GENERAL INTRODUCTION: TOWARDS AN ADMINISTRATION WITHOUT FRONTIERS?

MIGRATION OPPORTUNITIES IN EUROPE

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1. INTRODUCTION

ACCORDING to the *Black's Law Dictionary*, "migration" is a "movement (of people or animals) from one country or region to another". Such a brief definition, which would be more appropriate for an everyday dictionary than for a legal dictionary, does not give an idea of the complexity, both from the legal and from the social and political perspective, of the migratory phenomenon. Indeed, according to the *New Dictionary of the History of Ideas*, "migration is a central aspect of human existence"[1], as it is strictly linked to the development of mankind itself.

Migration is a central aspect not only of the history of mankind and of Europe, but also of the development of the European Communities and of the European Union. In the European Treaties, the idea of free movement, not only of goods, companies and services, but also of workers, was a peculiar and very important feature, especially if compared to the other free trade agreements. For example, in the case of the North American Free Trade Agreement (NAFTA), it is well known that a militarized border divides the United States and Mexico, preventing the inflow of Mexicans into the United States.

The free movement of persons which characterizes the European Union, especially after the establishment of the area of freedom, security and justice, is quite peculiar, as compared to a globalized world where goods,

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[1] Migration in World History, *in*: *New Dictionary of the History of Ideas*, ed. by M. HOROWITZ, Detroit, Charles Scribner's Sons, 2005, vol. 4, pp. 1446 ss.

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capital and services are quite free to circulate, but where workers still encounter many limitations, as it was written, more than ten years ago:

> "Economic globalization denationalizes national economies; in contrast, immigration is renationalizing politics. There is a growing consensus in the community of states to lift border controls for the flow of capital, information, and services and, more broadly, to further globalization. But when it comes to immigrants and refugees, whether in North America, Western Europe, or Japan, the national state claims all its old splendor in asserting its sovereign right to control its borders"[2].

Due to the importance and the complex development of migration policies in Europe, this report will address only few issues and will be based on a specific perspective.

The aim of the report is twofold: first of all, it will focus on the possibilities for people to move between European Union countries, and, secondly, on the legal consequences of such opportunities. Thus, the main object will be the movement of persons across the European internal borders, taking account of both *European citizens* and *third-country nationals* (once they have crossed the external borders or in the cases where they can avail themselves of European law relating to the free movement inside the European Union borders).

The report will not deal with aspects that are not strictly related to law and to the legal consequences of internal migration in the European Union. Migration, and especially European migration, may be studied from several different perspectives that take account of the many important social, sociological and economic problems involved. However, this report concentrates only on the legal aspects, and, moreover, only on few legal aspects, adopting the particular perspective of the study of the legal choices and opportunities that migration between European countries may offer to European citizens and to third-country nationals settled in Europe.

In order to introduce the problems that will be discussed, two cases are particularly illustrative.

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[2] S. SASSEN, *Losing control? Sovereignty in an age of globalization*, New York, Columbia University Press, 1996, p. 59. *Cf.* also A. PÉCOUD / P. DE GUCHTENEIRE, *Migration without borders: an investigation into the free movement of people*, UNESCO, Global Migration Perspectives, n. 27, April 2005, pp. 11 ff.

1.1. The Polish Plumber Case

In January 2004, the European Commission announced that it had presented a proposal for what it considered to be the "biggest boost to the Internal Market since its launch in 1993" (as declared by the Internal Market Commissioner, Mr. Frits Bolkestein)[3], that is, the Proposal for a Directive of the European Parliament and of the Council on services in the internal market[4]. One of the main objectives of the proposal was to provide "a balanced mix of measures involving targeted harmonisation, administrative cooperation, the country of origin principle and encouragement of the development of codes of conduct on certain issues"[5], with the aim to "implement in practice the country of origin principle, whereby once a service provider is operating legally in one Member State, it can market its services in others without having to comply with further rules in those 'host' Member States. Service providers would no longer be subject to a plethora of divergent national regulations, administrative requirements and a duplication of supervisory controls which raise costs and often dissuade service providers from engaging in cross-border activities"[6]. Four Articles (from 16 to 19) and a number of recitals dealt specifically with the country of origin principle and its derogations[7].

However, a strong reaction against the Directive was promoted by Euroskeptics. After a first appearance, in December 2004, in an article by Philippe Val, published in a December 2004 issue of the French satiric newspaper *Charlie Hebdo*[8], the idea that a Polish plumber and an Estonian architect could move to other European countries in order to offer their services at a cheap price was used by Philippe de Villiers, in an interview appeared on *Le Figaro* of 15 March 2005. According to Mr. de Villiers,

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[3] Press release n. IP/04/37 of 13 January 2004, available at http://europa.eu/rapid/

[4] Doc. COM(2004)2 def. of 13 January 2004 (version 1), of 25 February 2004 (version 2) and of 5 March 2004 (version 3). Reference is to the latest version.

[5] 6th recital of the proposed Directive.

[6] Press release n. IP/04/37, p. 3.

[7] Art. 16 (Country of origin principle) established that "Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field. Paragraph 1 shall cover national provisions relating to access to and the exercise of a service activity, in particular those requirements governing the behaviour of the provider, the quality or content of the service, advertising, contracts and the provider's liability".

[8] http://www.charliehebdo.fr/index.html.

the possibility for such workers to provide services in other countries according to the wage and social security provisions of their country of origin would have led to the "*démantèlement*" of the French (and Western European) economic and social model[9].

As an ironic answer to that interview, the then former Commissioner, Mr. Bolkestein, noted during a press conference he gave in France (and published on *Libération* of 25 April 2005) that he would have hired a Polish plumber due to the difficulties to find a good one for his second house in the countryside of Ramousies, in the Nord-Pas-de-Calais. Shortly afterwards, the major of the village in which Bolkestein had his second house gave him a list of available plumbers found in the phone book.

A strong debate developed, concerning both the principle of the country of origin and the referendum that had to be held in some countries in order to ratify the *Treaty establishing a Constitution for Europe*, signed in Rome on 29 October 2004. The "Polish plumber" became the symbol of wild liberalization and of the invasion of hungry and underpaid workers, willing to work at any hour of day and night in order to earn a few Euros.

Besides a few folkloristic and ironical aspects, such as the printing and diffusion in France, on behalf of the Polish tourist board, of a poster with a seductive image of a Polish plumber, to counter what was perceived as a negative French rhetoric about Eastern European workers and Poland[10], the issue was extremely important.

According to the new Commissioner for Internal Market and Services, Mr. Charlie McCreevy, the Commission had to "address concerns about the operation of the country of origin principle: we need to maintain this if we want to promote the cross-frontier provision of services. To do so we will need to address key issues such as giving greater confidence and certainty to businesses and consumers on what law will apply to cross-border

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[9] P. DE VILLIERS, La grande triche du oui, *in*: *Le Figaro*, 15 March 2005 (http://www.lefigaro.fr/archives/): "*Cette affaire est très grave, car la directive Bolkestein permet à un plombier polonais ou à un architecte estonien de proposer ses services en France, au salaire et avec les règles de protection sociale de leur pays d'origine. Sur les 11 millions de personnes actives dans les services, un million d'emplois sont menacés par cette directive. Il s'agit d'un démantèlement de notre modèle économique et social*".

[10] The poster features a Polish plumber who beckons French tourists to come to Poland, by saying "*Je reste en Pologne, venez nombreux*" (I am staying in Poland, do come over in numbers). It seems that it had the effect to increase tourism from France: *cf*. *Plombier polonais in*: fr.wikipedia.org.

transactions. We also need to build the trust and confidence between Member States necessary for it to operate effectively"[11].

However, as it is well known, the debate led to the failure of the referendum on the *Treaty establishing a Constitution for Europe* held in France on 29 May 2005 (where the negative votes have been 54,68%) and in the Netherlands on 1 June 2005 (where the negative votes have been 61,6%).

Also, the *Bolkestein directive* proposal was strongly modified, and the principle of the country of origin was replaced by the more general and less effective "freedom to provide services" established by Article 16 of the Directive n. 2006/123/EC of 12 December 2006, on services in the internal market[12].

1.2. The Case of Mr. Akrich

The second case deals with a third-country national immigration issue. The case is now quite well known, and its legal consequences will be discussed below (par. 3.2); however, it is useful to briefly recall the factual background.

In February 1989, Mr. Akrich, a Moroccan citizen, was granted leave to enter the United Kingdom on a one month's tourist visa; then he applied for a student visa, but his application was refused in July 1989 (and his subsequent appeal was dismissed in August 1990). In June 1990, he was convicted of attempted theft and use of a stolen identity card and, on the basis of a deportation order by the Secretary of State, he was deported to Algeria (on 2 January 1991). In January 1992, he returned to the United Kingdom, by using a false French identity card, but he was arrested and again deported in June 1992. One month later, he clandestinely returned to

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[11] Statement to the European Parliament on Services Directive, 8 March 2005, doc. SPEECH/05/149.

[12] On the services directive, see C. BARNARD, *Employment Rights, Free Movement under the EC Treaty and the Services Directive*, Mitchell Working Paper Series, 5/2008; C. BARNARD, Unravelling the services directive, *in*: *CMLR*, vol. 45, 2008, pp. 323 ff.; G. DAVIES, *Services, Citizenship and the Country of Origin Principle*, Mitchell Working Paper Series, 2/2007; G. DAVIES, The services directive: extending the country of origin principle and reforming public administration, *in*: *European Law Review* (*EL Rev.*), vol. 32, n. 2, April 2007; O. DE SCHUTTER / S. FRANCQ, La proposition de directive relative aux services dans le marché intérieur: reconnaissance mutuelle, harmonisation et conflits de lois dans l'Europe élargie, *in*: *Cahiers de droit européen* (*CDE*), 2005, n. 5-6, pp. 603 ff.

the United Kingdom, where he resided unlawfully and, on 8 June 1996, he married Mrs. Helina Jazdzewska, a British citizen.

One month after the wedding, he applied for leave to remain as the spouse of a British citizen. However, according to the British legislation, a person who applies for leave to enter the United Kingdom whilst a deportation order is in force against him must be refused leave to enter, even if he might otherwise qualify for leave to enter in some capacity.

As a person who enters the United Kingdom when a deportation order is in force against him is considered to be an illegal entrant and is thus liable to be removed from the United Kingdom, Mr. Akrich was detained (as from the beginning of 1997) and then deported (in August 1997), in accordance with his wishes, to Dublin (Ireland) where his spouse had established since June 1997, had been working since August 1997 and found a full-time work in a bank since January 1998.

In January 1998, Mr. Akrich applied for revocation of the deportation order and for entry clearance, as the husband of a British citizen. During an interview by a British official at the embassy in Dublin concerning their stay in Ireland and their intentions, Mr. and Mrs. Akrich declared that they were applying for entry clearance on the basis of the decision of the European Court of Justice in the *Singh* case and that they intended to return to the United Kingdom because they had heard - by solicitors and others in the same situation - about the right, conferred by European Union law, to be able to go back to the UK after staying six months in another Member State.

On 21 September 1998 the Secretary of State refused to revoke the deportation order and on 29 September 1998 the application for entry clearance was refused as well. The reason of the refusal was the consideration that Mr. and Mrs. Akrich moved to Ireland on a temporary absence deliberately to “manufacture” a right of residence for Mr. Akrich on his return to the United Kingdom and thus to evade the provisions of the United Kingdom’s national legislation.

In October 1998, Mr. Akrich appealed against those two decisions to an Immigration Adjudicator, who decided that, as a matter of law, there had been an effective exercise by Mrs. Akrich of Community rights and that Mr. Akrich did not constitute such a genuine and sufficiently serious threat to public policy as to justify the continuation of the deportation order. Against such a decision, the Secretary of State appealed to the Immigration Appeal Tribunal, which referred the question to the European Court of Justice.

The decision of the Court of Justice, discussed below, seems to uphold Mr. and Mrs. Akrich's strategy. Very clearly, Advocate General Gelhoedm, in delivering his opinion in the case *Akrich*, stated that

> "Community law makes it possible for a national of one Member State to install himself in another Member State. A citizen of the Union may have all kinds of reasons for installing himself in another Member State. One such reason may be that another Member State offers him a more favourable legal regime. [...] Community law can have no complaint with such mobility; rather it is precisely the objective of Community law to promote mobility.
> The installation of Mr and Mrs Akrich in Ireland must be viewed as a use of EC law for a purpose not contemplated by the EC legislature but which is inherent in EC law. The EC legislature did not intend to create a right that can be used in order to evade national immigration laws but did create a right in favour of a national of a Member State to install himself in another Member State together with his spouse. Installation in that other Member State constitutes the key element of the freedom given by Community law to nationals of the Union.
> In other words, the installation of a worker in another Member State in order to benefit from a more favourable legal system is by its nature not a misuse of Community law"[13].

1.3. Migration Problems and Opportunities

What do a Polish plumber and Mr. Akrich, *i.e*. a Morocco citizen, have in common? There are at least two sets of common points.

First of all, both are trying to get some advantages through the use of European law, which can be applied to them only in so far as they move between EU Member States, that is, only if they migrate between two different countries. In particular, the hypothetic Polish plumber is trying to get more clients, by offering lower prices for his services than those offered by local plumbers, while Mr. Akrich is trying to be allowed to lawfully reside in the United Kingdom, although British law would not allow him to do so.

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[13] Opinion of Advocate General Geelhoed delivered on 27 February 2003, in the case C-109/01, *Secretary of State for the Home Department v Hacene Akrich*, §§ 179-181.

Then, both kinds of benefits searched by the individual may cause - and, indeed, have caused - reactions from national governments, as they constitute an intrusion into two core aspects of the modern state: the rules concerning membership of the national community (rules on citizenship and on immigration) and the rules concerning the working and social conditions (beyond what is expressly agreed at the European level).

The two examples show how wide and different are the opportunities linked to the choice of moving to other European countries. Sometimes, the benefit searched is a better or more favorable legal or economic environment; sometimes, moving to another country is an instrument to become a "European worker", in order to "manufacture" a situation where European law may be applied (differently from "purely internal" situations, where only national law may be invoked).

Due to the extremely wide topic, only few issues will be discussed here. It will be discussed briefly how European law created new opportunities for European citizens, in a more extensive way than that envisaged by the framers of the European Treaties, who aimed mainly at creating a common market where workers would have been able to find more job opportunities (par. 2). Then, it will be briefly illustrated how European policies and judicial decisions are creating opportunities also for third-country nationals (par. 3). Finally, in the concluding remarks, it will be described how many different "kinds" of persons have been created by European law and what are the problems, fears and reactions caused by migration opportunities.

2. The Free Movement of European Citizens

2.1. From the Free Movement of Workers to the Free Movement of European Citizens

Due to the evolution of European legislation and especially of the case law of the European Court of Justice (and to its growing acceptance by the national courts, and especially by the Constitutional Courts), European workers and citizens have acquired little by little an increasing number of rights.

This evolution relates both to the number of recipients and to the kind of rights assured by European law.

As concerns the number of recipients, the Court of Justice, who has the monopoly to interpret the concepts to be applied by national courts, established a wide definition of "worker", and, on the opposite, a very narrow

definition of "public administration". In this way, the Court increased the opportunities for Europeans to move to other Member States in search of work. The original scope of the European Treaties was to assure the movement of workers, that is, of persons as economic factors: thus the policy chosen by the drafters of the European Treaties was to favor a very specific kind of migration.

However, the secondary legislation and the Court little by little extended the scope of the Treaties: free movement was extended to specific categories of persons (students, pensioners, etc.) and, then, by the Maastricht Treaty (which inserted the now Article 17 TEC), to all European citizens, by the formal creation of a "European citizenship"[14].

Although the scope of the rules on European citizenship seemed to be very limited, as "citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby" (Art. 17.2 TEC), it has been widened by the Court of Justice, so that - in short and roughly - the rights to move, to reside and not to be discriminated are extended to all persons who move to another Member State, even if they do not aim at pursuing any economic activity[15]. And, moreover, the recent case law seems to move towards the recognition of such rights also to "static" EU citizens that would acquire - without the need to move - the same rights as the citizens who have availed themselves of the right to move to another country[16].

As concerns the rights conferred by European law, the Court interpreted and extended the rights of departure, entry and residence and to family re-

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[14] See esp. J. SHAW, Citizenship and the European Union, *in*: *Law of the European Union*, Houndmills, Palgrave 2000, pp. 370 ff.; S. DOUGLAS-SCOTT, In search of Union citizenship, *in*: *Constitutional law of the European Union*, ed. by C. HARLOW etc., Longman, 2002, pp. 479 ff.

[15] Although some rights (*e.g.* the right to vote and to stand as a candidate at municipal elections in the host Member State, that to vote and to stand as a candidate in elections to the European Parliament in the Member State of residence, under the same conditions as nationals of that State, that to diplomatic or consular protection in the territory of a third country and that to petition the European Parliament and to apply to the Ombudsman) are available to all European citizens (and, as concerns the right to petition the European Parliament and to apply to the Ombudsman also to "any natural or legal person residing or having its registered office in a Member State", *i.e.* non-citizens), the most important rights are related to movement for economic purposes.

[16] E. SPAVENTA, Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects, *in*: *Common Market Law Review* (*CMLR*), 2008, vol. 45, pp. 30 ff.

unification (established by Regulation n. 1612/68 and Directive n. 68/360) and to remain in the territory of a Member State after having been employed there (established by Regulation n. 1251/70); it interpreted narrowly the exceptions (that is, the Member States' right to derogate from the free movement provisions on grounds of public policy, public security or public health established by Directive n. 64/221).

One of the most important contributions of the case law relates to the expansion of the social rights granted by European law, by interpreting the "same social and tax advantages as national workers" clause established by Art. 7.2 of Regulation n. 1612/68[17].

2.2. From Obstacles to New Opportunities: The Choice of the Most Favorable National Law

The case law of the European Court of Justice created many opportunities for European workers and, then, for European citizens. Some of the most well-known cases are those related to "health tourism", "social tourism", and so on.

Those are cases of (temporary) migration caused not by the typical migratory reasons (search for a job, family reunification, etc.) but by the search of better health care or of social security benefits (such as the job-seeker allowances) that are provided only by some countries. The scope was clearly underlined by Advocate General Ruiz-Jarabo Colomer in the case *Müller-Fauré*:

> "There is another reason why I believe there would be a relatively high number of patients who, if they could be certain of being reimbursed, would choose to travel to another Member State in order to see a spe-

[17] See the judgments of the Court of Justice of 30 September 1975, in case 32/75, *Cristini-Fiorini*; of 31 May 1979, in case 207/78, *Even*; of 27 March 1985, in case 249/83, *Hoeckx*; of 17 April 1986, in case 59/85, *Reed*; of 18 June 1987, in case 316/85, *Lebon*; of 21 June 1988, in case 39/86, *Lair*; of 21 June 1988, in case 197/86, *Brown*; of 12 May 1998, in case C-85/1996, *Martínez-Sala*; of 15 September 2005, in case C-258/04, *Ioannidis*; of 18 July 2006, in case C-406/04, *De Cuyper*. See E. ELLIS, Social advantages: a new lease of life?, *in*: *CMLR*, vol. 40, 2003, pp. 639 ff.; F. PENNINGS, Co-ordination of social security on the basis of the state-of-employment principle: time for an alternative?, *in*: *CMLR*, vol. 42, 2005, pp. 67 ff.; V. HATZOPOULOS, A (more) social Europe: a political crossroad or a legal one-way? Dialogues between Luxembourg and Lisbon, *in*: *CMLR*, vol. 42, 2005, pp. 1599 ff.

> cialist. They would be those who, having the means to afford it, would not wish to wait a relatively long time before being seen by a doctor. The patient seeks, with legitimate eagerness, to do everything in his power to look after himself. Let us bear in mind that, as far back as the eighteenth century, Molière was aware of that human tendency since Argan, the main character in his comedy *Le malade imaginaire*, sought to marry his daughter Angélique, irrespective of her wishes, to a doctor in order to ensure for himself treatment for any complaint from which he might ail"[18].

European secondary legislation and ECJ case law have shaped and reshaped such cases, opening up new possibilities for migrant citizens, but also providing for some limitations, such as the need of a real link with the country that provides the benefits. It seems that, although some new possibilities have been created by the Court of Justice, through an incremental approach, the case law does not suggest (yet) that *all* migrant EU citizens have immediate right to claim *all* benefits in the Member States on the same conditions as nationals.

In short, the Court of Justice has used the provisions on the European citizenship to grant workers' rights to workers that could not benefit from them, or even to non-workers. Two examples may be given[19].

The first (case *Collins*) has to do with a dual (US and Irish) citizen, born in the US, who, as part of his college studies, spent one semester in the United Kingdom in 1978 and then returned to the UK in 1980 and 1981,

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[18] Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 22 October 2002, in the case C-385/99, *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*.

[19] For a deeper discussion, see A.P. VAN DER MEI, *Free movement of persons within the European Community: cross-border access to public benefits*, Oxford, Hart, 2003; F. PENNINGS, Co-ordination of social security on the basis of the state-of-employment principle: time for an alternative?, *in*: *CMLR*, vol. 42, 2005, pp. 67 ff.; V. HATZOPOULOS, A (more) social Europe: a political crossroad or a legal one-way? Dialogues between Luxembourg and Lisbon, *in*: *CMLR*, vol. 42, 2005, pp. 1599 ff.; C. NEWDICK, Citizenship, free movement and health care: cementing individual rights by corroding social security, *in*: *CMLR*, vol. 43, 2006, pp. 1645 ff.; K. SIEVEKING, ECJ Rulings on Health Care Services and their Effects on the Freedom of Cross-Border Patient Mobility in the EU, *in*: *European Journal of Migration and Law*, vol. 9, 2007, pp. 25 ff.; see also M. MOORE, Freedom of movement and migrant workers' social security: an overview of the case law of the Court of Justice, 1997-2001, *in*: *CMLR*, vol. 39, 2002, pp. 807 ff.

for a stay of approximately 10 months, during which he did part-time and casual work in pubs and bars and in sales. Then he went back to the US, to Africa and, on 31 May 1998, he returned to the United Kingdom in order to find work there. On 8 June 1998, he claimed a jobseeker's allowance, which was refused by decision of an adjudication officer of 1 July 1998, on the ground that he was not habitually resident in the United Kingdom. Then Mr. Collins appealed to a Social Security Appeal Tribunal, which upheld the refusal, and to the Social Security Commissioner, which referred the case to the Court of Justice.

The Court ruled that

> "in view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 48(2) of the Treaty - which expresses the fundamental principle of equal treatment, guaranteed by Article 6 of the Treaty - a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.
> The interpretation of the scope of the principle of equal treatment in relation to access to employment must reflect this development, as compared with the interpretation followed in *Lebon* and in Case C-278/94 *Commission v Belgium*"[20].

The Court openly distinguished this case from its previous judgment in *Lebon* (where it had ruled that social advantages apply only to *actual* workers and not to those who move in search of employment)[21], also because of the new provision on European citizenship. Thus, European citizenship influences the interpretation of Art. 48 on the free movement of workers, although Member States have the right to verify that a genuine link exists between the person seeking work and the employment market of the country.

The second example is the case *Trojani*, which deals with the complex relationship between right of residence, working conditions and social security benefits. Mr. Trojani, a French national, went to Belgium in 2000 (after a previous stay in 1972 as a self-employed person in the sales sector), where he resided, without being registered, first at a campsite and

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[20] Judgment of the Court of Justice of 23 March 2004, in case C-138/02, *Brian Francis Collins v Secretary of State for Work and Pensions*, §§ 61-63.

[21] Judgment of the Court of Justice of 18 June 1987, in case 316/85, *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon*.

then in Brussels. After a stay at a youth hostel, he was given accommodation in a Salvation Army hostel, where in return for board and lodging and some pocket money he did various jobs for about 30 hours a week as part of a personal socio-occupational reintegration program. He then applied for the minimum subsistence allowance (*minimex*), which was refused on the grounds that, firstly, he did not have Belgian nationality and, secondly, he could not benefit from the application of Regulation n. 1612/68. Mr. Trojani appealed to the *Tribunal du travail* of Brussels, which referred the case to the Court of Justice.

The Court ruled that the right to reside according to Art. 18 TEC is not unconditional; that in case of a lawful residence (according to national or European law), the immigrant European citizen enjoys the benefit of the fundamental principle of equal treatment; and that, however,

> "it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence. In such a case the host Member State may, within the limits imposed by Community law, take a measure to remove him. However, recourse to the social assistance system by a citizen of the Union may not automatically entail such a measure"[22].

3. The Free Movement of Third-Country Nationals

For a long time, with the exception of the third-country nationals who were family members of a European citizen (thus falling under the provision of Article 10 of Regulation n. 1612/68), the conditions concerning the entry, stay and other conditions of third-country nationals were deemed not to concern the internal market, and thus subject only to national regulation. Only little by little, and also due to some ECJ[23] cases, did immigration become an increasingly important issue in the European integration agenda.

In brief, passing through the TEU mechanisms of intergovernmental cooperation, European migration policy has been included in the first pillar

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[22] Judgment of the Court of Justice (Grand Chamber) of 7 September 2004, in case C-456/2002, *Michel Trojani v Centre public d'aide sociale de Bruxelles*, §§ 32, 40, 45.

[23] *Cf. Free movement of persons in Europe: legal problems and experiences*, edited by H.G. Schermers *et al*., Dordrecht, Nijhoff, 1993.

by the Amsterdam Treaty, although Treaty principles are quite broad and vague and secondary legislation is extremely fragmented.

3.1. The Fragmented Regulation of Third-Country Nationals

In short, the common framework of migratory movements is defined by Article 2 TEU, which establishes that one of the objectives of the European Union is

> "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime"

and by Articles 61 ff. of the TEC.

However, the general framework is fragmented at different levels: the Protocols appended to the Treaty provide for exception and opting in/out clauses, especially as concerns the United Kingdom, Ireland and Denmark; the Schengen agreement and *acquis* have been transferred into the first pillar, but subject to the above-mentioned limitations; and secondary legislation is still far from providing a comprehensive framework, due to lack of agreement on many important aspects.

The main issues concerning the rights of third-country immigrant workers - as compared to the rights of EU workers - are the regulation of their entry, the equality as concerns their working conditions, their conditions of stay and their right to family reunification.

Regarding the regulation of entry of third-country nationals, there is no common European legislation, as the Commission proposal for a Directive on the conditions of admission and stay of third-country workers[24] has not found Member State consent. Only administrative cooperation and regulation of specific sectors (as in the case of the Directive on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerative training or voluntary service)[25] have been achieved.

As concerns the conditions of stay, only the status of immigrants who are long-term residents has been regulated, by Directive n. 2003/109.

[24] COM(2001) 386 of 11 July 2001.

[25] Directive n. 2004/114/EC of 13 December 2004.

Thus, long-term residents enjoy ample rights to move to other Member States, while short-term residents enjoy only limited rights to move in the Schengen area for a period of up to three months and subject to certain conditions (the possession of a valid travel document, and of a visa if required; being able to demonstrate the purpose of the journey and the possession of sufficient means of subsistence for the period of stay and for the return).

3.2. The Right to Family Reunification beyond National Limitations?

As concerns family reunification, it is necessary to distinguish between third-country nationals who are married (or are relatives) to EU citizens and third-country nationals who are married (or are relatives) to third-country nationals lawfully resident in the European Union. Indeed, although family reunification is not considered to be a general fundamental right falling under the provision of Article 8 of the European Convention on Human Rights (ECHR)[26], it is a very important aspect of migration policies (also because it is one of the widest sources of legal immigration) and it is provided by both the regulation concerning the free movement of European workers (Article 10 of Regulation n. 1612/68, and now Article 16.2 of Regulation 2004/38) and some specific rules concerning the status of third-country immigrants.

As concerns the reunification of third-country nationals with their families, important common rules have been provided by the Directive on the right of third-country nationals to family reunification[27] and by other

[26] Judgment of the European Court of Human Rights of 31 January 2006, *Rodrigues da Silva and Hoogkamer v the Netherlands*, application n. 50435/99, where it was held (§ 39) that "Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest" (§ 39). *Cf*. also the judgment of 31 July 2008, *Darren Omoregie and others v Norway*, application n. 265/07, where it was held (§ 54) that "the Convention does not guarantee the right of an alien to enter or to reside in a particular country".

[27] Directive n. 2003/86/EC of 22 September 2003.

sources (as the Association Agreement n. 1/80 between the European Community and Turkey)[28].

As concerns the reunification of third-country nationals who are married to or family members of European Union citizens, Regulation n. 1612/68 (and now Regulation n. 2004/38) applies. In this field, the Court of Justice gave an extremely important contribution, favoring EU citizens who had some kind of trouble with their own national legislation[29]. After the first attempts of third-country nationals to circumvent the limitations set by national legislation, where the Court of Justice found that EC law was not applicable to "merely internal situations"[30], in the case *Singh*, concerning an Indian citizen who married a British citizen and lived and worked for a few years in Germany, and their right to family reunification also after the return to the home country, the Court held that European laws

> "require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there … and returns to establish himself or herself … in the territory of the State of which he or she is a national. The spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and resided in the territory of another Member State"[31].

The *Akrich* case, described above, although quite similar, differed in many aspects, and especially for the reason that Mr. and Mrs. Akrich moved to another country only to be able to avail themselves of EC law.

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[28] *Cf.* K. GROENENDIJK, Family Reunification as a Right under Community Law, *in*: *European Journal of Migration and Law*, vol. 8, 2006, pp. 215 ff.

[29] *Cf.* N. REICH / S. HARBACEVICA, Citizenship and family on trial: a fairly optimistic overview of recent Court practice with regard to free movement of persons, *in*: *CMLR*, vol. 40, 2003, pp. 615 ff.; G. BARRETT, Family matters: European Community law and third-country family members, *in*: *CMLR*, vol. 40, 2003, pp. 369 ss.

[30] Judgments of 27 October 1982, joined cases 35 & 36/82, *Elestina Esselina Christina Morson and Sewradjie Jhanjan v Netherlands*; of 5 June 1997, *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen*, joined cases C-64/96 & C-65/96.

[31] Judgment of the Court of Justice of 7 July 1992, in case C-370/90, *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*.

In that case the Court ruled that:

"Where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State" (third ruling of the case *Akrich*)

and that

"Where a national of a Member State married to a national of a non-Member State with whom she is living in another Member State returns to the Member State of which she is a national in order to work there as an employed person and, at the time of her return, her spouse does not enjoy the rights provided for in Article 10 of regulation No 1612/68 because he has not resided lawfully on the territory of a Member State, the competent authorities of the first-mentioned Member State, in assessing the application by the spouse to enter and remain in that Member State, must none the less have regard to the right to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, provided that the marriage is genuine" (fourth ruling of the case *Akrich*).

The *Akrich* case may be read - and it was read in such a way by a certain number of commentators - as the Court opening the doors to the use of European law in order to circumvent the national law, with the only exception of marriages of convenience. According to the judgment of the Court, thus, an "abuse" of EC law would occur only in cases of marriages of convenience[32], and not in the case where a European citizen, accompanied by his or her partner, migrates to another country - with the aim to come back soon to his or her home country - and works there for a while[33].

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[32] "Article 10 of Regulation No 1612/68 is not applicable where the national of a Member State and the national of a non-Member State have entered into a marriage of convenience in order to circumvent the provisions relating to entry and residence of nationals of non-Member States" (second ruling of the case *Akrich*).

[33] The problem of abuse of EC law is an increasingly important issue, and is the object of a growing attention by both the case law and the researchers of EC law.

What matters is that such a third-country national "must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated" (first ruling).

However, some doubts remained, concerning the "lawful residence" requirement established in the fourth ruling. Three possibilities (or "scenarios") have been envisaged[34]: according to the first, Member States should grant residence to third-country nationals that have lawfully resided in a different Member State, according to the latter state's legislation; according to the second, Member States do not have to recognize the lawful residence granted by other Member States (in order to prevent such individuals from "gaining" from staying in other states, in situations where they would not be eligible to family reunification under national law); and, according to the third, prior lawful residence in the Member State of final destination is necessary only if there has been a previous stay (that is, Member States could refuse residence only if the third-country national has been previously expelled, as in the *Akrich* case). The first two situations may be described also by reference to the application of a kind of principle of mutual recognition, although in such cases what matters is not the mutual recognition of the conditions of entry of third-country nationals, but only the fact that they are the legal and lawfully married partners (or sons, etc.) of an EU citizen.

The Court, recently, has solved (and, in short, eliminated) the problem of the "lawful residence", eventually clarifying its previous judgment.

In the case *Eind*, decided on 11 December 2007, the Court ruled that

> "When a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third-country national who is a member of his family has a right … to reside in the Member State of which the worker is a national, even where that worker does not carry on any effective and genuine economic activities. The fact that a third-country national who is a member of a Community worker's family did not, before residing in the Member State where the worker was employed, have a right under national law

See the recent essays of R. DE LA FERIA, Prohibition of abuse of (Community) law: the creation of a new general principle of EC law through tax, *in*: *CMLR*, vol. 45, 2008, pp. 395 ff.; K. ENGSIG SØRENSEN, Abuse of rights in Community law: a principle of substance or merely rhetoric?, *in*: *CMLR*, vol. 43, 2006, pp. 423 ff.

[34] M. ELSMORE / P. STARUP, Comment on *Case C-1/05, Yunying Jia v. Migrationsverket, Judgment of the Court (Grand Chamber), 9 January 2007*, *in*: *CMLR*, 2007, vol. 44, pp. 793 ff.

> to reside in the Member State of which the worker is a national has no bearing on the determination of that national's right to reside in the latter State"[35].

And, eventually, the Court clearly established, in the very recent case *Metock*, that it does not matter what the legal status of the third-country citizen is and where the EU national and the third-country national married, as

> "Directive 2004/38/EC … precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive.
> Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State"[36].

4. Migratory Opportunities and Strategies

The brief analysis carried out shows the increasing complexity of the relationship between the State and its inhabitants. As compared to the traditional citizen vs. non-citizen divide, the situation is today far more complex, as many different categories of citizens and non-citizens may now be envisaged.

Moreover, different rights are accorded to each of these categories and new rights are afforded by the European Union legal system. Although this fragmented situation may create uncertainty and lead to an increase of the level of litigation before the European judges, it opens up new possibilities for European and non-European citizens and companies.

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[35] Judgment of the Court of Justice (Grand Chamber) of 11 December 2007, in case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind.*

[36] Judgment of the Court (Grand Chamber) of 25 July 2008, in case C-127/08, *Blaise Baheten Metock et al v Minister for Justice, Equality and Law Reform*.

Thus, three aspects will be briefly underlined, as a starting point for further research. The first relates to the different "kinds" of persons that have been created by European law; the second, to the opportunities and choices created by European law; and the third, to the problems, fears and reactions caused by migratory opportunities.

4.1. The Different Categories of Migrants

The traditional idea of a sharp distinction between citizens and foreigners, whose origins may be traced back at least to the Greek and Roman tradition[37], is a fundamental aspect of the modern state.

Without even trying to enter into the debate concerning the notion and limits of the concept of citizenship, it may be simply recalled that, a quarter of a century ago, the Supreme Court of the United States stated that

> "the exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community"[38].

As an effect of European integration, it is now possible to distinguish between at least six different categories of foreigners[39]. The first category is that of *European Union workers*, *i.e.* citizens of a Member State who move to another European Union country in search of work (or, to a certain extent, for the other reasons specifically covered by European secondary legislation, as students, pensioners, tourists, service recipients, etc.). A second category, which is only a temporary (or "transitional") category, is that of the *workers of the new Member States*, due to the transitional measures that limit (temporarily) the movement of their citizens (or of certain categories of citizens). A third category is that of *European Union*

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[37] See G. CRIFÒ, *Civis. La cittadinanza tra antico e moderno*, Roma-Bari, Laterza, 2005; P. COSTA, *Cittadinanza*, Roma-Bari, Laterza, 2005.

[38] US Supreme Court, *Cabell v Chavez-Salido*, 454 U.S. 432 (1982), at 439. On the development of US citizenship, see J.H. KETTNER, *The development of American citizenship, 1608-1870*, Chapel Hill, University of North Carolina Press, 1978.

[39] The situation gets even more complicated when considering the differences (concerning esp. border controls) between Schengen and non-Schengen countries.

citizens, *i.e*. those citizens of a Member State who move to other countries not in search of work or for the other reasons covered by specific European rules. The fourth category is that of *third-country long-term resident immigrants* (who enjoy a number of rights under the Directive n. 2003/109/EC). The fifth, that of *third-country non long-term* (i.e. *short-term*) *resident migrants*. Finally, a sixth category is that of *illegal* (or *undocumented*) *immigrants*.

Thus, especially as concerns the so-called area of freedom, security and justice created by the European Union Treaty, a very fragmented situation may be noted. Although many terms have been used to describe the legal position of foreigners that enjoy peculiar rights (as denizenship[40], civic citizenship, and so on)[41], it is probably more accurate to attempt to briefly describe the number of rights warranted to each category.

Each category enjoys a decreasing number of rights. *Citizens* in their own countries enjoy the widest number of rights, *i.e*. the three categories of rights (civil, political and social) sketched by T.H. Marshall[42]. However, especially as concerns social rights, it must be underlined that in each country such rights are warranted according to different criteria and systems (*e.g*. Bismarckian vs. Beveridgian model) and are usually afforded according to the available amount of public economic resources.

As concerns the two other main categories of European citizens, *i.e*. *European citizens* and *European workers*, both enjoy similar civil rights (afforded at first by the European Communities Treaties and then by the provisions on European citizenship of the Treaty on European Union) and political rights (afforded mainly by the citizenship provisions). There is, indeed, a difference as concerns the so-called social rights, that are warranted to European workers and not to European citizens, although there is

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[40] T. HAMMAR, *Democracy and the nation state: aliens, denizens and citizens in a world of international migration*, Aldershot, Avebury, 1990; E. OZLEM ATIKCAN, *Citizenship or Denizenship: The Treatment of Third Country Nationals in the European Union*, Sussex European Institute, SEI Working Paper n. 85, May 2006.

[41] For a discussion, see C. JOPPKE, The Legal-domestic Sources of Immigrant Rights: The United States, Germany, and the European Union, *in*: *Comparative Political Studies*, 2001, vol. 34, pp. 339 ff.; R. PENNINX / M. BERGER / K. KRAAL, *The Dynamics of International Migration and Settlement in Europe: A State of the Art*, Amsterdam, Amsterdam University Press, 2006 (IMISCOE Joint Studies); *Migration and Citizenship: Legal Status, Rights and Political Participation*, edited by R. BAUBÖCK, Amsterdam, Amsterdam University Press (IMISCOE Reports), 2007.

[42] T.H. MARSHALL, *Citizenship and Social Class*, Cambridge, Cambridge University Press, 1950.

a trend to warrant such rights also to European citizens, because of the incremental approach of the Court of Justice (as in the case *Collins*, discussed above, at par. 2.2) and of the European legislation.

Third-country nationals, finally, are given only very limited political and social rights, and even economic rights (such as the right to pursue an economic activity) are usually limited. As seen above (par. 3.1), there is a difference between long-term residents and other third-country immigrants.

European workers and European citizens are "privileged" immigrants, while third-country nationals are non-privileged immigrants. The latter enjoy different rights, and have different naturalization and/or integration perspectives, depending both on their status and on the country where they reside. These differences may lead to "asylum shopping" (although there should not be any more "refugees in orbit" or "applicants in orbit", *i.e.* applicants waiting for a positive answer from the many countries where they applied for asylum, as common criteria have been established) or to "naturalization shopping" (as periods set by national legislation may vary, usually between three to five years, third-country nationals may naturalize in one State and then move to another one), or, finally, to "citizenship shopping".

4.2. Migration Opportunities and the Possibility of "Choosing the Law"

Due to the possibility to choose the country where to settle, to reside or to work, Europe is not only and not anymore just a market for economic activities. Indeed, it is a field where countries and public administrations are encouraged to compete against each other, giving rise to the mechanism that Charles Tiebout defined as "voting by foot"[43].

Law shopping and *regulatory competition*[44] are phenomena that now characterize not only the European economic activities, but also fields

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[43] C.M. TIEBOUT, A pure theory of local expenditures, *in*: *Journal of Political Economy*, 1956, vol. 64, pp. 416 ff.

[44] For a synthesis, *cf.* K. GATSIOS / P. HOLMES, Regulatory Competition, *in*: *The New Palgrave Dictionary of Economics and the Law*, edited by P. NEWMAN, London - New York, Macmillan Reference, 1998, vol. 3, pp. 271 ff., who define regulatory competition "as the process where regulators deliberately set out to provide a more favorable regulatory environment, in order either to promote the competitiveness of domestic industries or to attract more business activity from abroad"; S. WOOLCOCK, Competition among rules in the single European market, *in*: *International Regulatory Competition and Coordination - Perspectives on Economic Regulation in Europe and the United States*, edited by W. BRATTON / J.

more strictly linked to the personal sphere. For example, as it is happening in the United States, it will soon become possible to choose the country were to celebrate a gay marriage (as it is now allowed in Spain) and have it recognized by the home country[45].

According to recent researches, the possibility to *choose the law*[46], *i.e*. the possibility to use the laws (even public laws) of another legal order by moving there or by using other devices, and *law shopping* (or *regulatory arbitrage*), *i.e*. the possibility to use rules or other characteristics of other legal orders by attracting them (*i.e*. "shopping" them) to the original legal order, are phenomena of an increasing importance in European integration[47].

Very briefly, the most important aspects of this phenomenon are its elements, its limits, the role of the different actors involved and their reactions.

There are three main elements: the difference (of rules, regulations, administrative practice, judicial review) between the legal orders, the link (a linkage rule or other instrument) that lets interested people choose the rule or another factor of another legal order and, as concerns specifically the "arbitrage" in the strict meaning, the possibility to attract ("shop") the rule of another legal order to the reference (original) legal order.

The limits are, broadly speaking, three. The first is, of course, the lawfulness of the phenomenon: "choosing the law" is a lawful activity, so there is the need to respect all applicable laws. The second is the need of a difference between the different legal orders (if it disappears, there is no more interest in choosing the law of another country). The third is the set of legal limits established by a superior legal order that, in a certain way, establishes the "rules of the game". For example, as concerns the European

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MCCAHERY / S. PICCIOTTO / C. SCOTT, Oxford, Clarendon Press, 1996, pp. 289 ff.; J.-M. SUN / J. PELKMANS, Regulatory Competition in the Single Market, *in*: *Journal of Common Market Studies*, 1995, vol. 33, pp. 67 ff.

[45] At the moment, the European citizenship regulation only requires Member States to "facilitate entry and residence of … the partner with whom the Union citizen has a durable relationship, duly attested" (Art. 3 and *cf*. Art. 2 point 2).

[46] The expression "choosing the law" will be used, in order to distinguish it from the expression "choice of law" (also called "conflicts of laws"), which has to do with the specific question of which jurisdiction's law should apply in a given case.

[47] For a deep analysis on the phenomenon, *cf*. M. GNES, *La scelta del diritto. Concorrenza tra ordinamenti, arbitraggi, diritto comune europeo*, Milano, Giuffrè, 2004; S. CASSESE, L'arena pubblica: nuovi paradigmi per lo Stato, *in*: *Rivista trimestrale di diritto pubblico*, 2001, pp. 601 ff.; *La concorrenza tra gli ordinamenti giuridici*, edited by A. ZOPPINI, Roma-Bari, Laterza, 2004.

Union, the most important limits are the derogations to the freedoms established by the European Communities Treaty and the abuse of rights doctrine[48].

Three categories of actors are usually involved in the law shopping: private parties (such as multinational companies, assisted by international law firms, but also private persons, as in the case of Mr. and Mrs. Akrich) are usually the promoters of the law shopping; states (or international organizations) usually react to the law shopping by private parties, but sometimes they may take advantage from the phenomenon of choosing the law[49]; other actors, such as judges, international institutions, lobbies, etc. may influence the outcome of the phenomenon.

Finally, the phenomenon of "choosing the law" may be viewed in a dynamic way. After the "shopping" has been carried out by the interested actors (*e.g*. the patient willing to receive a better hospital care abroad, finding the way to send the bill to his home country health care system), there may be different reactions from the states, especially when there may be important consequences on the public finances (as in the case of health care)[50]. It is possible to distinguish three different kinds of reactions: uni-

[48] In brief, according to the European freedoms and to European principles as the mutual recognition principle, Member States are obliged to receive foreign goods, workers, services, etc., even if the goods, workers and services have been produced or provided by their own citizens in another Member State. Only in order to prevent abuse of EC rights (as established, on a case-by-case approach, by the Court of Justice) or for the specific reasons established by the Treaties (so-called "derogations", as defined, again, by the judge of the superior legal order, *i.e*. the European Court of Justice) are Member States allowed to limit the phenomenon.

[49] As in the tobacco litigation, where the European Commission, using a *forum shopping* device, decided to sue a few tobacco multinationals, deemed to cooperate in the illegal import of cigarettes to Europe, in a US Court, also in order to use the more favorable US treble-damages rule (*cf*. Court of First Instance, judgment of 15 January 2003, *Philips Morris International, R.J. Reynolds Tobacco Holdings and others v Commission*, joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01).

[50] *Cf*. the studies realized for the European Commission by W. PALM / J. NICKLESS / H. LEWALLE / A. COHEUR, *Implications of recent jurisprudence on the co-ordination of health care protection systems - General report produced for the Directorate-General for Employment and Social Affairs of the European Commission*, Association internationale de la mutualité - AIM, May 2000; Haut Comité Santé, *The internal market and health services*, 17 December 2001; Commission staff working paper, *Report on the application of internal market rules to health services. Implementation by the Member States of the Court's jurisprudence*, Brussels, 28 July 2003, doc. SEC(2003)900. *Cf*. also A. PAULUS / S.

lateral reactions (change of national legislation to limit the possibility of choosing the law), multilateral reactions (agreements between states in order to decrease or eliminate the differences, or in order to strengthen the barriers, for example increasing multinational cooperation, as in the case of the fight against tax heavens) and competitive reactions (which give rise to regulatory competition, etc.).

The short explanation of the mechanisms and consequences of the phenomenon of "choosing the law" suggests that Europe is a fragmented but strictly linked arena, where citizens, non-citizens, companies, rights and duties may circulate almost freely, subject only to the rules established by European legislation. In such environment, although all actors, and even third-country immigrants, may gain some kind of rights by moving to other countries, "privileged" immigrants may even gain new rights - as compared to the rights they would enjoy in their own country - by establishing themselves in another Member State (as in the case of social tourism). And, moreover, by moving to another country, European citizens may "import" new rights to their own country.

4.3. Fears and National Reactions

Migration opportunities and the possibility of "choosing the law" have raised a number of fears. However, it is enough to say a few words on the two most commonly felt fears: social dumping and public safety.

First of all, there is the fear that opening European markets to "social law shopping", by establishing a country of origin principle (as it was provided in the Bolkestein proposal), would create a high risk of social dumping. It is usually thought that the only solution, due to the lack of a common regulation and minimum standards, is keeping the labor markets partly closed (as concerns labor and social conditions) and insulated from each other. In this way the Polish plumber problem may seem to be solved. The reaction against the Bolkestein proposal has been very strong, as the country of origin principle was almost completely eliminated. However, it did not solve other problems that were already there and were caused by other rules and especially by the free movement principles. For example, the problem of the posting of workers was already an issue before the Bolkestein directive proposal, where, indeed, a solution to that

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EVERS / F. FECHER / J. VAN DER MADE / A. BOONEN, Cross Border Health Care: An Analysis of Recent ECJ Rulings, *in*: *European Journal of Law and Economics*, 2002, vol. 14, pp. 61 ff.

problem was proposed[51]. And, moreover, it does not take account of the strength of market forces that may create the risk of the "Chinese plumber". Indeed, even if immigration from third countries may be limited by reinforcing the borders of the "fortress Europe", products and services will be delivered to European houses directly from China and other third countries.

Finally, there is the issue of public safety fears, created by the enlargement of the European Union to Eastern European countries. This phenomenon is not new to European history: indeed it occurred, against the citizens of the Southern European countries, also during the first years of existence of the European Economic Community. It has to be mentioned also that, although each step of European Union enlargement was accompanied by fears of massive migration flows, they all turned out to be ungrounded. And, as concerns the recent enlargements towards East, many studies converge to show that substantial East-West migration flows are unlikely[52]. Then, repatriation agreements, which can also provide the possibility for home Member States to prevent the emigration of repatriated citizens towards the Member States from which they have been repatriated[53], and police cooperation should prevent security problems.

In Europe, the convergence of market forces and of the strong legal principles enshrined in the free movement principles have created a phenomenon that, according to the words of an eminent British judge and scholar, may be compared to

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[51] *Cf.* the judgments of the Court of Justice of 17 December 1970, *Manpower SARL v Caisse primaire d'assurance maladie de Strasbourg*, in case 35-70; and of 10 February 2000, *Fitzwilliam Executive Search Ltd (FTS) v Bestuur van het Landelijk instituut sociale verzekeringen*, in case C-202/97.

[52] *Cf.* A. PÉCOUD / P. DE GUCHTENEIRE, *Migration without borders*, cit., p. 13. Important and recent statistical data on European migration are found in *Immigration and the Transformation of Europe*, edited by C.A. PARSONS / T.M. SMEEDING, Cambridge, Cambridge University Press, 2006; and *International Migration in Europe: Data, Models and Estimates*, edited by J. RAYMER / F. WILLEKENS, Chichester, J. Wiley, 2008.

[53] Judgment of the ECJ (First Chamber) of 10 July 2008, in case C-33/07, *Ministerul Administraţiei şi Internelor - Direcţia Generală de Paşapoarte Bucureşti v Gheorghe Jipa*.

> "an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law"[54]

or, as the same author declared a few years later,

> "no longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses - to the dismay of all"[55].

Although the last few words of the cited sentence reflect the (hopefully limited) Euro-skeptic view of European integration, there can be no doubt as concerns the incredible degree of integration that, in fifty years, has been achieved between countries divided by centuries of wars and reciprocal fears.

Reciprocal fears are, and probably will continue to be, an important characteristic of European integration, that required, requires and will require political, legislative and judicial intervention. As Germans and Belgians feared the immigration of Italians in the sixties and seventies, now Italians fear the immigration of Romanians. It took a long time and even the intervention of the supranational judge in order to create a common area where European foreigners could move freely, without being discriminated or deported for the purpose of deterring other aliens[56].

Thus, also countries that are new to immigration issues, as they have historically been countries of expatriation, should adapt to their new role as countries of immigration, and take advantage of, not counteract, the possibilities that migration may provide.

History shows that there is always the risk that, having been discriminated in the past, it will be possible to be discriminated again, as it happened in January-February 2009 at the Lindsey Oil Refinery in North Lincolnshire (UK), where workers went on strike in protest against the use of foreign (*i.e.* Italian) labor in engineering and construction projects.

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[54] Lord Denning, in the case *Bulmer v Bollinger*, 2 All E.R. 1226, 1231 (C.A. 1974).

[55] LORD DENNING, preface to G. SMITH, *The European Court of Justice: judges or policy makers?*, London, Bruges Group, 1990.

[56] As in the case decided by the Court of Justice on 26 February 1975, *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln*, case 67-74.

ABSTRACTS / RÉSUMÉS

The report focuses on the possibilities and opportunities for European citizens and third-country nationals arising from the use of the free movement of persons established by the EC Treaty. Although migration, and especially European migration, may be studied from several different perspectives (which may take into consideration many important social, sociological and economic problems), the report focuses only on the legal aspects, and, moreover, only on few legal aspects, adopting the particular perspective of studying of the legal choices and opportunities that migration between European countries may offer to European citizens and to third-country nationals settled in Europe (*i.e.* once they have crossed the external borders or in the cases where they can avail themselves of European law relating to the free movement of persons).

Le rapport se concentre sur les possibilités et les chances offertes aux citoyens européens et aux ressortissants de pays tiers par l'usage de la liberté de déplacement des personnes établie par le traité CE. Bien que l'immigration, et notamment l'immigration européenne, puisse être étudiée sous plusieurs angles (concernant de nombreux problèmes sociaux, sociologiques et économiques importants), le rapport se focalise uniquement sur les aspects légaux, et même plus, sur quelques-uns seulement, adoptant la perspective particulière de l'examen des options légales et des occasions que la migration entre pays européens peut offrir aux citoyens européens et aux ressortissants de pays tiers installés en Europe (*i.e.* une fois qu'ils ont franchi les frontières extérieures ou dans le cas où ils peuvent profiter du droit européen sur la liberté de déplacement des personnes).

F. Vogin