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Free Movement of Persons in the European Union

Barriers to Movement in their Constitutional Context

Eleanor Spaventa

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By

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Foreword

It gives me great pleasure to contribute a foreword to this particular addition to the Kluwer European Law Collection – a series made up of what Andrea Biondi has described as 'state of the art publications focused on specialised areas of EU law'. This book meets that description in full. It addresses the European Court's interpretation of the Treaty provisions on free movement of persons and services and in particular the evolution of the Court's jurisprudence on non discriminatory restrictions on these fundamental freedoms. The case law of the Court holds a wide range of national measures to comprise restrictions on fundamental freedoms requiring justification – from economic regulation of various kinds, to the deportation of the spouse of a service provider resident in his own country of nationality. The writer convincingly argues that the effect of the developing case law is to abolish the distinction between restrictions on cross border economic activity, and restrictions on economic activity *per se*. The seminal cases on Union Citizenship are addressed at length, and it is by reference to the establishment of Union Citizenship that Dr Spaventa explains and relates developments in the rights to freedom of movement of economically active and economically inactive persons. This is an impressive work of scholarship which provides not only detailed and rigorous analysis of an extensive case law, but also a normative justification for that case law and the direction of its evolution in recent years.

Professor Derrick Wyatt QC
Oxford, June 2007

A nonna, mamma e papà
Miei modelli di vita.

Acknowledgments

This book is partially the result of doctoral research started at Oxford, and completed at Cambridge. Whilst engaged in this project I have had the benefit of working in different institutions (Cambridge, Birmingham and Durham) with wonderful and inspirational colleagues, with whom I have had very fruitful discussions on all matters concerning European law and beyond.

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ciccio. His support has helped me beyond description, and for his friendship and kindness I will never be grateful enough.

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This book is dedicated to my grandmother, Lydia de Novellis, who saw the start of this project but was not patient enough to see it finished; and to my parents, Luigi and Clare.

Introduction

This book analyzes the scope of the free movement of persons provisions focusing in particular on the notion of barrier to movement. The primary aim of the investigation is to assess whether we can provide a satisfactory conceptual and normative explanation for the broad interpretation given by the Court to those provisions.

The freedom of movement for workers, the freedom of establishment and the freedom to provide services across the Community, together with the free movement of goods and the free movement of capital with which this book is only tangentially concerned, are at the cornerstone of the internal market. Those provisions grant to economically active citizens, i.e., those who are engaged in an economic activity, rights of movement and an extensive right to equal treatment in all matters relating, even indirectly, to their status as economic actors.

The Court has interpreted those freedoms as fundamental Community rights and it has, accordingly, adopted hermeneutic tools typical of rights discourse. Thus, from a very early stage in the integration process, it has adopted a teleological rather than literal interpretation of the Treaty, seeking to maximise the useful effect of the free movement provisions. It has broadly interpreted the rights that economic migrants derive from the Treaty, whilst at the same time interpreting narrowly the possible grounds of derogation that the Member States could invoke to limit those rights. It has given a broad interpretation to the notion of discrimination, including in its scope both direct discrimination (discrimination in law) and indirect discrimination (discrimination in fact). Direct discrimination can be justified only having regard to one of the grounds listed by the Treaty. Indirect discrimination, which has been broadly construed to include any rule which might put nationals of another Member State, or migrants, at a disadvantage, can be justified having regard to broader public interest aims.

Thus, any imperative requirement of public interest, save for those of a purely economic nature, might be relied upon to justify an indirectly discriminatory rule.

However, the Court has imposed upon the Member States significant constraints. In order to be compatible with Community law, the rule pursuing an imperative requirement of public interest must be necessary to achieve the purposed aim, and the restriction that the rule imposes on the free movement right must be proportionate to the achievement of such public interest. Furthermore, the rule restricting a Community freedom must also comply with the general principles of Community law and in particular with fundamental rights.

The imperative requirements doctrine therefore subjects the rules caught by the Treaty to an extensive judicial scrutiny, allowing the national and Community courts a power of review over the *way* a public interest in pursued, as well as imposing a Community standard of fundamental rights protection. Such power of judicial review is not particularly problematic in relation to indirectly discriminatory rules. After all, given the Treaty commitment to the elimination of any discrimination on grounds of nationality, as indicated both in the free movement provisions and in the general prohibition of such discrimination contained in Article 12 EC, it is natural that when a rule places at a disadvantage migrants or nationals from another Member State, then such rule should be justified or should be redrafted so that any discrimination is eliminated. Here, the Treaty rules impinge on national regulatory autonomy only by requiring the abolition of any unjustified discrimination. However, lacking discrimination, the Member State remains entirely free to decide upon the level of market regulation as well as to decide how best to pursue its policy aims.

The situation is more problematic once the scope of the Treaty free movement provisions is broadened to include non-discriminatory restrictions. In the 1990s, the Court changed its interpretation of the notion of barrier to movement so as to include not only directly and indirectly discriminatory restrictions, but also any rule which hinders or otherwise discourages movement between Member States. The expansion of the material scope of the Treaty free movement provisions is sided by other two developments: the relaxation of the intra-Community link required to trigger the Treaty; and the relaxation of the economic nexus necessary for the Treaty free movement of services provisions to apply.

As a result of those developments, an increasing number of national rules might fall within the scope of the Treaty, and be subject to the necessity and proportionality test required by the imperative requirements doctrine. National regulatory autonomy is therefore greatly affected: choices which traditionally pertained to national (and Community) legislatures, are now subject to the possibility of diffuse judicial review. Therefore, the judiciary is called upon to assess whether rules which do not have a specific intra-Community effect strike a reasonable balance between competing interests. Furthermore, since the rule is

non-discriminatory in nature, the effect of Community law is to impinge upon the level of regulation chosen by the national regulator since, once the rule is found to be disproportionate, there is no choice but to eliminate it in respect of all economic actors.

The expansion of the scope of the free movement of persons provisions thus gives rise to important (and familiar) constitutional questions. In particular, the problem is whether there is a sufficient normative basis in the Treaty to justify such a pervasive effect of Community law upon national regulatory autonomy. This is the main question that this book seeks to answer. In order to do so, and after having given an overview of the scope of the free movement provisions, we will analyze both the developments of the case law and the two main conceptual frameworks put forward by the scholarship, to argue that the developments occurred in this field should be understood, and explained, in the context of the introduction of Union citizenship.

Taken together, the free movement cases on non discriminatory restrictions point at the emergence of a new constitutional dimension whereby the Member States bear considerable duties towards Union citizens *qua* citizens rather than just *qua* economic actors – a duty not to *interfere* with individual rights (*Gebhard*); a duty to *respect* individual rights (*Carpenter*); a duty to *protect* individual rights (*Peerbooms*). And it is in the context of Union citizenship that these developments are better understood. Thus, it is argued, legitimacy for the Court's extensive interpretation might be more convincingly found in a *joint* teleological interpretation of the free movement and citizenship provisions. As a result of the introduction of Union citizenship, the *telos* justifying the Court's interpretation has shifted from the internal market, to include the protection of individual rights.

Writing in 1931, de Novellis argued that European economic integration would not be achieved in the foreseeable future.[1] This was, of course, before World War II, and things have changed considerably since then. Not only Europe has progressed towards an integrated economy, but the European project has evolved to create a new constitutional dimension which 'puts the individual at the heart of its activities'. The Union citizen is then not merely instrumental to the economic welfare of the Community – rather, she achieves an additional status, and with that, an additional layer of fundamental rights protection.

Synopsis

In the first chapter, I provide an overview of the material and personal scope of the free movement of persons provisions. Many readers will be familiar with the

[1] L. de Novellis *L'unificazione economica dell'Europa* (Fratelli Treves Editori Milano 1931), 203.

cases analyzed in this chapter, which aims simply at providing the background information to understand the developments which form the main focus of analysis in the rest of the book. In particular, it is important to appreciate how the free movement of persons provisions have always been broadly and purposefully interpreted even before the expansion of the scope of the Treaty which has occurred in the 1990s. Thus, both the personal scope (with the inclusion of work-seekers as well as part-timers), and the material scope of the Treaty (with a broad understanding of the concept of discrimination), have been generously construed by the Court. In particular, a refined interpretation of the concept of discrimination has been instrumental to eliminating barriers to integration resulting from the variegated regulatory traditions of the Member States.

In the second and third chapters, we explore the expansion of the Treaty's scope to embrace truly non-discriminatory barriers to movement. Chapter 2 analyzes the expansion of the scope of Article 49 EC. After a brief introduction on the *Sunday Trading* cases and the *Keck* ruling, essential to appreciate both the constitutional implications of the expansion of free movement rights and the terms of the debate as developed in the scholarship, we turn to analyze the case law on Article 49 EC. In particular, we focus on the notion of non-discriminatory barrier; on the relaxation of the intra-Community link required to trigger the Treaty; and on the broadening of the definition of remuneration. The initial expansion of the concept of barrier to movement to embrace all rules imposed by the host-Member State is not in itself particularly problematic, since it ensures the elimination of double regulatory burdens which might truly affect the economic operators' ability to extend their markets beyond the confines of the State of origin. However, matters become more difficult once Article 49 EC can be relied upon also to challenge non-discriminatory barriers imposed by the Member State of establishment. In *Gourmet* the Court allowed the claimant to rely upon the freedom to provide services against its state of establishment, the only regulator, on the grounds that *Gourmet* had potential clients in another Member State. This development, confirmed in later case law, significantly expands the scope of the Treaty by allowing virtually any economic operator to challenge market rules, whether those imposed by the host State, or those imposed by the home State.

The relaxation of the notion of barrier to the cross-border provision of services is accompanied by the relaxation of the economic link necessary to trigger the Treaty. In a series of cases, the Court allowed Article 49 EC to be used to challenge the rules on reimbursement of cross-border medical care. Whilst the Court, in *Watts*, seems to have partially backtracked from a too generous interpretation of Article 49 EC, the health care cases are interesting in that they provide the foundation for a mode of interpretation which will later be applied in defining the parameters of citizenship rights.

In Chapter 3, we look at the concurrent developments which have occurred in the field of freedom of establishment and free movement of workers. Thus, starting with the *Gebhard* ruling, the scope of Article 43 EC is expanded to embrace non-discriminatory barriers to the freedom of establishment. In this way, again, the Court allows economic operators to challenge what might be the only regulator, without the need to establish that the rules at issue have a specific impact on the intra-Community situation. As a result, the dividing line between Articles 49 and 43 EC becomes relevant only at the justification stage, rather than at the definitional stage. A similar development occurs in the field of Article 39 EC. There in the *Bosman* ruling, the scope of Article 39 EC is broadened to embrace non-discriminatory restrictions to the movement of workers. And yet, the development in the field of workers is less marked for two reasons: first of all, the demarcation line, and the market access test, seem more clearly defined in that instance; secondly, the scarcity of cases on non-discriminatory restrictions makes it hard to establish whether the narrower impact of the workers' cases on national regulatory autonomy is simply circumstantial. After having analyzed non-discriminatory barriers to workers and establishment, we turn to a brief analysis of the notion of non-discriminatory barrier to the free movement of capital (especially in the golden share cases, and in *Burtscher*), and then to the case law on tax and social security rules. In the latter, the effect of the *Gebhard* case law is rather limited: were the notion of hindrance/discouragement to movement to be applied in the field of taxation and social security, then high levels of direct taxation and social security contribution would always have to be justified. It is not surprising then that, by and large, in the field of taxation and social security contribution the Court has limited itself to the scrutiny of discriminatory restrictions.

The expansion of the scope of the free movement provisions calls into question the adequacy of the conceptual explanations put forward by the scholarship in order to provide a rationale for the Court's interpretation. The discriminatory/double burden approach, examined in Chapter 4, does not represent an accurate description of the state of the law. Rather, its value is prescriptive, in the sense of indicating what the law *ought to be* or should have been. In this sense, the discrimination theory has the advantage of providing a coherent normative structure for the Treaty free movement provisions.

On the other hand, the market access test, examined in Chapter 5, is better apt at providing a framework which is capable of accommodating most, although not all, of the case law. And indeed the market access rhetoric clearly inspires the Court in its rulings. However, and without subtracting from its merits, the market access test fails to provide a normative explanation capable of providing legitimacy for the Court's interpretation. In this regard, I argue that a more accurate way of describing the Court's case law is to understand the rights granted by the Treaty as a right to pursue an economic activity free of disproportionate market regulation. Whilst this

definition is not helpful in drawing the outer boundaries of the free movement provisions, and indeed it does not substantially differ from the market access test, it is useful in highlighting two factors. First of all, the market access test provides no guidance as to what constitutes a barrier to market access or as to why such barriers fall within the scope of the free movement provisions. Secondly, it stresses the fact that the free movement provisions have evolved into a broader 'individual' right which resembles familiar rights known in national constitutional law, and more precisely, the right not to be hindered in the pursuit of one's business without a good reason. Yet, even should we accept that the 'freedom to pursue an economic activity' test provides us with an accurate, or more accurate, descriptive analysis, it still does not shed any light as to the normative justification for such test; and, it does not, in itself, explain all of the case law. In order to address these two problems it is then necessary to take a further step and look at the developments which have occurred in the field of the economic free movement provisions in their constitutional context. This for two related reasons: first of all, it is now impossible to provide an account of the law on the free movement of persons without including an account, however brief, of the way the Court has interpreted the rights of economically inactive citizens. Secondly, and more importantly, the developments in the field of citizenship might help provide a normative explanation for the case law on the economic free movement provisions.

In Chapter 6, we first look at the development of the case law on Article 18 EC, focusing in particular on the hermeneutic techniques adopted by the Court. Here, the Court has adopted a mode of interpretation similar to that used in relation to the health care case law. Faced with secondary legislation which granted residence rights only to those who are economically independent, i.e. those who have sufficient resources and comprehensive health insurance, the Court chose to give effect to Article 18 EC without calling into question the validity of the conditions provided in secondary legislation. Thus, those who do not satisfy the conditions provided in secondary legislation have a right to be treated proportionately (even when the rules of the Member State are not *per se* incompatible with the Treaty) and to see their fundamental rights respected. This diffuse right of judicial scrutiny then resembles the right to judicial review known in national contexts with the fundamental difference that in the latter case such right is usually limited to administrative/executive acts, whilst in the former case it extends to the *way* legislation is applied to the circumstances of the case at issue. After having analyzed the citizenship case law, we turn to assess whether it can provide us with useful tools in relation to the case law on economic migrants. We first analyze the ruling in *Carpenter*, to argue that it should be seen as a citizenship case. In that case, the Court held that the right to provide services of a person established in his own Member State was affected by the deportation of his wife. This rather artificial finding allowed the Court to carry out a fundamental rights review of the legislation

at stake, indicating that it constituted a disproportionate interference with the claimant's right to family life. However, seen from the perspective of citizenship, the case can be more convincingly explained. In particular, we advocate the elimination of reverse discrimination by means of the combined effect of Articles 17 and 12 EC. Article 17 EC establishes Union citizenship and does not make such status conditional upon migration; Article 12 EC provides for a prohibition of discrimination on grounds of nationality in all matters falling within the scope of the Treaty and the Court has interpreted such right as comprising also a right not to be discriminated against on grounds of migration. It is argued that there is no hermeneutic nor literal reason why the right not to be discriminated on grounds of nationality and migration should not be extended to static Union citizens when they are in a comparable situation to migrants. Viewed in this light, the approach in *Carpenter* can be more convincingly explained.

In Chapter 7 we turn to the economic free movement case law to argue that it also can be explained having regard to the stance taken by the Court in the citizenship cases. Here a purposive interpretation of the Treaty rights, with the benefit of hindsight derived from the *Baumbast* ruling, allows us to provide a normative justification for the Court's case law. In *Baumbast* the Court held that any limitation to the rights conferred by Article 18 EC must be proportionate and consistent with fundamental rights. If we interpret Articles 39, 43 and 49 EC as granting also a right to exercise an economic activity in another Member State, then any limitation to that right is subject to the proportionality scrutiny, and the *Gebhard* case law can be explained. Any rule regulating an economic activity can be seen as a limitation to the right to pursue an economic activity in another Member State. Here, it is immaterial whether the barrier restricts market access or not. It is the right to pursue an economic activity which is limited by market rules. And it is for this reason that tax and social advantages are scrutinised only insofar as discriminatory or if they are on such a large scale as to totally eliminate the possibility of exercising the economic activity.

Finally, once we redefine the right granted by the Treaty as a right to exercise an economic activity, the case law relating to the challenges to the Member State of establishment, even when it is the only regulator, can also be explained. The Court has always construed the free movement provisions as prohibiting potential barriers to intra-Community trade. Once it is accepted that economic operators can challenge non-discriminatory barriers, and barriers which do not specifically affect movement, then it is clear that any situation has potential intra-Community credentials. After all, the very nature of the internal market, allows for a possible change of ownership or transfer of residence. And the existence of a barrier to the exercise of an economic activity can undoubtedly have a foreclosure effect whereby new entrants do not enter into the market because the existence of the barrier makes entrance economically non-viable.

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Chapter 1

The Rights of Economic Migrants: An Overview

As said in the introduction, in approaching the free movement provisions, it is important to understand that, from the very beginning, in fact from the ruling in *Van Gend en Loos*,[1] the Court has interpreted the free movement provisions as *fundamental* Community rights. It is therefore not surprising that in defining the scope of those rights the Court should adopt hermeneutic techniques typical of rights discourse. Thus, the interpretation is teleological rather than literal; it is aimed at achieving the *full effect*, rather than just a formal guarantee, of the rights at stake; it is expansive in nature; the derogations are narrowly construed; and the limitations to those rights are closely scrutinized in order to ensure that the aims are legitimate and consistent with fundamental rights, and that, more importantly, the means are proportionate to those aims. The rights rhetoric permeates then the entire free movement discourse. But those rights serve also another purpose: they are a vehicle for integration, and with time they become a means to shape market regulation along liberal lines. The two purposes rarely clash,[2] rather market integration and individual rights usually go hand in hand, and the expansive interpretation of the Community rights successfully achieves its twofold aim.

In this chapter we are going to examine briefly the scope of the free movement provisions and the rights that Community nationals derive from them. Whilst the rest of the book focuses on the notion of non-discriminatory barrier, a field in which the Court's interpretation continues to develop, posing not insignificant

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[1] Case 26/62 *Van Gend en Loos* [1963] ECR 1.

[2] But sometimes a clash might arise between non-economic fundamental rights and the free movement provisions, e.g. Case C-112/00 *Schmidberger* [2003] ECR I-5659, where the Court clarified those non-economic fundamental rights might take precedence over the free movement provisions. See also pending case C-438/05 *The International Transport Workers' Federation et al v Viking Line APB et al.*