population*. According to the relevant provision of the 1980 immigration national statute, an alien may request this status after 5 years of regular and continuous stay in the Belgian Kingdom, provided that public order or national security reasons do not oppose. The aliens, who the status of *étranger établi* has been recognised to, is inserted in the register of the general population (*registre de la population*) whereas the legal immigrant is listed in a different register (*registre de la population étrangère*).

⁹¹ See Belgian Constitutional Court decision n 5/2004, in relation to the right to subsistence income, para B (6) (3): ‘Il existe une différence entre les étrangers qui sont autorisés à s’établir dans le Royaume et les étrangers qui sont autorisés à y séjourner pour une durée limitée ou illimitée. [...] Le critère de “l’autorisation d’établissement dans le Royaume”, qui ressort de l’inscription au registre de la population, est pertinent par rapport à l’objectif de promouvoir l’intégration sociale des personnes résidant en Belgique. Il n’est pas déraisonnable, en effet, que le législateur réserve les efforts et moyens particuliers qu’il entend mettre en œuvre en vue de réaliser cet objectif à des personnes qui sont supposées, en raison de leur status administratif, être installées en Belgique de manière définitive ou à tout le moins pour une durée significative. Il s’agit d’ailleurs d’étrangers dont la situation de séjour est dans une large mesure semblable à celle des Belges qui ont leur résidence effective en Belgique’. The principle has been confirmed in other Constitutional Court decisions in relation to disabled allowances. See decisions 153/2007 and 3/2012.

⁹² See Belgian Constitutional Court, decision 5/2004, para B (6) (4); decision 92/2004, para B (11) (1) (second para).

⁹³ See Belgian Constitutional Court, decision 75/2003, B (9); see Belgian Constitutional Court decision 92/2004, para B (11) (1)

However, the ECtHR based the presence of these attachments on factual elements rather than on any formal administrative recognition of the status of the long-term resident.⁹⁴

The Belgian Constitutional Court seems to follow a partially different scheme. As noted, the federal legislator has provided a sort of minimal treatment in the social assistance field, to be applied equally to national and aliens (the *aide sociale*). According to the Constitutional Court, this would allow the same legislator, when it provides supplemental welfare entitlements, to reserve them to nationals or at least to those immigrants that can be substantially equated to nationals. Thus, the logic is not that of a pure principle of equal treatment between citizens and aliens. It rather seems more grounded upon the idea that aliens, as human beings, are entitled to a minimal form of social protection. This being the case, the equal treatment principle does not apply to other supplemental social assistance benefits, unless the immigrant has an administrative status that highlights his strong connection with the territory, according to an incremental approach.⁹⁵

The incremental approach followed by the Constitutional Court might influence the capacity of sub-national units to introduce classifications based on nationality when dealing with immigrants' eligibility for social assistance benefits. Since the federal legislator already provides a minimal uniform social assistance benefit in this area (the *aide sociale*), it may be submitted that sub-national units would not be obliged to guarantee a full respect of the equality principle in relation to the access of immigrants to other sub-national unit welfare entitlements, or at least that they would be obliged to do so only with regard to long-term immigrants.

Although not many in number, sub-national units' measures in the field of social assistance use long-term residency as a criterion to select the beneficiaries.

To give an example, the already-mentioned case of the Flemish decree on the care insurance scheme does not set any limitations based on nationality in relation to the compulsory joining of the insurance scheme. However, amongst the conditions that a claimant must satisfy in order to receive the benefit, the decree provides a five year residency requirement in the Flanders Region for all potential claimants irrespective of their nationality. Since a long-term residency requirement tends to favour the autochthonous persons, it can thus be questioned whether this measure amounts to an indirect form of discrimination on grounds of nationality, at least with reference to EU citizens.

⁹⁴ See para 39 of the *Koua Poirrez* decision (n 70), where the ECtHR mentions the fact that the claimant was residing in France and she had previously obtained other public social assistance benefits.

⁹⁵ The Belgian Constitutional Court explicitly took this position in relation to the relevant ECtHR case-law in two cases involving the constitutionality of the provisions of art 4 of the *loi du 27 février 1987*, which establishes limitations on the grounds of nationality in relation to the beneficiaries of disabled allowances. In decision n 92/2004, para B (11) (2), the Court did not consider in breach of the non-discrimination and of the equality principle (see arts 10 and 11 of the Belgian Constitution) the fact that the disabled allowance benefits did not apply to legally present third-country national immigrants. The Court explicitly considered whether this finding was in line with the *Koua Poirrez* decision of the ECtHR and with the principle there set that only narrow considerations could justify a classification based on nationality. It deemed that the ECtHR decision had to be distinguished from the case it was called to assess, since the applicant could be the beneficiary of the *aide sociale*, the amount of which would be calculated taking into account his disabled status.

In the subsequent decision n 153/2007, the Belgian Constitutional Court considered it illegitimate that long-term resident immigrants, once they are listed in the *registre de la population*, were excluded by the scope *ratione personae* of the act. The Belgian Constitutional Court reads the *Koua Poirrez* (n 70) case-law as limited to prohibiting discrimination between nationals and aliens insofar as the latter possess an administrative long-term immigrant status. However, even assuming that the ECtHR applies a strict scrutiny review only when immigrants having a meaningful attachment with the host State are involved, it does not require that this condition must be fulfilled only by having a legal status of long-term resident.

Other cases of long term residency requirements can be found elsewhere in Belgian sub-national units' social assistance measures. This is the case of the German speaking Community decree concerning disability allowances⁹⁶ Art 18 of which provides that in order to be eligible for the relevant benefit, the claimant must reside in the German speaking community territory and, alternatively, have the Belgian nationality or the nationality of one EU Member State or have been continuously resident in Belgium for 5 years or for 10 years in case of non-continuous residence.

The French speaking Community regulation reserves disability allowances to persons residing within that Community and having either the Belgian nationality or being refugees, or stateless, or EU workers. However, those who do not satisfy the nationality requirements may be eligible, provided that they fulfil a five-year previous residency in the national territory.⁹⁷

In these two latter cases, we may note that the residency requirement applies to third-country nationals but it does not to EU citizens and that it refers to the national territory instead of that of the sub-national unit.

This could avoid the problems with the possible breaching of the EU equal treatment provision with regard to EU citizens. Yet, it may be suggested that making the enjoyment of a welfare benefit conditional upon a residency requirement, which applies only to third-country nationals but not to EU citizens, would amount to discrimination on the grounds of nationality, according to art 14 of the ECHR. To this extent, it should be recalled that in *Moustaquim v Belgium*⁹⁸ the ECtHR held that, since the EC constitutes a special legal order, there is an objective and reasonable justification for the preferential treatment accorded to the nationals of the EU Member States rather than to third-country nationals.

However, such a statement was made for a case involving the expulsion of a third-country national, an area where States traditionally enjoy wide discretion. Once the right to enter or stay in a given Country is not at stake and the difference of treatment applies to the enjoyment of fundamental rights set out in the Convention, it seems unlikely that the special legal order of the EU can still be seen as a justification for such a differentiation.

3.3 Italy

In Italy, immigration federalism has thus far mainly concerned the access of immigrants to regional welfare entitlements, especially in the areas of social assistance and social housing.

In decisions n 300/2005 and n. 156/2006, the Constitutional Court clearly stated that the access of aliens to regional welfare system falls under the jurisdiction of the Regions rather than that of the national State. Afterwards, 'immigration federalism' issues have been primarily assessed in the light of the equality principle and with regard given to the protection of fundamental rights.

According to the Constitutional Court's case-law, a systematic reading of arts 2 and 3 of the Italian Constitution requires that aliens and nationals are treated equally as far as the protection of fundamental rights is concerned. Yet, derogations to the equal treatment

⁹⁶ In *Moniteur Belge* 13-11-1990.

⁹⁷ See art 275 of the *Arrêté du Gouvernement wallon portant codification de la législation en matière de santé et d'action sociale du 29 septembre 2011*, in *Moniteur Belge* 21.12.2011. These provisions were originally inserted in the *décret du 6 avril relatif à l'intégration des personnes handicapées*.

⁹⁸ *Moustaquim v Belgium*, App no 12313/86, s A193, (ECHR, 18 February 1991)

principle are admitted insofar as they derive from the inherent difference in status between aliens and nationals. The Court refers to the fact that while the entering and staying in the Country constitute rights for the nationals, they are, on the contrary, subject to an administrative authorisation for the aliens.⁹⁹

However, in some cases the Constitutional Court has been continuing to accord a wide discretion the legislator in establishing derogations to the equal treatment principle, basing this on supposedly existing factual differences between the legal status of the citizen and the alien. Moreover, since the fundamental rights category lacks a clear constitutional definition, it is quite difficult to single out what fundamental rights the Court is referring to.¹⁰⁰

More recently, the Constitutional Court delivered a number of decisions¹⁰¹ in which, relying on the equality and the reasonableness principle, as well as on the ECtHR case-law, it held the unconstitutionality of several national law provisions, which limited social assistance entitlements to those immigrants in possession of the long-term resident's EC residence permit, in pursuance of art 8 of the directive 2003/109/EC.¹⁰² According to the directive, the issuing of this residence permit is made conditional to the fact that the third-country national has stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Thus, limiting these social assistance entitlements to those immigrants in possession of the long-term resident's EC residence permit meant to exclude those immigrants that, even if long-term residents in Italy, were not in possession of the long-term resident's EC residence permit because of the lack of stable and regular resources. The Constitutional Court noted that the relevant social benefits were meant to be instruments to satisfy the primary needs of the human being. Consequently, the legislator could not prevent needy persons from having access to these measures because of they do not have a long-term residence permit the issuing of which is made conditional to the possession of economic resources. In fact, the lack of them is the very reason that caused these needy persons to ask for welfare protection in the first place.

Although the Constitutional Court has regarded the relevant social benefits as a tool for the safeguard of human beings as such, it has been careful to limit their application only to legal aliens, excluding illegal aliens. Moreover, the Court seemed to suggest that the legislator may subordinate the social entitlements to the possession of a permit of stay, insofar as its length proves a significant link with the State. However it did not provide any precise reference to the length of the permit of stay.

Within this context, we can now consider how the Constitutional Court has approached the case of the eligibility of aliens for regional social assistance benefits.

To this extent, two different frameworks have been experienced thus far.

On the one hand, some Regions have provided for restrictions upon the eligibility of aliens for regional social assistance benefits and regional social housing. This was accomplished

⁹⁹ See Italian Constitutional Court, decision 104/1969.

¹⁰⁰ See generally for a critical approach to this Constitutional Court line of cases, Marco Cuniberti, *La Cittadinanza. Libertà dell'Uomo e Libertà del Cittadino nella Costituzione Italiana* (Cedam 1997).

¹⁰¹ See Italian Constitutional Court, decision 306/2008. See also decisions n 11/2009, n 187/2010 and n 329/2011.

¹⁰² Directive 2003/109/EC of the Council of 25 November 2003 concerning the status of third-country nationals who are long-term residents in [2004] OJ L16/44.

either by excluding aliens from the personal scope of application of the relevant acts, or by making the social benefit entitlement conditional upon a long-term residency condition in the Region.

On the other hand, other Italian Regions pursued an opposite policy by granting some forms of social welfare to illegal migrants, namely the access to some form of temporary social housing or to health treatment, in addition to those already provided by the national health service.¹⁰³

These two situations were both scrutinised by the Constitutional Court.

As far as the first hypothesis is concerned, the Constitutional Court already in 2005 scrutinised the constitutionality of a regional provision reserving free public transport to disabled nationals residing in the relevant Region.

The Region claimed for the legitimacy of this classification, since the benefit at stake could not be considered as a fundamental right. In fact, according to the above-mentioned Constitutional Court case law, the principle of equal treatment between nationals and aliens applies only in relation to fundamental rights. Regions – it was argued by the Region's legal defence – should be free to introduce classifications based on nationality whenever the enjoyment of a fundamental right is not involved.

The Constitutional Court admitted that the regional social benefit could not be considered as a fundamental right. This implied, then, that its previous case law concerning the application of the equality principle to aliens could not be applied as such. However, the Court added that this did not mean that the discretion of the regional legislator was unlimited because any legal classification may be reviewed according to the reasonableness principle.

The Court considered that the regional social benefit was based on a principle of social solidarity in relation to which classifications on nationality, rather than on the needy status of the individual, are arbitrary. And even budget constraints could not be invoked as an excuse for such a classification. The Court recalled that art 41 of the 1998 Immigration Act states that immigrants who are present in Italy with a permit of at least one year should have access to social assistance on equal conditions with nationals. This provision – the Court said – is to be considered as a principle of general relevance in the national legal framework and, as such, it can be taken as a paradigm in order to accordingly shape the reasonableness test. This means that derogations to the principle of equal treatment between aliens and nationals are to be grounded on clear, specific reasons.¹⁰⁴

As a consequence of the above-mentioned constitutional decision, regional acts explicitly limiting aliens' eligibility to regional social entitlements were replaced by the increased use of durational residency requirement as a precondition for access to the relevant social benefits.¹⁰⁵

These measures were taken in order to prevent new immigrants from benefiting from regional social welfare entitlements. However, since a long-term residency requirement

¹⁰³ Art 35 (3) of the 1998 Immigration Act sets a list of health treatments to be provided by the health national system to indigent aliens who are illegally present in the national territory.

¹⁰⁴ See Italian Constitutional Court, decision 432/2005.

¹⁰⁵ Further references in Dinelli, 'La stagione della residenza' (n 4) 639.

applies generally to all persons living in the relevant region - thus covering nationals, EU citizens and third-country nationals - problems arose with regard to EU law. Indeed, some judges did not to apply the relevant provisions because of the breaches of EU law.

Finally, the long-term residency requirement issue has been examined by the Constitutional Court. In a recent decision, the Constitutional Court has considered that classifications based on residency, as well as those based on nationality, conflict with the equality and reasonableness principles whenever they are used to determine the eligibility for social benefits. The Court held that the benefits provided for by the challenged provisions are intended to remedy to a needy status. Therefore, limitations based on nationality or residency, are not justifiable, insofar as they exclude vulnerable individuals.¹⁰⁶

The second hypothesis that the Constitutional Court has evaluated is the case of regional statutes aimed at extending social benefits to illegal immigrants.¹⁰⁷

The national government brought actions before the Constitutional Court claiming the illegitimacy of the relevant regional provisions. According to the national government's legal counsel, the regional measures interfered with immigration and public order, which are jurisdictions reserved to the national level. They do so because they provide regional social benefits to illegal immigrants, a condition that is considered a crime in the Italian legal system in pursuance of art 10 *bis* of the 1998 Immigration Act.

The Constitutional Court did not follow this reasoning. In decision 61/2011, it made clear that the challenged regional measures were meant to provide basic human rights that both the Constitution and the 1998 Immigration Act grant even to illegal immigrants.¹⁰⁸ It also recalled that it is the 1998 Immigration Act itself that states at art 3 (5) the principle according to which the Regions, within their powers, and budget allocations, must adopt those actions required to guarantee to aliens their fundamental rights.

In the above decision of the Constitutional Court, certain findings may provoke some critical remarks.

First, as far as the allocation of competences vis-à-vis immigration policy is concerned, the assumption according to which the regional measures at stake by no means interfered with national reserved matters is questionable. In fact, the contrast to illegal immigration may also imply restrictions upon the illegal immigrants' access to social rights. The dividing line between immigration issues – reserved to the national level – and migrant integration issues – reserved to the sub-national units' level – maintains its value as long as both legislators share the view that the only alien to be integrated is the legal immigrant with a concrete perspective of staying in the country.

Second, it can be noted that the Court considered the challenged provisions as if they were meant to satisfy basic human rights. In this way, the Court might have implied that Regions

¹⁰⁶ See Italian Constitutional Court, decision n. 40/2011.

¹⁰⁷ See *Legge Regione Toscana*, n 29/2009, and *Legge Regione Puglia*, n 32/2009, both aimed at enlarging the list of health treatments that the national State already provides to illegal aliens. In the case of *Legge Regione Campania* n 6/2010, the regional statute was aimed at ensuring to irregular immigrants a form of temporary sheltered housing, a measure which is not provided for by the 1998 Immigration Act.

¹⁰⁸ The Constitutional Court had already deemed legitimate the provisions contained in the above-mentioned Tuscan and Puglian statutes. However, it interpreted them narrowly, as they were meant to provide almost the same health treatments set out in the 1998 Immigration Act. The decisions are annotated by Francesca Biondi dal Monte, 'Regioni, immigrazione e diritti fondamentali' [2011] *Le Regioni*.

are empowered to provide illegal immigrants only with a minimal level of protection in social assistance. However, once the Constitutional Court considered that no interference occurs with the national reserved matters in the immigration field, then why should the power of the Regions to provide social entitlements to illegal immigrants be limited to the provision of the basic human rights?

In any event, if we give a broad reading to the above mentioned Constitutional Court case-law, it may be argued, then, that the Italian Regions can build up a truly inclusive immigrant integration model that can apply to illegal migrants too, despite the opposite national pattern.

4. THE “CULTURAL REGIONAL CITIZENSHIP” DIMENSION

Integration is a process where different components have a role: language, religion, culture, social status, et cetera. The integration of migrants has been regarded, for some time, as a sort of natural and voluntary process taking place, as time elapsed. The migrant, through his work, became actively involved in the host State society and thus enjoyed a series of rights that made himself part of the relevant community.

States have undertaken different policies in order to facilitate the integration process: in some cases, they have guaranteed migrants the right to express, in public, ways of life strictly linked to the culture or to the religion of their country of origin, permitting derogations to the general applicable rules; in other cases, the idea of special rights, as a way to allow minority groups to express their identity, has been denied, due to fears that this could lead to disaggregate the civil society of the host country.¹⁰⁹

However, in recent years a new idea of integration is occurring. Integration is increasingly becoming a sort of precondition, a positive obligation that a migrant must fulfil in order to have or keep the status of legal immigrant. We can call it “integration by law”.

This concept implies a clear link between the level of integration of the migrants and their legal status. Many national laws on immigration are introducing provisions dealing with integration tests: the knowledge of the host State’s language, history and civic values is increasingly used at all stages of a migrant’s stay, as a precondition for entry into, or remaining in, the national territory.¹¹⁰

With regard to this, it is worthy of note that integration remains basically a national issue even within Europe. Although the EU has recently increased its powers in the field of immigration policy, in the area concerning the integration of immigrants, art 79 (4) EUFT foresees EU intervention as merely complementary to that of the EU Member States.

Within this framework, both the Common Basic Principles for Immigrant Integration Policy¹¹¹ and the European Pact on Integration and Asylum¹¹² expressly admit that States

¹⁰⁹ See, on the debate on multicultural or assimilation integration approaches Adrian Favel, *Philosophies of Integration – Immigration and the Idea of Citizenship in France and Britain* (Palgrave 2001); Ralph Grillo, *Pluralism and the Politics of Difference: State, Culture and Ethnicity in Comparative Perspective* (Oxford Clarendon Press 1998); Julie Ringelheim, *Diversité Culturelle et Droits de l’Homme* (Bruylant 2006).

¹¹⁰ See Ricky van Oers, Eva Ersbøll and Dora Kostakopoulou (eds), *A Re-definition of Belonging? – Language and Integration Tests in Europe* (Martinus Nijhoff 2010); Elspeth Guild, Kees Groenendijk and Sergio Carrera, *Illiberal Liberal States – Immigration, Citizenship and Integration in the EU* (Ashgate 2009).

¹¹¹ Council of the EU, 1461/04, 2004, Justice and Home Affairs, 2618th meeting.

may ask immigrants to learn the State's language and to respect the identities of the Member States and of the EU.

Moreover both directive 2003/86/EC on the right to family reunification and directive 2003/109/EC on the status of third-country nationals who are long-term residents allow States to require third-country nationals to comply with integration measures, in accordance with national law, as a requirement, respectively, for the exercise of the right to family reunification (art 7 (2) dir 2003/86/EC) and for acquiring the status of long-term resident (art 5 (2) dir 2003/109/EC).

However, it may be argued that Member States' discretion in this field is not unlimited, at least when these compulsory integration measures may end up in becoming an excessive burden for immigrants, thus affecting the *effet utile* of the above-mentioned EU directives.¹¹³

The trend towards imposing national linguistic and cultural requirements as a precondition for the immigrant entry or stay in the national territory reveals that integration of migrants is increasingly considered as part of the national immigration policy. While some scholars emphasize that these cultural requirements may be a surreptitious way of selecting immigrants on otherwise forbidden grounds, such as religion, race, ethnicity and that they are expression of a 'repressive liberalism',¹¹⁴ others suggest the idea that language and civic integration requirements are not necessarily at odds with a civic notion of nation, since they permit effective immigrant integration.¹¹⁵

It is also submitted that the tendency to compel immigrants to learn the host country's language is on the rise due to some changes in the traditional pattern of third generation immigrant linguistic assimilation. These are, namely, the fact that immigrants tend to maintain strong connections with the country of origin and the fact that they form compact and homogeneous communities, thus questioning the language acquisition of the host State.¹¹⁶

Consequently, linguistic requirements are not seen as inherently illegitimate instruments. Although they can interfere with the right to respect for private life, according to art 8 of the ECHR¹¹⁷, they may be considered necessary in order to pursue important public interests, such as building national cohesion and integrating immigrants in the host

¹¹² European Pact on Integration and Asylum, (Council of the EU, 24 September 2008).

¹¹³ See case C-508/10, *European Commission v the Netherlands* (ECJ – 26 April 2012). The Commission challenged the legitimacy of a Dutch provision that imposed a fee in order to obtain the status of long-term resident, arguing that it breached Directive 2003/109/EC. The ECJ found that the fee was disproportionate and thus it undermined the *effet utile* of the Directive.

¹¹⁴ See Christian Joppke, *Veil: Mirror of Identity* (Polity 2009) 115, which refers to the case when liberalism promotes its liberal goals by illiberal means, forcing the members of its community to identify with liberal norms. See also Liav Orgad, '«Cultural Defence» of Nations: Cultural Citizenship in France, Germany and the Netherlands' (2009) 15 Eur L J, 719; Liav Orgad, 'Illiberal Liberalism Cultural Restrictions on Migration and Access to Citizenship in Europe (2010) 58 Am J Comp L, 53; Rainer Bauböck and Christina Joppke (eds), 'How Liberal Are Citizenship Tests', (2010) EUI Working Papers RSCAS, 2010/41 <http://Cadmus.eui.eu/btstream/handle/1814/1396/RSCAS_2010_41corr.pdf?sequence=3> accessed 2 January 2013.

¹¹⁵ Will Kymlicka, 'Immigration, Integration and Minority Nationalism' in Michael Keating and John McGarry (eds), *Minority Nationalism and the Changing International Order* (OUP 2006).

¹¹⁶ See Alan Patten and Will Kymlicka (eds), *Introduction: Language Rights and Political Theory* (OUP 2003) 8-9.

¹¹⁷ See Hugues Dumont and Françoise Tulkens, 'Citoyenneté et Responsabilité en Droit Public', in Hugues Dumont, François Ost and Sébastien Van Drooghenbroeck, *La Responsabilité Face Cachée des Droits de l'Homme* (Bruylant 2005) 219-220.

society.¹¹⁸ It is the way in which they are applied, though, that it is important to verify, in order to assess their compliance with fundamental rights.¹¹⁹ The legitimacy of the linguistic requirements relies on a proportionality test that takes into consideration several aspects, such as the fact the linguistic requirement is compulsory or not, or that it applies to obtaining citizenship status rather than a permit of stay.

The issue of cultural-linguistic requirements for immigrants has a further problematic dimension in those States characterised by a multinational structure or where national linguistic minorities are settled. Immigrants may find it more useful, or more attractive, or easier, to learn the language of the majority than to learn the local language. In some cases, they tend to create their own community and they do not wish to learn the local language. This led sub-national units to adopt policies aimed at protecting and promoting the status of their local national language among immigrant newcomers.¹²⁰

A national compulsory integration/linguistic measure could not be suitable in order to preserve the sub-national cultural-linguistic distinctiveness. Since the residence permit has legal effect nationwide and since it cannot limit the right of the legally-admitted aliens to move and reside within the Country, problems arise concerning the choice of the language the alien would be required to learn.

The adoption of cooperative mechanisms between the federal and the sub-national levels in the regulation of the entry and the stay of immigrants has represented one means of satisfying the sub-national units' need for linguistic protection. This solution has been enforced in Canada, where following an agreement with the federal authorities, the Province of Quebec is allowed to select immigrants on the grounds of their French knowledge.

Flanders has pursued a different course. In 2003, the Flemish authority introduced linguistic and cultural integration courses which newly-arrived third-country nationals – and even some categories of Belgian citizens – are compulsorily required to attend. The failure to attend these linguistic-cultural integration courses is punished with an administrative fine, and can be a ground for the suspension of the enjoyment of social welfare entitlements. The integration requirements, then, are not linked to the admission of immigrants into the national territory, as it is the case in Canada. This allows Flanders to autonomously pursue its integration policy, with no need for a cooperation agreement with the federal level.

We shall consider, then, in further detail, the case of Belgium, which is the only State amongst those considered by our comparative analysis where this topic arose. In Italy, linguistic requirements for immigrants have been introduced by the national legislator as a condition for the renewal of the permit of stay.¹²¹ On the occasion of the passing of the statute, the Autonomous Province of Bolzano, where a German-speaking minority is settled, asked for the linguistic requirements be in German. The request has not been taken into consideration by the national legislator.

¹¹⁸ See Ruth Rubio-Marin, *Language Rights: Exploring the Competing Rationales*, in Alan Patten and Will Kimlicka, *Language Rights* (n 111) 52-79.

¹¹⁹ See extensively José Woehrling, 'Linguistic requirement for immigrants', in *Mundialització, Lliure Circulació i Immigració, i l'Esigència d'una Llengua com a Requisite* (Institut d'Estudis Autònoms 2008) 133.

¹²⁰ For a political science view of the issue, see Kymlicka, 'Immigration, Integration and Minority Nationalism' (n 117); Ricardo Zapata Barrero, *Immigration and Self-Government of Minority Nation* (Peter Land 2009). In the legal literature, see the contributions in *Mundialització, lliure circulació i immigració, i l'esigència d'una llengua com a requisite* (n 119).

¹²¹ See art 4 bis of the 1998 Immigration Act.

4.1 The Flemish Inburgering Decree

As we have already noted above, art 5 (II) (3°) of the 1980 Special Act explicitly grants the Communities the power to deal with the integration and reception of immigrants.

An analysis of the *travaux préparatoires* works suggests that the integration measures that the Communities were empowered to pass were intended to be principally based on a voluntarily scheme.¹²²

This has been the case until 2003, when the Flemish authorities decided to enact a first decree concerning the so-called *inburgering* policy. This is defined by the Flemish legislator as an interactive process that implies rights and duties, both for the newcomers and for the Flemish government. The *inburgering* is structured in a two-stage process, the first of which includes Dutch language courses, civic orientation (which covers several aspects of Flemish society, such as education, mobility and health) and vocational guidance, which focuses on the access to the labour market.¹²³

The courses are mandatory for certain groups of individuals, namely: immigrants, aged at least 18, who are authorised to stay for more than three months in Belgium and who have been registered in a Flemish local municipality for less than twelve months; Belgian nationals, born outside Belgium, who have at least one parent born outside Belgium and have been registered for the first time in a Flemish municipality for less than twelve months; and aliens who are religious ministers.¹²⁴

Besides the mandatory target group, the *inburgering* process is offered on a voluntarily basis to other groups. These are further divided into priority and non-priority groups. The former are accorded priority when demand exceeds the places available. Among the individuals included in the priority group, are those immigrants who have been registered in a Flemish municipality for more than 12 months and who are beneficiaries of social assistance or social security revenues.

The original 2003 decree has been amended several times in order to better target the individuals to whom the act applies, and to define the categories of persons exempted from the courses.¹²⁵ Due to the lack of coordinating provisions concerning the *ratione temporis* and *ratione personae* scope of application of these acts, problems arise in the identification of the individuals currently required to attend the courses.¹²⁶

As stated above, the failure to attend a compulsory *inburgering* course is punished with an administrative fine. However, even those persons that do not fall into the mandatory target-group may be requested to attend the *inburgering* course when they apply for social security or social assistance benefits.¹²⁷

¹²² The point is highlighted by Van Drooghenbroeck, 'Fédéralisme, Droits Fondamentaux et Citoyenneté' (n 51)

¹²³ See Marie-Claire Foblets and Zeynep Yanasmayan, 'Language and Integration Requirements in Belgium: Discordance between the Flemish Policy of "Inburgering" and the Federal Legislator's View(s) on the Integration of Newcomers and Migrants', in van Oers, Ersbøll and Kostakopoulou (eds) (n 110) 271; Dumont and Tulkens, 'Citoyenneté et responsabilité en droit public' (n 117) 219-220.

¹²⁴ See art 5 of the *Inburgering* Decree, following the amendment introduced in 2008.

¹²⁵ This is the case for EU citizens, or for a non-EU citizen family member of an EU citizen.

¹²⁶ See for details Eric Somers, 'Le Parcours d'Intégration Civique en Flandre. Les Personnes Visée et Leurs Obligations', in Julie Ringelheim (ed) *Le Droit et la Diversité Culturelle* (Bruylant 2011) 301-344.

¹²⁷ See *Décret relative à la politique flamande d'intégration par le travail*, 4 June 2003.

The passing of the *inburgering* decree by the Flemish authority constituted a turning point with regard to the immigrant integration policy framework thus far adopted in Belgium.¹²⁸

As far as the federal level is concerned, no mandatory integration requirements have been introduced in order to allow immigrants to enter or stay in the country. Moreover, the previous references to integration criteria as a prerequisite for obtaining Belgian citizenship were abolished in 2000. Previously, proof of willingness to integrate was a prerequisite in order to be awarded the status of Belgian citizen. This provision had been implemented in practice by requiring sufficient knowledge of at least one of the three official languages of Belgium. Since this legislative amendment, continuous residency in Belgium for a certain time has become the most important condition to be fulfilled.¹²⁹

As far as the other federate units are concerned, Wallonia has always refrained from the idea of targeting individuals on the grounds of nationality or ethnic origin. No mandatory form of immigrant integration courses has been introduced thus far, though voluntarily measures directed towards immigrants are in force.

The *inburgering* decree itself has not been challenged before the Constitutional Court. However, the Constitutional Court has nonetheless had the opportunity to scrutinise the Flemish policy of compulsory immigrant integration.

In 2006, the Flemish Region introduced some amendments to the *Code Flamand du logement* in relation to social housing provisions. With the aim of facilitating the communication between social housing tenants and the officers who carry out the service, the Flemish authority required that any social housing tenant must show the will to learn Dutch as a prerequisite in order to rent a house under the social scheme. For those individuals falling under the scope of application of the *inburgering* decree, the obligation is satisfied with the attendance of the *inburgering* course. The failure to fulfil the mentioned requirements is considered as a serious contractual breach, which leads to the unilateral termination of the contract.

The above-mentioned requirement applies to all individuals, irrespective of their national status, provided that they live in the Flanders region and ask for social housing. The problem arose especially with regard to Belgian citizens of the French-speaking group living in some bordering Flemish municipalities – so-called *communes à facilités (linguistiques)* – who are granted the right to use French with the local public administrators.

A constitutional claim was brought by both the French Community and two organisations promoting the immigrants' rights.

The Constitutional Court held that the application of the decree cannot affect the guarantees that the French minority linguistic group enjoys in the *communes à facilités (linguistiques)* and thus the decree cannot apply to French-speaking persons living there.¹³⁰

¹²⁸ See Ilke Adam, 'Une Approche Différenciée de la Diversité? Les Politiques d'Intégration des Personnes Issues de l'Immigration en Flandre, en Wallonie et à Bruxelles (1980-2006)' in Ringelheim (n 126) 251-300 ; Foblets and Yanasmayan, 'Language and Integration Requirements in Belgium' (n 110) 271.

¹²⁹ See Marie-Claire Foblets, 'Le Parcours Mouvementé du Code de la Nationalité Belge: Rétrospective (1985-2003)' in [2003] *Annales de Droit de Louvain*, 259.

¹³⁰ See Belgian Constitutional Court 101/2008, annotated by Nicolas Bernard, 'L'arrêt Wooncode de la Cour Constitutionnelle du 10 Juillet 2008, quand l'Arbre (Linguistique) Cache la Forêt' [2008] *Journal de Tribunaux*, 689.

As for the other persons to whom the act applies, the Court considered whether the Dutch requirement amounted to a violation of art 23 of the Belgian Constitution, which deals with the social and economic rights of the individual. It was argued that, since the failure to learn Dutch could entail the termination of the social house lease, this would amount to a violation of art 23 of the Belgian Constitution.

The Court observed that this provision does not prevent the legislator from making the award of social benefits conditional upon certain obligations, which the applicant must fulfil. This is the case of the Dutch language requirement. The Court considered that the aim pursued by the legislator – namely to ease the communication between the social housing tenants and the service providers – was legitimate, and that the Dutch-learning obligation was a proportionate means, provided that the failure to fulfil the requirement did not automatically imply the termination of the contract and that the attendance of the language courses was free of charge.

The Constitutional Court, then, applied a proportionality test. Accordingly, whereas it considered legitimate in principle the idea of conditioning welfare entitlements upon the fulfilment of the linguistic requirement, it deemed that the means chosen to make the obligation effective were disproportionate. It is also important to stress that the Court, quite surprisingly, did not consider the relevant provision to be in breach of the EU law, notwithstanding the fact they potentially constitute an obstacle to the EU citizens' freedom of movement.

5. CONCLUSIONS

'Immigration federalism' questions not only the idea that immigration is a matter to be vested in the national legislator but also what immigration exactly means as to the purpose of the division of powers.

'Immigration' certainly includes those measures that concern the entry, the stay and the expulsion of aliens. But it also includes measures defining the rights of third-country nationals, once they are admitted or they find themselves illegally in the national territory (so-called legal status of aliens). Finally, immigration may also cover those measures that are specifically meant to culturally integrate immigrants.

Immigration, then, is to be considered as a policy rather than a matter, ie a political objective that is pursued through actions falling under different competences. More precisely, immigration is a shared-policy: a same immigration-related topic may fall under either a national competence or under a sub-national units' one. Integration of migrants is a good example. Although this is a matter usually vested in the sub-national units, national states are increasingly making the issuing of the authorisations for entering or for staying in the national territory conditional upon the meeting of cultural and linguistic tests. Thus, the integration of immigrants is increasingly considered as it were an exercise of the national power of regulating immigrants' entry and stay. Similarly, contrasting illegal migration is a goal that may be pursued by both the national legislators, with actions falling under the aliens removal matter of competency, and by sub-national units acting in pursuance of their police powers, at least insofar they are granted such powers.

The definition of the boundaries within which each territorial unit may act within the notion of the shared immigration policy is not easy to draw. The idea that the national legislator would primarily have the task of regulating the entry and the stay of the

immigrants, while the sub-national units would have the power to deal with the aliens' legal status and their integration, is weakening. On the one hand, the attempt of some US states to have a role in combating illegal migration, and the Belgian regional competences in issuing work permits, represent examples of the fact that even the regulation of the entry and the stay of immigrants may involve sub-national units' regulations. On the other hand, the social integration of migrants has been always influenced by national decisions concerning welfare.

Because of the lack of a clear-cut material dividing line, 'immigration federalism' is a dynamic phenomenon, the equilibrium of which is being constantly challenged according to the social and political needs of the territories involved. Thus, it is not surprising that in each of the three States taken into consideration, immigration federalism differs in its material scope: in the US, it is currently more focussed on contrasting illegal immigration; in Italy it is the regional welfare eligibility what matters the most; and finally, in Belgium, it is the integration of linguistic immigrants.

Therefore, it is more convenient to look at the way each legal system structures the relevant equilibrium among territorial authorities, rather than trying to define common dividing lines.

To this extent, the US and the two European countries taken into consideration by our analysis, show important differences.

In the US, the federal legislator has been granted a wide power in dealing both with immigration, intended as the regulation of the entry and the stay of immigrants, and with the legal status of aliens. This implies that it may intervene in areas that are usually up to the states to regulate. This also means that 'immigration federalism' is a phenomenon, the scope of which may increase or decrease as a consequence of the choices made by the federal legislator. The latter may decide to promote state action and thus differentiation among states – as it did with the PRWORA in relation to aliens' welfare eligibility – or, on the contrary, it may decide to restrain it by explicitly pre-empting the field – as it did in 1986 when it federalised the power to sanction employers who hired illegal immigrants.

The traditional deferential attitude adopted by the US Supreme Court in relation to the national decisions regarding immigration and *alienage* law has deeply influenced the division of competences in the field. State measures in the area of immigration are legitimate as long as federal law does not intervene by extensively regulating the matter, or as long as states actions do not stand as an obstacle to objectives laid down by federal law. The US states' scope of intervention is potentially wider than that of the Belgian and Italian sub-national units, since the former may rely on their police powers as a legal base for measures dealing with illegal migration. Although they cannot autonomously enforce the federal removal procedure as such, they may take actions that allow them to indirectly ease it. It remains nonetheless the case that an action of the federal legislator explicitly pre-empting state measures in the area is always possible. Thus, there are not constitutional guarantees of states' powers in the immigration area, at least insofar as the federal legislator, acting in pursuance of what it deems to be the national interest, may always explicitly pre-empt state measures in the field.

The Italian and the Belgian cases show a different framework: they both consider the power of the national state in dealing with immigration as primarily related to the regulation of the entry and the stay in the country. Both the Belgian and the Italian Constitutional Courts have refused to conceive of the legal status of aliens as an autonomous-standing

power clause, which would enable the national legislator to intervene in areas otherwise reserved to the sub-national units.

This means that the national legislator can legislate with regard to the rights and duties of immigrants as long as the relevant area falls under a national competence. For example, with regard to social assistance for immigrants, the national legislator can act, provided that it has powers in the field of social assistance, whether the beneficiaries are immigrants or otherwise.

Although sharing this common feature, immigration federalism has developed differently in the two European countries. While in Italy, immigration federalism has been more focussed on the social area, in Belgium, due to the wide powers the federal legislator still retains in relation to welfare, immigration federalism has been more focussed on immigrants' linguistic integration. However, the case of the Flemish insurance scheme and the emerging idea of welfare as a parallel competence may imply for the future a more meaningful role for the sub-national units in the field of social immigrant integration.

The different approach followed by the US, on the one hand, and by Italy and Belgium, on the other hand, as to the role of the national legislator in immigration policy, has had as a consequence that in these latter two States, the constitutional jurisdictions have played a more meaningful role in guaranteeing a territorial harmonisation of the legal status of immigrants through the enforcement of the equality and non discrimination principles.¹³¹

This can be clearly noted by considering the development of what we call 'regional social citizenship' and 'cultural regional citizenship'.

We emphasized that the emergence of 'immigration federalism' can be also explained by the fact that immigration flows have pushed the sub-national units to remodel their relationship with their new communities according to, alternatively, restrictive rather than inclusive attitudes towards newcomers. However, this development has to take into account the limitations deriving from the equality and non-discrimination principles as they are judicially enforced at the national and international levels.

Such a framework appears unlikely, both in the US, and in the two European states.

In the US, the issue of regional social citizenship is currently more influenced by the federal legislator than by the judicial enforcement of the equality principle. Although the Supreme Court stated that a strict scrutiny standard of review should apply to state - but not to federal - *alienage* classifications, the federal legislator with the enactment of the PRWORA has allowed the states to circumvent the aforementioned Supreme Court case-law. This has permitted the states to freely adopt restrictive or rather inclusive measures with regard to aliens' eligibility for welfare state benefits.

In the European scenario, constitutional jurisdictions, also as a consequence of the ECtHR case-law and to a lesser extent that of the ECJ, are increasingly considering nationality as an illegitimate criterion when it is applied to determine welfare eligibility. This has pushed

¹³¹ This is consistent with the opinion that in Europe, unlike in US, the judiciary has played a pivotal role in defining the constitutional status of the aliens. See Christian Joppke and Elia Marzal, 'Courts, the New Constitutionalism and Immigrant Rights: The Case of the French Conseil Constitutionnel' (2004) 43 Eur J Pol Research 823-844.

the sub-national units to increasingly make use of long-term residency requirements as a precondition to be the beneficiary of regional welfare entitlements.

The use of long-term residency requirements represents proof that the sub-national units will do what they can to strengthen the sense of common belonging of the people living in their territory. It may also be a way to preserve autochthonous communities, and thus to indirectly discriminate against recently arrived foreigners. This is why they are considered as suspect measures with regard to the non-discrimination principle. As long as they are applied generally, thus covering EU citizens, they may amount to a breach of EU law.

The case of cultural-linguistic regional citizenship is different: fewer legal constraints are found in relation to it. An explanation for this may be that the linguistic integration requirements, applied by sub-national units, may effectively serve two contrasting objectives: they may be used either as a surreptitious way to discriminate in the provision of some public benefits, or as measures effectively helping the immigrants to integrate into society. Because of this, they do not appear as inherently discriminatory measures, as nationality and long-term residency requirements applied in the social field do. It is the way they are implemented that is determinant in order to understand whether they are legitimate or not. For example, the Belgian Constitutional Court has admitted the legitimacy in itself of the *inburgering* Flemish policy, but it has reviewed those aspects of it that were more in contrast with the individual's fundamental rights.

Thus, the comparative analysis conducted thus far with reference to the three legal orders shows two different schemes for accommodating, on the one hand, the interests of the national legislator in defining ultimately the narratives of the integration process of immigrants, and, on the other hand, the demands of territorial differentiation put forward by the sub-national units.

The US model certainly guarantees the federal authorities wide power in order to define a common national framework for the integration of immigrants. However, this may result not only in potentially unlimited restrictions on the self-government rights of the sub-national units, but even in non-application of the constitutional guarantees of the equality and non-discrimination principles, at least insofar as it is the federal legislator that takes action.

On the contrary, both the Belgian and the Italian experiences have somehow undermined the role of the national legislator in defining a common nationwide immigrant integration framework with regard, respectively, to the welfare and to the cultural linguistic integration of immigrants. It is rather for the judiciary, especially the constitutional judiciary, to perform a homogenizing territorial role through the enforcement of the equality and the non-discrimination principles.

However, this scheme may lead to some inconsistencies. This is, for instance, the case of limitations to regional welfare immigrants' eligibility based on long-term residence requirements. Although both Constitutional Courts refer to the case-law of the ECtHR, they have indeed provided different solutions to this common question: the Belgian Constitutional Court admits the legitimacy of the long-term residence requirements, whereas the Italian Constitutional Court does not, deeming them in breach of the principle of equality.

Moreover, in the Italian case, the Constitutional Court decisions seem to suggest that Regions are free to develop integration policies for immigrants even if the latter are irregular. This occurs despite the fact that the regular status of immigrants is considered

not only by the national but also by the European authorities as a precondition for any immigrant integration measures.

Given the inconsistencies that both models present, a third solution may thus be suggested: immigration cooperative federalism.

If we accept to consider immigration as a shared policy, in the sense we have outlined above, cooperative federalism instruments would seem the best way to avoid overlapping and conflicting interventions, at the same time guaranteeing a coordinating role to the national state, thus emphasizing that immigration policy as a whole is a national concern¹³².

The inherent capacity of cooperative federalism to substantially derogate from the formal division of powers and its polymorphic nature represent other reasons why cooperative federalism seems specifically suitable within the field of immigration policy.

Cooperative federalism may in fact consist of both mere participation – where all territorial components take part in the decision-making process but a leading position is reserved to one of them – and of true collaboration – where the several territorial components are at a substantially equal position because they all have competences within the relevant field.

Thus, as far as immigration policy is concerned, cooperative federalism mechanisms may permit the varying of the intensity of the participation of the territorial units according to the specific immigration-related matter at stake. For instance, in relation to the entry and stay of immigrants a more substantial role may be recognised to the national state in the decision-making process. Consequently a ‘weak’ cooperative federalism, in the form of a participatory role for the sub-national units, may be preferred. On the contrary, in the field of welfare or cultural integration of immigrants, where sub-national units indeed have their own powers, cooperative federalism should be shaped so as to guarantee to the sub-national units the power to participate on an equal footing with the national legislator.

However, within this common legal framework, each legal system can establish its own equilibrium between territorial uniformity and federalism, thus taking into consideration its institutional peculiarities.

This may explain why in some legal systems ‘strong’ forms of cooperative federalism – where the consensus among all the territorial participants is required – have been enacted even in the area of the conditions of entry and stay of immigrants, despite the fact that this is usually a matter of concern for the national legislator.¹³³

¹³² For a similar view, see Eduard Roig, ‘Relaciones Intergubernamentales en Material de Inmigración: Desarrollo de un Modelo en Construcción’, in Eliseo Aja, José A Montilla and Eduard Roig (eds) *Las Comunidades Autónomas y la inmigración* (Tirant lo Blanch 2006) 76.

¹³³ This is the case of Canada where an agreement has been concluded between the federal government and the Quebec Province in order to allow the latter to select immigrants on the basis of their knowledge of the French language. Although the Canadian model of territorial allocation of powers relies on the idea of a clear-cut list of matters (so called water-tight compartment), immigration and agriculture are an exception of shared competences. This means that according to art 95 of the *British North America Act* (BNA) each Province may make laws in relation to immigration into the Province. However, the federal legislator may take action in the field as well. In the case of overlapping interventions, art 95 of the BNA states that: ‘any Law of the Legislature of a province relative to [...] Immigration shall have the effect in and for the province as long as far only as it is not repugnant to any Act of the Parliament of Canada’. Thus, although the federal legislator would have had the power to pre-empt the Province legislator in the immigration field, it has refrained to do so, preferring to deal with the issue by means of cooperative federalisms instruments. This clearly highlights the potentialities of cooperative federalism as a way to informally derogate to the otherwise applicable division

Co-operative federalism mechanisms have not been disregarded in the countries considered in our analysis. However, when they have been applied, they were ineffective. As far as the US is concerned, the federal statute on immigration – the INA – provides a framework within which to develop co-operative mechanisms between federal and state authorities in the field of the expulsion of aliens. However, this has only been enforced in few cases and it has not prevented states from autonomously pursuing their policies of contrast to illegal migrants.

In Italy, consultations with the Regions concerning the number of immigrants to be admitted annually in the country has not been an instrument that effectively takes into consideration the specific territorial needs for migrant workers at the regional level.

Concerning Belgium, it is because the uneven regional enforcement of the federal legislation in the issuing of work permits that the federal legislator has required a binding cooperative agreement. However, despite its adoption, uniformity has not been attained.

The complexity of reaching a compromise may also explain why the Belgian national legislator has thus far refrained from dealing with immigrant cultural-linguistic integration. Due to the different political approaches the Communities follow in relation to this area, the federal legislator has preferred to set the issue aside, and to allow the Flemish Authority to develop its own linguistic integration policy for immigrants.

Nevertheless, there are signs suggesting that, for the time being, cooperative federalism solutions could be more effectively pursued even in these countries.

Concerning the US, following the above-mentioned decision of the Supreme Court in relation to the Arizona Bill, it seems clear that a more decisive role for the sub-national units in the federal removal procedure will have been consecrated within the cooperative schemes already provided for by the INA.

Regarding Italy, one should recall that the massive influx of people coming from the Libyan coasts, soon before the fall of the Gaddafi regime, pushed the national government to conclude an agreement with the Italian Regions in order to organise these peoples' reception. This was done despite the fact that specific legal provisions assign the relevant powers exclusively to the national authorities.¹³⁴

Another reason suggesting that, at least in Europe, cooperative federalism could be further developed as a means of coordinating the measures of territorial units in the immigration area is the fact that the EU itself seems to adopt this model.

According to art 79 of the TFEU, the Union shall develop a common immigration policy. This consists of measures in the following areas: the condition of entry and residence and standards on the issue by Member States of long-term visas and residence permits (art 79 (2) lett a TFEU); the definition of the rights of third-country nationals residing legally in a

of competences. See Woehrling, 'Linguistic Requirement for Immigrants' (n 120); Matteo Nicolini, 'La Disciplina Canadese sull'Immigrazione tra Multiculturalismo, Secessionismo, e Riforme' in [2003] *Diritto Pubblico Comparato ed Europeo*, 726.

¹³⁴ See art 129 (1) lett h) and lett l), Decreto Legislativo 31 March 1998 (n 112). The agreement has been concluded the 26 of September 2012. It is available at <[www.statoregioni.it/Documenti/DOC_037760_100%20CU%20\(P.1BIS%20ODG\).pdf](http://www.statoregioni.it/Documenti/DOC_037760_100%20CU%20(P.1BIS%20ODG).pdf)> accessed 2 January 2013.

Member State (art 79 (2) lett b TFEU); illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation (art 79 (2) lett c TFEU) and combating trafficking in persons (art 79 (2) lett d TFEU). Art 79 (4) TFEU further mentions the area of integration of third-country nationals residing legally in the territories of EU Member States.

Thus, at the European level, immigration is not conceived of as a jurisdiction in itself, but rather as a political objective to be pursued through actions in different fields. The intensity of the intervention of each territorial component – respectively, the EU and the Member States – varies in relation to the specific area taken into consideration. Thus, in the fields of the conditions of entry and residence, the rights of third-country nationals, and illegal immigration, trafficking in persons, the EU may enact “hard-law” instruments. Cooperation with Member States is ensured not only by the voting procedure in the Council but also by the use of directives, which give a certain margin of discretion to the States¹³⁵. On the contrary, in the field of immigrant integration, the role of the EU is limited to sustaining Member States’ autonomous actions and developing soft-law coordination mechanisms according to the open method of the coordination scheme.

The EU case may thus be taken as an example of the potentialities, especially in terms of flexibility, that cooperative federalism could offer, even within immigration policy.

To conclude, since immigration federalism is a dynamic phenomenon the equilibrium of which is constantly challenged, cooperative federalism will allow each legal system to define its own balance between, on the one hand, the national interest in defining immigrant integration process and, on the other hand, the territorial differentiation that is the consequence of any real federalisation process. Cooperative federalism will guarantee that both the national and the sub-national authorities, each within their relevant granted powers, are on an equal footing in order to find the best means of taking actions within immigration policy.

¹³⁵ The directives thus far enacted in the immigration area are characterised by a limited degree of harmonisation and by the setting of minimum standards. This explain why many provisions in the directives itself expressly enable Member States to provide higher standards. This feature inevitably maintains a large political discretion by Member States in these fields.