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# New constraints on mobility in Europe: Policy response to European crises or constitutional ambiguity?

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**Abstract**. This paper investigates the effectiveness of recent measures undertaken by the governments of some European Union Member States such as the United Kingdom, Germany and Poland as well as of non-EU European countries such as Switzerland in order to face growing concerns in the public opinion with the increase of transnational migration flows on European continent. The authors analyse selected legislative, regulatory and administrative measures motivated by objectives of migration policy or affecting the mobility of workers, taken in the aftermath of the economic and financial crisis. They argue that, albeit political discourse unfavourable on immigration and migrant workers has become the mainstream in some countries, the measures taken by national governments and legislators seldom involve direct constraints on the free movement of workers which is safeguarded by EU treaty provisions. However, concrete examples illustrate that access of such workers to social security benefits has been restricted through making use of certain derogations from the principle of equal treatment allowed under EU law. In some cases national legislators had to abandon plans to limit directly the free movement of workers, because the envisaged provisions were incompatible with the EU Treaties. With regard to social security, regulatory measures and administrative actions may have effectively implemented national policy concerns with large-scale migration movements. In general, it could be concluded that the European Union, while struggling against multiple crises, has taken a not fully favourable approach to free movement and migration of EU citizens. The present political climate unfavourable to intra-European migration may be understood, from the perspective of historical analysis, as an expression of constitutional ambiguity underlying the European Union's normative

framework, consisting in a gap between its formally recognised noble values and the mentalities prevailing in the citizenry, which may place democratic forms of governance in a serious dilemma.

**Keywords:** Constitutional ambiguity, EU migration policy, economic freedoms.

**JEL Classification:** F5, K19

## 1. INTRODUCTORY REMARKS

When analysing the EU migration policy, its two separate aspects – internal and external migration policy – need to be emphasised. Given the principle of free movement of persons within the territory of the Union (under Article 20(1) TFEU citizens of the European Union – subject to certain conditions - enjoy the right to move and reside freely within the territory of all EU Member States), the concept of EU immigration policy is normally applied exclusively referring to measures taken towards third-country nationals attempting to enter the Union territory.[1] However, in this paper it is the EU internal migration policy that constitutes the focal point of interest and further deliberations.

At the same time mass immigration of third-country nationals towards the EU is affecting the freedom of movement within its internal borders when the member states responsible for the external Union borders do not effectively control the influx of illegal immigrants. This was the case when Italy and Greece were faced with the mass influx of refugees via the Mediterranean Sea. Notwithstanding the principle of the Dublin agreement[2] under which any new entrants may apply for asylum only in the EU country of one's initial arrival, it is not quite surprising that notably Italy and later on Greece were not fully complying with their obligation to register personal data of new entrants[3], thus leaving them an opportunity to move to other EU states. On the other hand, such developments might have been avoided provided the Member States had shown more solidarity in supporting the states experiencing excessive concentration of refugees (e.g., Malta after the crisis of 2008) so as to share this burden through relocation to other territories within the EU.

## 2. GENERAL EU LEGAL FRAMEWORK FOR INTERNAL MIGRATION

The point of departure for the EU's policy towards internal migration of nationals of its Member States is the aforementioned principle of free movement (Article 20 TFEU) as well as that of non-discrimination on grounds of nationality (Article 18 TFEU). These rights of EU citizens which emerged with the creation of a European Union citizenship by the Treaty of Maastricht, are to a certain extent overlapping the

[1] See also *infra*, Section 2.1

[2] Subsequently implemented by Regulations (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50 of 25 February 2003) and (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

[3] Cf. the statement by Antonio Vitorino referred to in: EU-immigration and asylum: are we up to the challenge, Notre Europe, 30.7.2014.

traditional (and unconditional) rights of freedom of movement of workers presently enshrined in Article 45 TFEU) and of freedom of establishment (Article 49 TFEU).

The principle of non-discrimination is further specified in secondary EU law, namely Article 4 of the Regulation (EC) No 883/2004[4] which provides for equal treatment of all EU citizens as well as stateless persons and refugees residing in a Member State, including members of their families[5] stipulating that such persons "shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof." Under Directive 2004/38/EC[6] the benefit of the right to equal treatment is extended to family members who are not nationals of an EU Member State and who have the right of residence or permanent residence (Article 24(1) *in fine*).

It should be noted, however, that Article 24(2) of the said directive introduces derogation from the principle of non-discrimination on grounds of nationality when it comes to entitlement to social assistance and maintenance aid. Consequently, by virtue of this Article the host Member State is freed from the obligation

i. to confer entitlement to social assistance during the first three months of residence (where appropriate also for the longer period provided for in Article 14(4)(b)) or
ii. to grant maintenance aid for studies and vocational training consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families, prior to acquisition of the right of permanent residence by these persons.

The cited provisions are relevant with regard to Union citizens exercising their right of residence at the territory of one of Member States other than their country of origin and seeking social assistance and/or maintenance aid. Pursuant to Article 6(1) the right of residence on the territory of another Member State for a period of up to three months is not subject to any conditions and is enjoyed both by EU citizens and their family members, even if they are not nationals of a Member State (Article 6(2)). The right of residence for a period longer than three months is granted to workers, self-employed, persons following a course of study or vocational training and those who have comprehensive sickness insurance cover in the host Member State as well as sufficient resources for themselves and their family members so as not to become a "burden on the social assistance system of the host Member State during their period of residence" (Article 7(1)(b)).

Two more provisions of the Directive in question deserve to be brought to the attention. Firstly, Article 14(3) prohibits an automatic expulsion measure in case of EU citizen's (or his/ her family member's) recourse to the social assistance system of the host Member State. Moreover, an expulsion measure may in no case be adopted whenever the EU citizen is a worker, self-employed or entered the territory of the host Member State in order to seek employment, in which case the expulsion may not take place for as long as the EU citizen may "provide evidence that they are continuing to seek employment and that they have a

[4] See Regulation (EC) No 883/2004 of the European Parliament and the Council of 29 April 2004 on the coordination of social security systems (O J L 166/ 1).

[5] For the persons covered by the Regulation in question, see its Article 2.

[6] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (O J 158/ 77), amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

*genuine* chance of being engaged" (Article 14(4)(b), emphasis by the authors). The more favourable treatment that Directive 2004/38/EC provides for migrant workers and self-employed persons, may be explained by the unconditional guaranties established in Articles 45 and 49 TFEU.

## 3. MEASURES POSSIBLY AFFECTING MIGRATION WITHIN THE EU AND EUROPE AT LARGE

Whilst the EU law provides for the general framework for the free movement of Union citizens, the Member States' national policies and administrative decisions largely influence the evolution of migration flows. The provisions of the Treaty safeguard the free movement of persons subject to appropriate measures (Article 3(2) TEU) and limitations justified on grounds of public policy, security and health (Article 45(3) TFEU). Examples can be found that restrictions allowed under EU law were implemented more strictly than necessary by the competent authorities of some Member States. In this respect the forced repatriation of Romanian and Bulgarian Roma people from the territory of France initiated in 2010 may serve as an example of indirect limitation of free movement of persons by public authorities. The French authorities tempted to justify these very controversial measures on the grounds of the French immigration law in force.

As during the economic and financial crisis the rate of unemployment increased in most EU member states, anti-immigrant propaganda undeniably gained influence on the attitudes of large parts of the citizenry. Certain of the Member States governments, too, were not immune against such attitudes and tried, in so far as possible, to come across the expectations of their electorate.

The margin of government action in this respect is, however, limited by the commitments agreed under the EU Treaties. Not only do they provide in principle for the EU citizens' freedom of movement, but they also set up strict and unconditional legal guarantees of the basic (economic) freedoms such as the free movement of workers and the freedom of establishment that can be claimed through judicial proceedings.

Despite a mainstream political discourse, which in some Member States has been quite unfavourable on immigration and migrant workers, national legislators have not achieved to establish any direct limits to the free movement of persons, notably of workers, because any provisions envisaged to that end would not only be incompatible with EU law but in contradiction with the basic principles of European economic integration. In this context David Cameron's intentions to renegotiate the EU Treaties and create more flexible rules for the UK were bound to fail from the outset. As from the beginning of the negotiations on the withdrawal of the UK from the European Union it was made clear to all parties involved that being part of the Union's single market necessarily implies acceptance of the freedom of movement of workers and the freedom of establishment.[7]

On the other hand, certain national regulatory measures and administrative measures may have effectively been targeted at implementing policy choices on large-scale population movements. By way of example, limiting access to social security (unemployment benefits, social housing, etc., as would be the case of a German Law aiming to prevent "the abuse of social benefits"[8]) for immigrants not having the status of workers, albeit not immediately in breach of EU law, may discourage some individuals from looking a better professional perspective in the country taking such measures or even force immigrants to return to their

7 See in this respect European Council (Art. 50) Guidelines for Brexit negotiations adopted on 29.04.2017, Press release 220/17. Cf. also Brexit negotiation Directives, Council document XT 21016/17 of 22 May 2017, notably paragraphs 20-21.

8 Gesetz vom 22.12.2016 zur Regelung von Ansprüchen ausländischer Personen in der Grundsicherung für Arbeitsuchende nach dem Zweiten Buch Sozialgesetzbuch und in der Sozialhilfe nach dem Zwölften Buch Sozialgesetzbuch, BGBl. I S. 3155.

country of origin. As long as such measures are linking social benefits to a certain period accomplished as an employed worker and do not create less favourable labour conditions for immigrant EU citizens than for nationals (subject to the exceptions referred to in Directive 2004/38/EC[9]), Member States enjoy substantial freedom in shaping their social policies.

Furthermore, beyond the scope of the EU provisions on visa policy the EU Member States remain masters of their policies with regard to immigration of third-country workers. In that vein, despite concerns voiced by business environment[10], the UK government decided to introduce visa curbs on highly skilled migrants. The UK's immigration minister James Brokenshire blames pressure on public services and forced down wages on massive immigration, stating at the same time that the government's "focus remains on reducing and controlling migration at sustainable levels"[11].

A question arises whether the misuse of host countries' social systems by immigrating job seekers is indeed a common phenomenon or whether rather isolated instances are used as an opportunity for national governments to satisfy anti-immigrant attitudes of the electorate by measures intended to curb freedom of movement of workers even within the internal market?

Whilst means to convincingly address this question are limited, there is sound evidence that immigrants contribute positively in terms of what they pay to the fiscal system of the host country when compared to what they receive in benefits and transfers.[12] Immigrants from the European Economic Area (EEA) have made a positive fiscal contribution in the UK even during periods of budget deficits, with notably strong positive contribution by immigrants from countries that joined the EU in 2004[13].

The increasing debate across Europe about migration shows two extreme views: while entrepreneurs tend to regard free movement as a key to economic prosperity thanks to access to skilled workers from across Europe and beyond, general public perceive immigration in terms of pressure on domestic labour market, stability of salary rates, housing, etc.

Even such booming economies as that of Switzerland are not resilient enough when confronted with public anxiety. On 9 February 2014 the Swiss people voted in favour of a popular initiative aiming at introducing a system of "autonomous management" to immigration from EU countries. This would evidently be in contradiction to the commitments undertaken by Switzerland in its agreement with the EU on the free movement of persons[14]. The Swiss government initially drafted legislation to implement such an autonomous management and agreed on a mandate for negotiations with the EU on the said agreement. In the subsequent negotiations the EU Commission not only refused the adaptations requested by the Swiss government, but made also clear that the non respect of the agreement in question would jeopardise

[9] Cf. fn.6

[10] See e.g. Financial Times 3 July 2014

[11] Financial Times of November 5, 2014

[12] See e.g. the study by Holger Bonin (Zentrum für Europäische Wirtschaftsforschung GmbH, Mannheim) entitled "Der Beitrag von Ausländern und künftiger Zuwanderung zum deutschen Staatshaushalt", Bertelsmann Stiftung.

[13] Christian Dustmann and Tommaso Frattini, "The Fiscal Effects of Immigration to the UK", *The Economic Journal* 2014, pp. 1-51. The authors claim that "by sharing the cost of fixed public expenditures (which account for more than 14% of total public expenditure) … [immigrants] have reduced the financial burden of these fixed public obligations for natives." The authors estimate considerable implicit savings on these expenditures, which amount to approximately £24 billion between 2001 and 2011 (op.cit., p.37), available at: http://www.cream-migration.org/files/FiscalEJ.pdf (accessed 26.06.2017).

[14] OJ L 114, 30/04/2002 P. 0006 – 0072.

the other sectorial agreements with the EU concluded under the 1972 Free Trade Agreement[15]. Under such circumstances the Swiss government sought to implement the referendum by proposing a "light management system" which is considered not to be in contrast with the free movement agreement and was finally adopted by the Swiss Parliament on 16 December 2016[16].

## 4. POLITICAL CONSERVATISM AND IMMIGRATION

One of the traits of political conservatism is resistance to change. In general change may be materialised in a variety of ways, including a far-reaching restructuring of a given ethnic community. Modification (if the case may be innovation) of societal structure normally occurs as a result of external influence, also construed as ideological or organisational paradigmas 'borrowed' from neighbouring societies.

If not externally imposed, societal reform presupposes openness to change. It is arguable that such openness traditionally is not a constant quality of any concrete ethnical group[17]. Under given circumstances it may, however, stem from a pragmatic calculation of costs and gains, or at least from shared convictions regarding the feasibility of the desired effect.

A question arises whether a population may, with a view to the achievement of a certain common objective, be ready to sacrifice its ethnical cohesion (or homogeneity)[18], which is widely believed to constitute the basis for the sense of community and group solidarity. By way of example, the common objective may be defined in economic terms, and the social unity partially compromised so as to gain cheap immigrant labour or highly qualified skills. From the behavioural perspective, the unity of a group may be reinforced by hostility towards the outsiders. The 'aliens' have no access to the group, unless with a consequence of either social dumping or, under unusual circumstances, unconditional and full integration. If the former process is the case, it may also be argued that such incorporation of individuals representing different ethnic origin is not perceived by the in-group members as renouncing of ethnical unity, which effect may provisionally be achieved by means of the aforementioned social dumping. On the other hand, if the immigrant population is of significant importance, it may be more difficult for the ethnically dominant group to keep the *status quo* following the subsequent generation shifts. Having realised that, societies may take a fall-back position and become more resilient again.

Political conservatism relates positively with anti-immigrant attitudes (Pettigrew et al 2007: 34). The same applies to strong national sentiment and pride, as opposed to the feeling of European identity which – at least at a continental scale - relates with pro-foreigner sentiment.

The experience of the economic crisis has in addition exhibited with all might that in particular economic predictors of immigrant attitude should not be underestimated. Economic concerns influence the

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[15] See General Affairs Council 16 December 2014, Conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries, notably paragraph 45: "free movement of persons is a fundamental pillar of EU Policy and that the internal market and its four freedoms are indivisible"

[16] Free movement of persons - functioning and current state of play, Mission of Switzerland to the EU, https://www.eda.admin.ch/missions/mission-eu-brussels/en/home/dossiers/personenfreizuegigkeit.html, accessed 26.6.2017.

[17] Cf. Peter Sloterdijk, Die schrecklichen Kinder der Neuzeit, in particular p. 242 ff.

[18] Unless being simply an ideological illusion such homogeneity may have been built up in a long-lasting historical process of nation building (as described by Eric Hobsbawm, Nations and Nationalism since 1780, Programme, Myth, Reality, second edition, Cambridge 1990) or in a short term voluntary process of move of populations and reconstruction of history as described by Gregor Thum, Die fremde Stadt – Breslau nach 1945, München 2006, for the western regions of Poland after the end of World-War-II.

perception of immigrants as a collective threat (Pettigrew et al 2007: 33), which fact does not manifest itself solely as part of realistic scenarios, but also purely hypothetical or imaginary (as the aforementioned Swiss case perfectly demonstrates). The more important it is that governments make proof of the political strength required to openly confront such instances of an electorate's putative economic disadvantage.

The contemporary reality where anti-immigration forces are gaining ground in Europe provides evidence that the EU falls short of an open post-national model of society. In this context the achievements of Schengen and generally the EU citizenship and the freedoms enjoyed by them are somewhat in advance of the development of European societies and may not be taken for granted as long as society does not fully catch up with the order of freedom and peace which has been established at the political level[19].

## 5. STRIKING THE RIGHT BALANCE BETWEEN PROTECTIONISM AND PRAGMATISM

In order not to get a distorted picture of a seemingly immigration-friendly Europe, one has to carefully assess the economic and normative logic behind it.

Opening national labour markets to immigrants is based primarily on two grounds:

1. Economic predictors, including birth rates, aging of societies and likely decreases in the so called "supply of labour force" may induce governments to open labour markets also to immigrants from third countries so as to fill in a presumptive gap in the national labour;
2. Obligations under EU and/ or international law (equal treatment of EU citizens, the need to respect commitments under international law e.g. with regard to humanitarian aid, asylum seekers, etc.) may force governments to accept new entrants.

Such logic is not absent even in traditionally "emigrant countries", i.e. countries characterised by high emigration rates of their nationals to other states, as the example of Poland may show. Its emigration figures were quite substantial both before 1989 (due to political grounds) as well as after the fall of the communist regime (predominantly due to economic grounds), notably following Poland's EU membership and the subsequent opening of the Western-European labour market.[20]

Incidentally, it seems that Polish authorities' role in contemporary economic emigration phenomena may not be regarded as fully neutral. The Polish Ministry of Labour and Social Policy coordinates the activities of regional and district employment offices within the so called EURES network, the tasks of which are not limited to informational campaigns on the conditions of life and work in the EU/EEA countries, but also consist in running pan-European employment services, i.e. enabling lawful employment to Polish unemployed and job seekers in the EU/EEA countries as well as carrying out recruitment for employers from EU/EEA countries and providing them with suitable candidates to work. Employee mobility days, workshops, conferences, seminars, a European Job Fair, recruitment projects for foreign employers, etc. are organised as part of such activities. The Polish Ministry of Labour and Social Policy has also created a website (www.eures.praca.gov.pl) where information on foreign published job offers, events

[19] This affirmation is another way of formulating the European Union's „need to reconnect with its citizens" which was repeatedly stated in various resolutions adopted by the European Parliament.

[20] According to the Polish Statistical Office (GUS) between 2004-2010 the number of Polish labour emigrants amounted to 2 mln.

organized by EURES and information about living and working conditions, both in Poland and in other EU / EEA countries may be found.[21]

Such measures, even if not directly, enhance the economic emigration of Polish nationals, thus also contributing to the lowering of the level of unemployment within Poland.[22] But in the light of the demographic prognosis for the upcoming decades and the predicted deficit of native population at the age of professional activity, high emigration rates have also a negative impact on the Polish labour market (deficiency in labour force, including highly-qualified workers) and social security system.[23] This means the necessity of opening labour market to third country nationals.

However, in Poland, as in numerous other states, the policies with regard to employment of immigrants are revealing a protectionist character. Employment of immigrants is considered only as *complementary* to the domestic labour supply; work permission for nationals of third countries may only be issued if the Polish nationals registered as unemployed and looking for a job may not satisfy the labour needs of the employer. Moreover, another necessary prerequisite for the work permission in question is the confirmation that the remuneration to be paid to the immigrant worker will not be lower than that of the local worker at a similar post.[24] Given that a majority of immigrants take low-profile jobs, the remuneration rate criterion may also have the welcome effect to prevent the exclusion of non-qualified Polish nationals from the domestic labour market. At the same time, the introduction of such requirements is justified by the general principle of *equal pay for equal work* safeguarding fair conditions of employment under modern labour law and protecting immigrants from potential exploitation and exclusion.

To sum up, the Polish case represents well the post-EU accession emigration trends in Central and Eastern European States. At the same time, it follows the usual pragmatic line of immigration policy, the priorities of which are dependent on the condition of the national labour market.[25] All in all, demographic prognosis pointing to the substantial aging of EU's population shows that immigration from third countries may be desirable in economic terms. However, Member States are reluctant to make tangible steps towards renouncing of what they refer to as "social cohesion", neither vis-à-vis third country nationals, nor by encouraging the entry of other EU Member States' nationals. Such attitudes are gaining on visibility in the context of economic and other European crises.

This leads us to the question addressed in the following whether the European Union and the normative power it disposes of do make a difference in this regard.

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[21] See at www.eures.praca.gov.pl, accessed on 26.06.2017.

[22] The unemployment rate in Poland in 2002 was 20 %, between 2007-2013 (on average) about 10 %, with further falling tendency in 2014 and 2015 (9% and 7.5%, respectively). It should be emphasised here that the said figures result from a complex economic processes and the authors do not dispose of concrete data what the exact role of economic emigration is in relation to the quoted figures (source: Eurostat).

[23] A noteworthy social consequence of economic migration of many Polish nationals is the problem of "euroorphanhood" (Polish "eurosieroctwo"), i.e. minors being deprived of parental care as a consequence of emigration of both parents.

[24] See Ustawa z dnia 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy (Dz.U. 2004 no 99 item 1001) and Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach (Dz.U. 2013 item 1650), notably Art.114, paragraph 1, subparagraphs 3 and 4.

[25] See e.g. the document entitled *Polityka migracyjna Polski – stan obecny i postulowane działania* (Polish Migration Policy) adopted by the Council of Ministers on 31 July 2012, notably page 25f, the implementation of which was discontinued by the new Polish government as of 19 October 2016 due to "radical change in the migration situation in Poland and worldwide, in particular as a result of the refugee crisis as of 2015" (see an interview with Jakub Skiba, the Secretary of State in the Polish Ministry of Home Affairs and Administration in *Biuletyn Migracyjny* 2016, No 55, p.2-4.

## 6. UNDER WHICH CIRCUMSTANCES MAY WE ASSUME A CONSTITUTIONAL AMBIGUITY?

Constitutional texts are counterfactual insofar as they are normative. They establish what *ought to be* as opposed to *what is*.

Sometimes, however, the normativity of a Constitution is in advance of its time. Behaviours and practices deeply rooted in the society are denying the normative claims solemnly proclaimed in the Constitution. Where nevertheless normativity is legally and formally upheld and generates a discrepancy between the normative claim and the social reality one could say that there is a *constitutional ambiguity*.

Such cases are not infrequent in history.

Despite the principles of the Rule of Law which were enshrined in Articles 7 and 8 of the 1789 French *Déclaration des Droits de l'Homme et du Citoyen*[26] a few years later France drowned in the blood of Jacobin terror.

Notwithstanding the provision of Amendment 5 of the Constitution of the United States of America [27] which entered into force on 15 December 1791 and established: "… nor shall any person be deprived of life, liberty, or property, without due process of law", slavery subsisted and was considered as lawful until the entry into force of the thirteenth amendment on 18 December 1865 which explicitly stipulated that "neither slavery nor involuntary servitude ... shall exist within the United States".

In both cases the constitutional provisions in force at that time may be regarded as emanation of a recognized basic value such as human dignity. Where institutional practice supported by a majority of the population failed to fully implement what presently we perceive as the full scope of that value, we need to presume that at such times the consciousness of that value was not sufficiently unfolded in the relevant societies.

Constitutional ambiguity may arise when new values or ways of living emerge in a society. It may happen that actors ahead of their time succeed in incorporating into the constitutional text some innovative aspects, which do not meet strong opposition while the majority of the society has not yet lived up to the values which are at the basis of the innovation.

Such discrepancies may also be found when looking at the European Union. In its founding Treaties the basic values to which it is committed are explicitly laid down. These treaties are commonly qualified as texts having constitutional quality[28]. However, the convictions and consciousness of the citizenry does not always correspond to the noble principles solemnly recognized in the constitutional document. The observations and thoughts, which will be exposed in the following outline of the history of the implementation of the freedom to move within the European Community, may demonstrate that the phenomenon of migration since the beginning is affected by a constitutional ambiguity.

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[26] Art. 7: „Nul homme ne peut être accusé, arrêté ni détenu que dans les cas déterminés par la Loi, et selon les formes qu'elle a prescrites."

Art. 8: „La Loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une Loi établie et promulguée antérieurement au délit, et légalement appliquée."

http://www.legifrance.gouv.fr/Droit-francais/Constituton/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789 (accessed 24.06.2017.

[27] http://constitutioncenter.org/media/files/constitution.pdf (accessed on 24.6.2017).

[28] Carlos Rodriguez Iglesias, Zur „Verfassung" der Europäischen Gemeinschaft, EuGRZ 1996, 125; Dimitris Th. Tsatsos Die Europäische Unionsgrundordnung / Grundsatzfragen und fünf Anregungen zum Umdenken anläßlich der Regierungskonferenz 1996, EuGRZ 1995, 287.

## 7. HISTORICAL OUTLINE OF MEASURES REGARDING MIGRATION WITHIN THE EUROPEAN COMMUNITY

The issue of migration is dealt with in the founding Treaties of the EU at a rather late stage only. It is addressed for the first time in the context of the *Cooperation in the fields of Justice and Home Affairs* in Article K.1 of the Treaty of Maastricht[29] according to which "for the purposes of achieving the objectives of the Union, in particular the free movement of persons" the Member States shall regard "immigration policy and policy regarding nationals of third countries" and notably "combating unauthorized immigration" as matters of common interest. The terminology of this Article makes clear that in the language of the Treaties the migration of "persons holding the nationality of a Member State", i.e. of citizens of the Union[30] from one Member State to another is not qualified as immigration.

Since the beginning of European economic integration the free movement of persons is one of the objectives of the founding Treaties. Initially enshrined in Article 3 c) of the EEC-Treaty it comprised the right of dependant workers to freely move within the European Economic Community[31] and the right to establish business as self-employed person in another Member State[32]. The free movement of workers was considered as a necessarily required constituent element of a free and social market economy in the absence of which resources would not be allocated in an optimal manner[33]. From the very beginning of the process of economic integration this right entitles nationals of Member States not only to move freely and to settle down in any other Member State in view of taking up an activity as an employed person but also to remain in that State after the termination of the said activity[34]. On the other hand, the provisions concerning the social security of workers employed in several Member States enabled workers to benefit from the accumulated pension rights in any of the Member States where they were employed[35].

The constitutional and legal framework of the European Communities allowed individuals to move where they believed to find better opportunities. Such moves were additionally facilitated by certain measures. A national of a Member State seeking employment in the territory of another Member State was promised the same assistance there as that afforded by the employment offices in that State to their own

[29] Signed on 7 February 1992, in force since 1 November 1993.

[30] Cf. the legal definition in Article 20(1) TFEU.

[31] The right was spelled out in Articles 48 and 49 of the EEC-Treaty and in Regulation (EEC) Nr. 1612/68 of the Council on freedom of movement for workers within the Community (O.J. L 257 of 19.10.1968 p.2).

[32] Spelled out in Article 52 of the EEC Treaty.

[33] Cf. e.g. the overview on the principles of a social market economy published by Konrad Adenauer Stiftung, available under http://www.kas.de/wf/de/71.10948/.

[34] These rights are explicitly warranted in Article 48(3 a-d) EEC-Treaty and were implemented by the measures referred to under footnote 11; the right to remain was implemented with some delay by Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (O.J. L 142 of 30.6.1970 p. 24).

[35] Article 51 of the EEC Treaty, which was initially implemented by Regulations No 3 and 4 of 25.9.1958 and 3.12.1958 (O.J.1958 Nr.30 p. 561, 597). These Regulations were replaced in 1972 by Regulation (EEC) Nr. 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community (O.J. L 149 of 5 July 1971, p. 2) and Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (O.J. L 74 of 27.3.1972 p.1)

nationals seeking employment[36]. A national of a Member State who found employment in the territory of another Member State was entitled to install together with him his spouse and their descendants who are under the age of 21 years or are dependants or any dependent relatives in the ascending line of the worker and his spouse[37]. The central employment services of the Member States were instructed to co-operate closely with each other and with the Commission with a view to acting jointly as regards the clearing of vacancies and applications for employment within the Community and the resultant placing of workers in employment[38].

However, the migration of workers between Member States has not been significantly encouraged. In Article 50 of the EEC Treaty (a provision which survived unchanged in Article 47 TFEU) the Member States had committed themselves to adopt a joint programme encouraging the exchange of young workers. But this initiative revealed to be rather a measure of window dressing without a tangible impact. A first programme of this kind was secured in 1964 in a form of an intergovernmental agreement[39] while its second and third editions were adopted in form of decisions of the Council in 1979[40] and 1984[41] respectively. When in 1990 the Council[42] extended the third programme for another two years it hinted to the fact that it had already adopted the Youth for Europe action programme[43]. Subsequently the idea of a specific programme to this end was abandoned and the exchange of young professionals incorporated in broader action programmes.

Linguistic barriers and the practical difficulties of settling down constitute obstacles to migration that tend to affect the working population more significantly than students and professional elites, in particular when the opportunities of employment and the standard of living in the various Member States come closer to each other. These are the presumed reasons for the diminishing of migration within the European Community since the first "*petroleum shock*" in 1973 while migration from third countries continued to grow[44].

In an overall assessment, the policy regarding migration of nationals of Member States from one State to another pursued by the European Community from the outset may therefore be considered as neutral. The Member States accepted the principles of free movement of workers as well as the freedom of providing

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[36] Article 5 of Regulation (EEC) No 1612/68 of the Council on freedom of movement for workers within the Community (O.J. L 257 of 19.10.1968 p.2); as a complement to this Regulation the Council Directive 68/360 (EEC) provided for the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (O.J. L 257 of 19.10.1968 p.13); subsequently this Directive was modified in 1973, 1990, 1996 and finally replaced by Directive (EC) 2004/38 mentioned above (fn. 6)

[37] Article 10 of Regulation (EEC) No 1612/68 (loc.cit. fn. 27)

[38] Article 13 of Regulation (EEC) No 1612/68 (loc.cit. fn. 27)

[39] O.J. No. 78 p. 1226

[40] O.J. L 185 of 21.7.1979 p. 24

[41] O.J. L 331 of 19.12.1984 p. 36

[42] Council Decision 60/268/EEC amending Decision 84/636/EEC establishing a third joint programme to encourage the exchange of young workers within the Community, O.J. No. L 156 of 21.6.1990 p.8

[43] Council Decision 88/348/EEC O.J. L 158 of 25.6.1988 p. 42

[44] Cf. Peter Karpenstein in: Groeben, Boeckh, Thiesing, Ehlermann, Kommentar zum EWG-Vertrag, 3. Auflage 1983 Vorbemerkung 4 zu den Artikeln 48 und 49

services as economic necessities. In the same vein, however, some precaution was taken so as to avoid too mighty waves of migration. Regularly the freedom of movement for workers became effective several years later than the integration of the markets. It was implemented amongst the founding Member States in a step-by-step approach through the adoption of three Regulations[45]. With regard to newly adhering Member States its implementation was in many cases delayed until the expiry of a transitional period that could last up to 10 years[46]. Furthermore, the provisions implementing the principle of freedom of movement for workers maintain certain reservations for the case that a Member State undergoes or foresees disturbances on its labour market which could seriously threaten the standard of living or level of employment in a given region or occupation[47]. The exceptions in such cases do not go so far as providing for the possibility of repealing the individual right. However any measures by the competent administrative bodies aiming at the insertion of citizens coming from other Member States in the national labour market may be suspended under such circumstances.

## 8. THE UNION'S CONSTITUTIONAL AMBIGUITY TOWARDS MIGRATION

The historical review of that process may enlighten us about the fact that the politically responsible actors of the period under consideration were well aware of the need of ensuring the right to free movement of persons for the achievement of an advanced state of economic integration and notably a single market in Europe. It also shows, however, that they were equally aware of the societal difficulties that can arise from substantial phenomena of migration in particular in periods of economic crisis and recession. After centuries of efforts by political and cultural actors to build up a national consciousness amongst the peoples regrouped in European nation States it is no wonder that broad parts of the present populations adhere to such ideas. While top level political and economic leaders as well as cultural elites at all times enjoyed the privilege to be able to move quite freely throughout Europe and the world known at that time, the working people once they could no longer be denied their personal liberty became used to be glued to their soil by State governance and nationalist ideologies similarly as in previous periods it occurred to peasants through the feudal law.

At the time when the European founding Treaties established the freedom of movement for workers, the majority of the European population would hardly have accepted major currents of migration from

[45] Regulation No. 15 on First Implementing Measures (O.J. No. 57/1961 p. 1073)

Regulation No. 38/64/EEC on the Freedom of Movement of Workers (O.J. 62/1964 p. 965)

Regulation (EEC) No 1612/68 (loc.cit. fn. 31)

[46] Cf. Article 45 of the Treaty concerning the Accession of the Hellenic Republic (O.J. L 291 of 19.11.1979 p. 27), Articles 56 and 216 of the Treaty concerning the Accession of the Kingdom of Spain and the Portuguese Republic (O.J. L 302 of 15.11.1985 p. 35 and 88), Article 24 and Annexes V - XIV of the Treaty concerning the Accession by the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic (O.J. L 236 of 23.9.2003 p. 40), Article 20 and Annexes VI – VII of the Treaty on the Accession of the Republic of Bulgaria and Romania (O.J. L 157 of 21.6.2005 p. 35, 278, 311), Article 18 and Annex V of the Treaty on the Accession of the Republic of Croatia (O.J. L 112 of 24.4.2012 p. 25, 67).

[47] Article 20 of Regulation (EEC) No 1612/68 (loc.cit. fn. 27)

other States[48] and the change had to be implemented prudently. At their arrival in the late fifties of the 20th century the first migrant workers within the European Community were welcomed as "*guest-workers*". They were expected rather to stay for a limited period of work and then to return to their country of origin. The population under the prevailing conditions of general increase of welfare did not contest the different course of history. In times of crises it showed, however, that in many cases such acceptance was superficial and nationalism is more deeply rooted in European peoples than expected.

If we assess that process from a contemporary perspective, we may be tempted to conclude that with regard to the phenomenon of migration an ambiguity still persists.

On the one hand there are now about three generations who in their curriculum have benefitted from the freedom of movement within a European Space. The experience gathered in their lifetime may confirm that there is no contradiction between the consciousness of being rooted in a particular national cultural identity and the capacity to integrate for a time or permanently in one of the neighbouring European societies without renouncing to that identity, since the difference between such identities lays rather in the codes used than in the substance addressed[49].

On the other hand one should not forget that such cases of coexistence of identities are individual experiences that do not put into question the identity of a societal context. Nowadays European societies are sufficiently open so as to allow individuals to perceive the confrontation with the other as stimulating and enriching[50]. The attitude of a collective may change, however, where it perceives to be collectively confronted with 'the other'. What individually is perceived as enrichment may, however, be collectively perceived as a threat. To give a concrete example, the author, a German citizen living in the formerly German city of Wroclaw in Poland, feels to be generally well accepted by the inhabitants, commercial agents and office holders in his neighbourhood. There are serious doubts, however, that the feelings would be the same if German citizens would massively move to Wroclaw, thus putting into question the transformation of this city into a Polish one which was achieved with great suffering[51] after the end of World-War-II.

Undoubtedly there is a tension between the principle of free movement of persons[52] and the principles of respect of national identities[53] and of cultural and linguistic diversity[54]. While individual mobility within the territory of the European Union is perceived as a positive factor, which contributes to the achievement of the objective of "*an ever closer union among the peoples of Europe*[55]", massive collective movements of persons could and probably would be perceived as threatening the existing diversity and the various identities. This

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[48] It may be reminded that after the end of World-War-II local populations when faced with substantial migration movements of the displaced persons of the same nationality as their own, only reluctantly and not without difficulties, received and integrated the displaced who were victims of forced migration.

[49] Significant in this regard is the research by Oskar Reichmann on "Europeanisms", cf. Oskar Reichmann, Semantische Gemeinsamkeiten (Europäismen) im Wortschatz europäischer Sprachen und das Projekt 'Europa', in: P. Schiffauer/K. Łobos, Beiträge zu den Wurzeln der europäischen Integration, Berlin 2016.

[50] One could be tempted to attribute this openness to an instinctive exogamic stimulus.

[51] Cf. Gregor Thum, Die fremde Stadt – Breslau nach 1945, München 2006, p. 107ff., 338ff.

[52] Presently enshrined in Article 3 (2) of the EU-Treaty.

[53] Presently enshrined in Article 4 (2) of the EU-Treaty.

[54] Presently enshrined in Article 3 (3 in fine) of the EU-Treaty.

[55] Presently enshrined in Article 1 (second section) of the EU-Treaty.

tension gives rise to a *constitutional ambiguity* underlying the process of European integration since its very beginning.

Individual mobility is welcome and the individual freedom to move within the Union is legally guaranteed for the actively working citizenry. Declarations by political authorities, which count that freedom amongst the essentials of European integration, may be regarded as sincere[56]. The European Union proves to be an "*area of freedom*[57] insofar as it does not recur to restrictive measures in order to maintain the balance between the concurring objectives of freedom of movement and respect of diversity and identities. There was and is a trust in the freedom of choice by citizens who have to weigh the advantages of migrating to a country which offers them better opportunities against the burdens of such a move like the language barrier and the loss of societal networks.

From that perspective it is fully coherent and understandable that the policies adopted by the European institutions are limited to ensure equal conditions for the free exercise of the freedom to move without setting incentives or otherwise actively promoting migration. In the same vein, the growth or decline of the flux of migration within the European Union must by no means be regarded as an indicator for the success or failure of the integration project. The more the standards of living and the conditions of working in the various parts of the European Union come closer to each other the less there are economic reasons for massive migration.

On the contrary one may expect increasing demand and favourable conditions for migration of persons with highly specialised skills. Economic interpenetration requires the availability on both sides of a commercial relationship of staff, which is sufficiently familiar with the manners, conventions and laws in use on the other side. The skills required for that sake are not so much acquired through experiences of definitive migration but instead through experiences of temporary immersion into a second or third culturally different environment. Consequently European exchange programmes like ERASMUS promote rather the opening of mental horizons and the acceptance of the other as equivalent, while only exceptionally they pave the way to migration.

## 9. CONCLUSION

The constitutional law and the political practice of the European Union confirm its ambiguity towards the phenomenon of migration between Member States. Such constitutional ambiguity manifests itself through the fact that the individual freedom of persons to move within the Union is solidly guarantied while the Union through its policies does not really encourage the development of significant collective streams of migration within its external borders. In the prevailing model of society the individually migrating stranger is welcome while massive streams of migration may rather be perceived as a threat. Political tendencies seeking to limit migration within the Union reflect that assessment. Present reactions to such tendencies show political determination to defend the individual right to freely move within the European Union as a read line in the upcoming constitutional discussions about the future of the European Union. At the same time efforts are deployed to abolish in the respect of the law of the European Union any measures, which

[56] E.g. the stance taken by chancellor Merkel towards the intentions to renegotiate that freedom which were uttered by prime minister Cameron in November 2014.

[57] Cf. Article 3(2) of the EU-Treaty.

involuntarily tend to encourage migration such as the granting of social benefits independently from the status of a worker[58].

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[58] For Germany cf.: Gesetz vom 22.12.2016 zur Regelung von Ansprüchen ausländischer Personen in der Grundsicherung für Arbeitsuchende nach dem Zweiten Buch Sozialgesetzbuch und in der Sozialhilfe nach dem Zwölften Buch Sozialgesetzbuch, BGBl. I S. 3155. This modification of the German social security legislation endeavours to restrict the number of beneficiaries to the minimum necessary under EU law as established by the European Court of Justice in its judgement of 11.11.2014 in case C-333/13 (Dano/Jobcenter Leipzig). The Court has ruled the exclusion of a migrant EU-citizen from social benefits of the host country as lawful insofar as the citizen did not have the status of a worker and therefore did not come under the scope of the relevant Article 24 of Directive 2004/38/EC (referred to under fn. 6). Whether the German law in all its aspects is compatible with EU law is still subject to judicial review.