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**Free Movement of Persons in The European Union, National Borders and  
Legal Reforms: The Principle of Non-Discrimination  
Based On Nationality (Article 12 ECT)**

Dr. Ana Salinas de Frías\*

A central feature of the European Union (EU) project which seeks “integration” at the Community level, is the idea that productive factors within an economy should enjoy the right of free movement. Persons, are productive factors and as such, are recipients of this right. The idea is unique within the EU where, unlike other regional associations, control of the workforce has long been guaranteed to workers.

The economic objective of free movement of workers is to create a common market workforce. The political objective, according to the Preamble and Principles of the Treaty establishing the European Community (hereinafter the ECT), is to strengthen the cohesion among the people of the EU by eliminating barriers to migration and through the promotion of citizenship within the Union. These two objectives are clearly supported by the principle of non-discrimination based upon the worker’s nationality, which is one of the few principles within the treaties that expressly establishes civil rights. It is perhaps this reason that explains why this principle is so often invoked before the Community’s highest jurisdictional institution, either in tandem with other complaints or as the sole cause of action. EU law expressly prohibits, within Community territory, the application, of different criteria for Community citizens, in similar situations where nationality is the only objective difference between them. This prohibition, already vaguely contemplated by the constituent Treaties, has been progressively amplified and specified through the case law of the European Court of Justice (ECJ).

Prohibition of discrimination is a classic prohibition in the international instruments for the protection of human rights,<sup>1</sup> as well as in the post World War II European constitutional texts. With the European Community’s, main objective being economic, then political integration, the concept of *discrimination* acquires very specific and characteristic features. Considered as a fundamental principle, constituent Treaties have consecrated many provisions to this principle and have continued to develop its different aspects over time. Simultaneously, the functionalism of the principle has been invoked, as Article 12 ECT restricts its operational capacity to the sphere of said Treaty. This functionalism, with its submission to fundamental human rights and to the objectives of the Treaties, has restricted its reach. However, it has not

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<sup>1</sup> See *European Convention on Human Rights*, 3 September 1953, art. 14, Europ T.S. No. 5; *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI)A of 23 March 1966, art. 2.1, art. 26; *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 (XXI)A of 16 December 1966, art. 2.2; *Universal Declaration of Human Rights*, G.A. Res. 217 (III)A of 10 December 1948, art. 2, art. 7; *American Convention on Human Rights*, 22 November 1969, art. 1, OAS T.S. No. 36.

weakened this principle within the Community's borders, and perhaps it has proven even more efficient than the drafters of the provision had expected.

In Community law, non-discrimination is stronger than a general prohibition of arbitrariness, since this prohibition would not be sufficient to ensure the whole integration postulated by the Treaties.<sup>2</sup> However, the reference to the general principle of prohibition of discrimination varies in intensity throughout the Treaty of Rome.<sup>3</sup> In some cases, and as can be deduced from Articles 30 and 31 ECT, this principle is referred to as a necessary condition for the existence of the Common Market. In other cases, the principle has a more generic meaning, in that the only malice intended to be avoided is an arbitrary difference in treatment of workers which has no other effects. Such is the case with regards to Article 34.2 ECT, and the prohibition of discrimination between producers and consumers in the agricultural market. Likewise, the same meaning can be inferred from Article 82 ECT, as it proposes to reduce competition due to the concentration of companies and to the abuse of dominant positions within the market.

As for the general formulation of this principle, contained in Article 34.2 ECT, the Court has repeatedly stated that it is a specific expression of the general principle of equality, which is part of the fundamental principles of Community law. The Court has also stated that the principle of non-discrimination stands for the proposition that similar situations are not dealt with in different ways, unless the difference is objectively justified.<sup>4</sup> However, the Court has also pointed out that this Community concept of discrimination does not prohibit disparities between the legislation of the different member states. Nonetheless it is forbidden for each member state to apply its own laws in different ways based upon the nationality of the interested parties. Community law does not consider possible differences of treatment and distortions that may derive from the differences in the legislation of the member states, provided that these norms affect all natural and legal persons under its area of application and that they are in accordance with objective criteria that does not include either nationality<sup>5</sup> or any possible clashes between a transposed Community law and the domestic legal system.<sup>6</sup>

<sup>2</sup> See Pinero Rodriguez Et Al., *Igualdad y Discrimination* 135 (1986).

<sup>3</sup> See A. Bleckmann, *Considerations sur L' Interpretation de L' Article 7 du Traite CEE 469-81* (1976); F. Shockwiler, *La Portee du Principe de Non-Discrimination de L'Article 7 du Traite CEE 3-24* (1991).

<sup>4</sup> See Case 245/81, *Edeka Zentrale Ag v. Germany*, 1982 E.C.R. 2754; Joined Cases 117/76 and 16/77, *Ruckdeschel v. Hauptzollamt Hamburg-St. Annen* 1977 E.C.R. 1753, [1979] 2 C.M.L.R. 445 (1979); Joined Cases 124/76 and 20/77 *Huileries Ponta-Mousson v. Office National Interprofessionnel des Cereales*, 1977 E.C.R. 1811, [1979] 2 C.M.L.R. 445 (1979). <<>This criteria will be held by ECJ also in the sphere of economic dispositions of ECT, in the sphere of property rights and in the sphere of Community civil servants, a field where we can find a great deal of examples).

<sup>5</sup> See Case 14/68, *Walt Wilhelm v. Bundeskartellamt*, 1969 E.C.R. 16, [1969] C.M.L.R. 100 (1969); Joined Cases 185-204/78, *Van Dam en Zonen*, 1979 E.C.R. 2361, [1980] 1 C.M.L.R. 350 (1980); Case C-177/94, *Perfili*, 1996 E.C.R. I-175-76.

<sup>6</sup> See Joined Cases 81, 82 & 146/79, *Sorasio-Allo & al. v. Commission*, 1980 E.C.R. 2329, [1982] 1 C.M.L.R. 91 (1982). (The ECJ will not consider as a discrimination those differences of treatment derived for natural phenomena, only those differences of treatment

### A. Prohibition of Discrimination based on Nationality and Free Movement of Workers (Articles 39 and Beyond).

It is, in the case of the movement of a worker from a member state within the Community, that equal treatment of Community nationals is most clearly verifiable. From the point of view of fundamental rights, we should determine the type of discriminations that exists and the treatment they receive from the Court's case law, which seems to show a clear movement from an initial economic fundamental freedom<sup>7</sup> to a real bundle of fundamental rights.<sup>8</sup> That is why freedom of movement will be restrictively interpreted only in exceptional circumstances.<sup>9</sup> The community legal system shall protect the fundamental freedom of all workers, regardless of their value as productive factors. These freedoms include the freedom to move within the Community under the same conditions as the nationals of the Member State where they are; the freedom to accept offers of employment; and the freedom to stay in a member state during the period of employment and afterwards once employment ends. The idea of the "general principle of equal treatment (general prohibition of discrimination) fundamental freedom of movement within the Community" becomes a central element in the case law about fundamental rights.

Article 39.2 ECT states that the "freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work and employment." However, the Treaty establishes four important limitations to this freedom: public policy, public security, public health concerns and employment in the public service. According to this basic regulation, the ECJ has generically defined this prohibition in the sphere of freedom of movement as a specific expression of one of the fundamental principles of Community law. This principle requires that similar situations

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derived from human activities, especially those adopted by public authorities, will be considered as discriminatory).

<sup>7</sup> See Case 246/80 Broekmeulen v. Husarts Registratie Commissie, 1981 E.C.R. 2329, [1982] I C.M.L.R. 91 (1982).

<sup>8</sup> See Case 131/85, Emir Cul v. Regierungspresident Dusseldorf, 1986 E.C.R. 1588, [1987] I C.M.L.R. 501 (1987); Case 222/86, UNECTEF v. Heylens, 1987 E.C.R. 4117, [1989] I C.M.L.R. 901 (1989); Case 139/85, Kempf v. Staatssecretaris van Justice, 1986 E.C.R. 1471, [1987] I C.M.L.R. 764 (1987); Case 29289, R. v. Immigration Appeal Tribunal ex parte Antonissen, 1991 E.C.R. I-777, [1991] 2 C.M.L.R. 373 (1991); see Esther Johnson & David O'Keefe, From Discrimination to Obstacles to Free Movement: Recent Developments Concerning the Free Movement of Workers 1989-1994, 31 C.M.L. Rev. 1313 (1994). Bibliography related to free movement of workers is enormous, so it is only possible to quote some indicative references. Anyway, for a comprehensive analysis see V. Abellan Honrubia, La libertad de circulación de trabajadores, Tratado de Derecho Comunitario Europeo. Estudio sistemático desde el Derecho español. Madrid, vol. II, 99 1986. P. Jimenez de Parga Maseda, El derecho a la libre circulación de las personas físicas en la Europa comunitaria, Madrid, 1994. See G.F. Mancini, La circulación de los trabajadores por cuenta ajena en la jurisprudencia comunitaria, within D.J. Linan Noguera & G.C. Rodriguez Iglesias, El Derecho comunitario europeo y su aplicación judicial. Madrid, 805 1993 (For more recent developments).

<sup>9</sup> See E. Cerexhe, L'égalité de traitement dans l'ordre juridique communautaire, in Mélanges offerts à Pierre-Henri Teigten Paris, 34 1984.

shall not be dealt in different ways, unless the difference is objectively justified.<sup>10</sup> However, the absolute and unconditional character of the principle of non-discrimination and the free movement of workers has been confirmed by the Court<sup>11</sup> and prevails over the actions of public authorities, but also over any type of regulation which intends to regulate collective bargaining.<sup>12</sup> The kind of activity protected by the aforementioned principle presents an extremely wide link: it is only necessary that the activity is considered as a provision of wage earning work or a provision of remunerated service. The precise nature of the legal link by which these services are satisfied is indifferent. The principle of non-discrimination equally affects both work or services provisions.<sup>13</sup>

It is also a principle with an indisputable direct effect, and thus a generator of immediate civil rights. The ECJ, stated as much when it held that not only did the Article 39 ECT fundamental principle of free movement of workers have a direct effect and establishes individual rights that the respective national jurisdictions must respect, but also that the derived Community regulation adopted with regards to the limitations to that fundamental freedom—Directive 64/221—is also immediately applicable.<sup>14</sup> However, disparity between national legislations does not mean discriminatory treatment, since they affect all persons within their jurisdiction, regardless of their nationality.<sup>15</sup>

Section three of Article 39 ECT thus states, in unrestrictive terms, that some specific rights enjoyed by nationals of the member states regarding free movement of workers, including their right to move freely within the territory of the other member states and to stay there for the purpose of employment.<sup>16</sup> Thus, discrimination, both direct and indirect based on nationality, is prohibited.<sup>17</sup> One form of prohibited discrimination is, the hiring of

<sup>10</sup> See Case 147/79, Hochstrass v. ECJ, 1980 E.C.R. 3019, [1981] 2 C.M.L.R. 586 (1981); Case 810-79, Uberschar v. Bundesversicherungsanstalt für Angestellte, 1980 E.C.R. 2753.

<sup>11</sup> See Case 167/73, Commission v. French Republic, 1974 E.C.R. 1347, [1974] 2 C.M.L.R. 216 (1974); see Trevor C. Hartley, *Direct Applicability and the Failure to Repeal Incompatible National Legislation*, 1 Eur. L. Rev. 53 (1976); see also E. Cerexhe, *L'égalité de traitement dans l'ordre juridique communautaire*, in *Mélanges offerts à Pierre-Henri Teigten* Paris, 35 1984.

<sup>12</sup> See Case 36/74, Walrave and Koch v. Association Union Cycliste Internationale, 1974 E.C.R. 1405, [1975] 1 C.M.L.R. 320 (1975); Case 13/76, Dona v. Mantero, 1976 E.C.R. 1339, [1976] 2 C.M.L.R. 578 (1976).

<sup>13</sup> See Case 36/74, Walrave and Koch v. Association Union Cycliste Internationale, 1974 E.C.R. at 1418.

<sup>14</sup> See Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1347, [1975] 1 C.M.L.R. 1 (1975); Case 118/75, Watson and Belmann, 1978 E.C.R. 1197; Case 1/78, Kenny v. Insurance Officer, 1978 E.C.R. 1497, [1978] 3 C.M.L.R. 651 (1978); see Derrick Wyatt, *Alien's Duty to Notify National Authorities of his Presence*, 1 Eur. L. Rev. 556 (1976); see comments to *Van Duyn* decision by TOMUSCHAT, Ch. *L'ordre public, menace pour la libre circulation?*. XI CDE, 1975, p. 302-309; TOMUSCHAT, Ch. *Le principe de proportionnalité: Quis iudicabit? L'affaire Watson*. CDE, 1977, p. 97-102.

<sup>15</sup> See Case 1/78, Kenny v. Insurance Officer, 1978 E.C.R. at 1498.

<sup>16</sup> See Case 292/89, R. v. Immigration Appeal Tribunal ex parte Antonissen, 1991 E.C.R. at I-777.

<sup>17</sup> See Case 41/84, Pinna v. Caisse D'alocations Familiales de la Savoie, 1986 E.C.R. I, [1988] 1 C.M.L.R. 350 91988); Case 33/88, Allue and Coonan v. University of Venice, 1989

professors who are nationals of other member states, as foreign language assistants for only one year. This is justified by citing a temporary needs of the contracting university<sup>18</sup> or by arguing for the need to raise the level of knowledge, at the university. This of course favors the relation with the member state whose language is taught, where as the one year limit does not apply to the professors who are citizens of that State.<sup>19</sup> Another form of this type of discrimination occurs with the establishment of higher employer contributions to social security for contract workers that studied in another Member State, than for those workers who have studied within that State.<sup>20</sup> Additionally, another example involves the non-application of a favorable provision, applicable to all national workers in general, to a worker of another Member State, that would mitigate the negative effects derived from the absence of the said worker from his job because of compulsory military service. When that worker is obliged to fulfill the same obligation in his State of origin, the discrimination is prohibited.<sup>21</sup>

As for the sphere of material and territorial application of this prohibition, it extends to all legal relationships that can be located within the Community's territory, either considering the place where they are established or where they produce their effects.<sup>22</sup> Moreover, its application involves not only avoiding an unfavorable treatment or a negative conduct, but also the application, to migrant Community nationals who are carrying out a labor activity<sup>23</sup> in that State, or any favorable regulation or advantages applicable to the nationals of the Member State.

**(a) The Scope of Personal Application of the Prohibition of Non-discrimination and its case Law Extensions**

Article 39 ECT seems to define clearly the sphere scope of application of the prohibition of discrimination based on nationality. However, derived Community law on this subject has complicated this subject, shading the initial profiles of the beneficiaries, which have been considerably amplified by the ECJ case law.

The principle of free movement established in Article 39.2 refers to "the workers" as the beneficiaries. This principle, according to Article 39.3 and to case law, entails the abolition of any discrimination based on nationality

E.C.R. 1610; Case 111/91, *Commission v. Grand Duchy of Luxembourg*, 1993 E.C.R. B17; Joined Cases C-259/91, C-331/91 and C-332/91, *Allue and Others v. Università degli Studi de Venezia and Università degli Studi di Parma*, 1993 E.C.R. I4309; Case C 419/92, *Scholz v. Opera Universitaria di Cagliari and Porcedda*, 1994 E.C.R. I521.

<sup>18</sup> See Case 33/88, *Allue and Coonan v. University of Venice*, 1989 E.C.R. at 1610.

<sup>19</sup> See Case C-272/92, *Spotti v. Bayern*, 1993 E.C.R. 5207.

<sup>20</sup> See Case 27/91, *URSSAF v. Hostellerie La Manoir Sarl, Aix-les-Bains*, 1991 E.C.R. 5542.

<sup>21</sup> See Case 15/69, *Wurtembergische Milchverwertung-SudmilchAG v. Ugliola*, 1969 E.C.R. 369-70, [1970] C.M.L.R. 194 (1970).

<sup>22</sup> See Case 36/74, *Walrave and Kpck v. Association Union Cycliste Internationale*, 1974 E.C.R. at 1421; see *Prodest v. Caisse Primaire d'Assurance Maladie de Paris*, 1984 E.C.R. 3161.

<sup>23</sup> See Case 15/69, *Wurtembergische Milchverwertung-Sudmilch-AG v. Ugliola*, 1969 E.C.R. at 363-70.

between workers of the member states regarding employment, remuneration and other conditions of work and employment. The principle entails the right of EU nationals—subject to public policy, security, health, and to employment offer limitations—to move freely within the territory of member states for this purpose, to remain in a Member State for employment purposes and to remain in the territory of a member state until the conclusion of their employment.<sup>24</sup> Of course, in this definition found in the Treaty the concept of *worker*, the main beneficiary of the right, has to be understood strictly according to Community parameters. Since the Court considers free movement of EU workers as a fundamental principle of Community law, we have to deal with a Community concept of *worker*,<sup>25</sup> and both the notion of *salaried activity* and the notion of *worker* in the context of Article 39.2 ECT. This article cannot be restrictively interpreted, because both parameters define the scope of application of one of the fundamental human rights guaranteed by the Treaty.<sup>26</sup> In addition, this concept has to be defined following the objective criteria that constitutes the working relationship, the main characteristic of which consists of “a person that fulfills, for a certain period of time, in favor of others and under their direction, a series of provisions, in consideration of a remuneration.”<sup>27</sup> This Community concept of *working relationship*, coupled together with the Community idea of *worker*, gives the migrant worker the same tax and social advantages as any other national worker.<sup>28</sup>

From the beginning, the ECJ has interpreted the concept of worker broadly. Furthermore, this concept incorporates all those EU nationals who have moved to another Member State in order to carry out a salaried work, even if it is only a part-time job or if, the remuneration obtained with that activity is lower than national minimum wage.<sup>29</sup> Therefore, the restrictions that Member States may impose upon EU workers are strictly limited: every person carrying out an actual employment activity—except those activities carried out in such a little scale as to be considered marginal and accessory—will be considered a worker. Consequently, Member States cannot unilaterally subordinate the social advantages established by Article 7.2 of Regulation 1612/68 to a minimum period of professional activity. For this reason, a national from a Member State who moves to another EU member state in order to complete a series of studies is also considered a Community worker.<sup>30</sup>

<sup>24</sup> See Case 53/81, *Levin v. Staatssecretaris van Justice*, 1982 E.C.R. 1047-48, [1982] 2 C.M.L.R. 454 (1982); see Case 292/89, *R. v. Immigration Appeal Tribunal ex parte Antonissen*, 1991 E.C.R. AT I-777.

<sup>25</sup> See Case 53/81, *Levin v. Staatssecretaris van Justice*, 1982 E.C.R. at 1048.

<sup>26</sup> See Case 44/65, *Knappschaft v. Maison Singer et Fils*, 1965 E.C.R. 965, [1966] C.M.L.R. 82 (1966); Case 53/81, *Levin v. Staatssecretaris van Justice*, 1982 E.C.R. at 1049; Case 66/85, *Lawrie-Blum v. Land Baden-Wurtemberg*, 1986 E.C.R. 2144, [1987] 3 C.M.L.R. 389.

<sup>27</sup> See Case 66/85, *Lawrie-Blum v. Land Baden-Wurtemberg*, 1986 E.C.R. at 2144; see Case 33/88, *Allue and Coonan v. University of Venice*, 1989 E.C.R. at 1600.

<sup>28</sup> See Case 65/81, *Reina v. Landeskreditbank BadenWurtemberg*, 1982 E.C.R. 44.

<sup>29</sup> See Case 53/81, *Levin v. Staatssecretaris van Justice*, 1982 E.C.R. at 1050.

<sup>30</sup> See Case 197/86, *Brown v. Secretary of State for Scotland*, 1988 E.C.R. 3244, [1988] 3 C.M.L.R. 403 (1988).

This right can be considered within two different approaches. First, it can be a passive approach, consisting of prohibitions restricting the entry of nationals from other EU countries. Secondly, it can be considered from an active approach because under this effect, individuals gain rights which require a positive action from the host state, who must adopt measures to protect EU nationals. The benefit to the EU is across the board uniformity.<sup>31</sup> Every document favoring the entry or settlement of an EU worker within a member State has also been interpreted in the broadest terms. Thus, it is not possible for the authorities of a member state to consider an EU national as an alien. Therefore, neither he nor his children<sup>32</sup> can be asked for an entry or residence permit or any other additional<sup>33</sup> document. The entry document has just a declarative value, not a constitutive<sup>34</sup> one. Thus, we can deduce a double consequence from this fact. First, Member States are obliged to issue that document to every Community national meeting all the requirements of the Community law.<sup>35</sup> Member states do not have discretionary power over EU nationals—a power that they have in regards to nationals of non-EU countries.<sup>36</sup> Nonetheless, national authorities have the power to control those requirements, but they cannot, in the event an EU national fails to meet them, impose a decision of expulsion or imprisonment.<sup>37</sup> Thus the right to family reunification under Regulation 1612/68—which allows the worker's family to follow the worker to the member state's territory has expanded the personal sphere scope of the right to free movement of workers.

The ECJ has demonstrated a restrictive attitude towards family members, who are beneficiaries of this right. This restrictive attitude has been shown with the adoption of *relative in charge* or of *son under 21 years old* restrictions. Nonetheless, the inclusion of relatives in charge, beneficiaries of these rights, of sons over 21 years old but still not emancipated, is actually not that specific. Regarding non-married couples, the Court has not accepted a

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<sup>31</sup> See Case 118/75, Watson and Belmann, 1976 E.C.R. at 1197.

<sup>32</sup> See Joined Cases 389 and 390/8, Echtermach and Moritz v. Netherlands Minister for Education and Science, 1989 E.C.R. 769.

<sup>33</sup> See Case 157/79, Regina v. Pieck, 1980 E.C.R. 2185 Case 321/87, *reaffirmed in* Commission v. Belgium, 1989 E.C.R. 997. Since the freedom of establishment is also a part of the freedom of movement of Community workers, a Community national shall not be asked for the affiliation to a national social security regime to allow him/her to reside within that Member State; see also Case 363/89, Roux v. Belgian State, 1991 E.C.R. I290. He/she will neither be obliged, before the entry in the territory, to answer questions related to the objective and long of his/her travel, as well as to the economic means he/she has. See also Case 68/89, Commission v. Netherlands, 1991 E.C.R. 2656.

<sup>34</sup> See Case 8/77, Sagulo et al., 1977 E.C.R. 1505; see also Case 48/75, Royer, 1976 E.C.R. 513; see also Case 157/79 Regina v. Pieck, 1980 E.C.R. at 2186; see also European Commission v. Belgium 1989 E.C.R. at 1010. In the same way, the Court will assert that the identity card shown by the migrant worker is just to show its identity and nationality. See also Case 376/89, Giagounidis v. Reutlingen, 1991 E.C.R. I-1092. See also Roux v. Belgium, 1991 E.C.R. at I-293.

<sup>35</sup> See Case 48/75, Royer, 1976 E.C.R. at 497.

<sup>36</sup> See Case 8/77, Sagulo et al., 1977 E.C.R. at 1504; Case 157/79 Regina v. Pieck, 1980 E.C.R. at 2184-2185.

<sup>37</sup> See Case 118/75, Watson and Belmann, 1978 E.C.R. at 1198; Case 48/75, Royer, 1976 E.C.R. at 514-515; Case 157/79 Regina v. Pieck, 1980 E.C.R. at 2187.



regulation interpreting non-married couples, whose derived rights are still not recognized.<sup>38</sup> In contrast, married couples—even if the couple is separated—enjoys those rights, since the marital link remains<sup>39</sup> as far as the divorce resolution is not finalized.<sup>40</sup> Age and economic dependence limitations do not affect, however, the right of Community worker's children to receive education, as well as scholarships or grants to complete those studies.<sup>41</sup> However, despite this broad concept of *worker*, those workers who have never moved from the State which they are nationals of in order to accept offers of employment actually made or to search for employment, are not beneficiaries of these rights, and the Court classifies such cases as “mere domestic situations.”<sup>42</sup>

Regarding the territorial sphere scope of application, the Court has maintained—in addition to the extensive conception *ratione materiae* of this right—that the non-discrimination principle must be imposed on all legal relationships, in so far as these relationships can be placed within the Community's territory, either because: a) of the place where they are set; or b) of the place where they manufacture their goods.<sup>43</sup> Even if these legal relationships are carried out outside the Community's territory, this principle would be applied even if the work relationship has a strong linkage with the territory of a Member State.<sup>44</sup>

#### **(b) The Content of the Concept of Social Advantage and its Derived Rights**

Article 7.2 of Regulation 1612/68 establishes, as a fundamental right derived from the free movement of persons, the right of EU migrant workers to enjoy the same tax and social advantages as any national worker of the State where the Community worker has moved too. This broadly recognized right, has been progressively delimited by ECJ.

As a basis criterion, the Court starts with a wide concept of *social advantage*. Its scope of application must include all social and tax advantages—no matter if they are bound or not to a work contract—generally recognized to

<sup>38</sup> See Case 59/85, *Netherlands v. Reed*, 1986 E.C.R. 13001301.

<sup>39</sup> See Case 26/783, *Diatta v. Berlin*, 1985 E.C.R. 589590. (These derived rights, in favor of the rest of beneficiaries due to their status of migrant worker's close family, are considered as fundamental rights).

<sup>40</sup> See Case 170/90, *The Queen v. Immigration Appeal Tribunal*, 1992 E.C.R. I-4294-95.

<sup>41</sup> See Case 7/94, *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v. Lubor Gaal*, 1995 E.C.R. I-1049.

<sup>42</sup> See Case 175/78, *La Reine v. Saunders*, 1979 E.C.R. 1135; see also Joint Cases 35 and 36/82, *Morson v. Netherlands and Sweradjie Jhanjan v. Netherlands*, 1982 E.C.R. 3736; see also Case 332/90, *Volker Steen v. Deutsche Bundespost*, 1992 E.C.R. I357; see also Case 180/83, *Hans Moser v. Land Baden-Württemberg*, 1984 E.C.R. 2547; see also Case 298/84, *Iorio v. Azienda Autonoma*, 1986 E.C.R. 255; see also Joint Cases 330/90 and 331/90, *Ángel López Brea and Carlos Hidalgo Palacios*, 1992 E.C.R. I336; see also Case 60/91, *Batista Morais*, 1992 E.C.R. 2105; see also Case 299/95, *Kremzow v. Republik Österreich*, 1997 E.C.R. para. 13.

<sup>43</sup> See Case 36/74 *Walrave and Koch v. Association Union Cycliste Internationale*, 1974 E.C.R. at 1421.

<sup>44</sup> See Case 214/94, *Ingrid Boukhalfa v. Bundesrepublik Deutschland*, 1996 E.C.R. I-2278.

all national workers for their worker condition or just for residing within the national territory, as well as those advantages whose extension to all Community workers will favor their mobility.<sup>45</sup> This includes not only benefits granted as rights, but also those benefits granted on a discretionary basis. The Principle of equal treatment requires benefits (including the granting of bank credits)<sup>46</sup>—be accessible under the same conditions, both for the State's nationals and for those nationals of other member states. Member states cannot combine the concession of social advantages, established by a regulation, to a minimum period of professional activity.<sup>47</sup> The principle includes the right of the migrant worker's children to: a) attend basic or professional studies; to receive economic aid or a grant; b) to attend those studies under the same conditions as that Member state's nationals,<sup>48</sup> or c) to attend professional advanced studies in another Member State,<sup>49</sup> even if it is the State of which the migrant worker's child is a national.<sup>50</sup> The admission of an EU migrant worker's child in primary education under the same conditions as that Member State nationals includes enrollment conditions, as well as the whole of situations derived from enrollment<sup>51</sup> and, in general, every measure aimed to facilitate attendance to courses.<sup>52</sup> Moreover, this concept of education has been broadened to the extent that it does not only include basic and professional courses, but also university education.<sup>53</sup>

According to the delimitation made by the Court, the concept of social advantage also includes the right of a handicapped child over 21 years of age to receive benefits derived from his parents worker status if the law of the Member State where they carry out their labor activity grants so to its nationals.<sup>54</sup> It also includes the right to get benefits from national measures for handicapped social re-adaptation.<sup>55</sup> This right must be recognized to the migrant worker's child even in the case of a minor handicapped child cannot become a

<sup>45</sup> See Case 297/78, Gilbert Even and ONPTS, 1979 E.C.R. 2034; *see also* Case 315/94, Vos v. Stadt Bielefeld, 1996 E.C.R. I1440.

<sup>46</sup> See Case 65/81 *Reina v. Landeskreditbank BadenWuerttemberg*, 1982 E.C.R. at 45. A wide interpretation of the content of the term social advantage that the Court holds in its case-law. *See* Case 249/83, Vera Hoeckx, 1985 E.C.R. 988; *see also* Case 94/84, Jozsef Deak, 1985 E.C.R. 1885-1886; *see also* Case 157/84, Maria Frascogna, 1985 E.C.R. 1749; *see also* Case 39/86, Sylvie Lair, 1988 E.C.R. 3196-3197.

<sup>47</sup> See Case 39/86 Sylvie Lair, 1988 E.C.R. at 3021.

<sup>48</sup> See Case 9/74, Casagrande, 1974 E.C.R. 778-779; *see also* Case 389 and 390/8 *Echternach and Moritz v. Netherlands Minister for Education and Science*, 1989 E.C.R. at 764; *see also* Case 308/89, di Leo, 1990 E.C.R. I4207.

<sup>49</sup> See Case 39/86 Sylvie Lair, 1988 E.C.R. at 3197; *see also* Case 235/87, Matteucci, 1988 E.C.R. 5610.

<sup>50</sup> See Case 308/89, di Leo, 1990 E.C.R. at I4209.

<sup>51</sup> See Case 68/74, Alaimo, 1975 E.C.R. 113.

<sup>52</sup> See Joined Cases 389 and 390/8, *Echternach and Moritz v. Netherlands Minister for Education and Science*, 1989 E.C.R. at 764; *see also* Case 308/89 di Leo, 1990 E.C.R. at I-4207; *see also* Case 7/94, Lubor Gaal, 1995 p. I1046-1047.

<sup>53</sup> See Case 39/86 Sylvie Lair, 1988 E.C.R. at 3197-3198; *see also* *Brown v. Secretary of State for Scotland*, 1988 E.C.R. 3244, 1988 3 C.M.L.R. 403 (1988); *see also* Joined Cases 389 and 390/8, *Echternach and Moritz v. Netherlands Minister for Education and Science*, 1989 E.C.R. at 762-763.

<sup>54</sup> See Case 63/76, Inzirillo, 1976 E.C.R. 2067-2068.

<sup>55</sup> See Case 7672, Michel S., 1973 E.C.R. 463.

Community worker when reaching majority of age, as a consequence of his/her handicap.<sup>56</sup> In the same way, it also includes the right of a migrant worker's child to receive benefits as a young worker applicant, in the same conditions established in the national law in favor of its own nationals.<sup>57</sup> Another possible content of social advantage is the right, for a migrant worker's ascendant, to receive a retirement pension granting a minimum income for them. That right cannot be scrutinized under residency requirements for a certain period of time in the Member State, if that condition is not also applied to the nationals of that member state.<sup>58</sup> Furthermore, this concept of social advantage bestows the right of a Community worker involved in a criminal procedure to have a hearing in his/her own mother tongue,<sup>59</sup> as well as the right of a migrant worker to receive financial aid to pay burial expenses.<sup>60</sup> Finally, in these cases the ECJ has remarked that the concept of social advantage is applied as a right derived from the free movement of persons within the EU. but it cannot be applied in a purely domestic situations.<sup>61</sup>

**(c) The Limitations on Grounds of Public Policy, Public Security and Public Health.**

As the free movement of persons enjoys the feature of being considered as a fundamental Community right and it has a direct effect, free movement of migrant workers can only be limited in those cases included in Article 39.3: public policy, public security or public health.<sup>62</sup> But even in these cases, the ECJ shall adopt a restrictive criterion: these circumstances<sup>63</sup> cannot be freely set by Member States, but, as they suppose a limitation of special importance for this process of consolidation, they must be set from a Community point of view. Though the article includes three different limitations, case law has mainly referred to public policy and public security, and it has settled down its meanings and scopes, as well as the limitations and the scopes of Council Directive 64/221.

A national authority shall use a restrictive measure for free movement of persons on grounds of public policy if there is any problem related to social order, that is, a violation of the national law, an actual threat serious enough to affect a fundamental societal interest.<sup>64</sup> This reasoning, which will be

<sup>56</sup> See Case 7/75, *Mr & Mrs. F. v. Belgium State*, 1975 E.C.R. 690.

<sup>57</sup> See Case 94/84, *Jozsef Deak*, 1985 E.C.R. at 1886; see also Case 278/94, *European Commission v. Kingdom of Belgium*, 1996 E.C.R. 14339.

<sup>58</sup> See Case 261/83, *Castelli v. ONPTS*, 1984 E.C.R. 3213-3214; see also Case 157/84, *María Frascogna*, 1985 E.C.R. at 1749.

<sup>59</sup> See Case 137/84, *Heinrich*, 1985 E.C.R. 2695.

<sup>60</sup> See Case 237/94, *O'Flynn*, 1996 E.C.R. I-2637.

<sup>61</sup> See Case 298/84, *Iorio v. Azienda Autonoma*, 1986 E.C.R. at 255.

<sup>62</sup> See Case 67/74, *Bonsignore*, 1975 E.C.R. 3175-3177. (The Advocate general Mayras states in his conclusions in *Bonsignore* that "Ces droits ont un caractère fondamental dans le système du traité. Leur exercice ne peut être limité arbitrairement ou même discrétionnairement par les États membres.").

<sup>63</sup> See Case 41/74 *Van Duyn v. Home Office*, 1974 E.C.R. 1347, 1 C.M.L.R. 1 (1975). See also comments to this decision by TOMUSCHAT, *L'ordre public...*, cit. supra, p. 302-310.

<sup>64</sup> See Case 30/77, *Regina v. Bouchereau*, 1977 E.C.R. 2014.

systematically repeated in subsequent cases,<sup>65</sup> sets up the substantive jurisprudential issue by affirming that: the interpretation of these limitations has to be restrictive—to favor the development of the migrant worker's rights—and should be shaped within the common framework of the Community.<sup>66</sup> Furthermore, since it is a limitation that refers to rights directly granted by Community law, it imposes specific obligations to Member States. Consequently, national jurisdictions must review any national measure that has been adopted to that respect, regardless of whether these measures were adopted by laws, by regulations or if they are individual measures related to a single worker.<sup>67</sup> From this moment forward, the Court will establish the conditions for these measures to be compatible with Community law.

In this case law, it is possible to make a distinction between substantive conditions and formal requirements. Regarding the substantive issues there are two main conditions. First, the ECJ has established that restrictions will be necessarily based on the personal behavior of the worker affected by the limitation.<sup>68</sup> Reasons based on general prevention criteria cannot be considered to expel someone from the territory of a Community Member State. Furthermore, if the requirements foreseen in the residence Member State related to the entry and access of aliens<sup>69</sup> are not met, that will not be considered as a threat to public policy or security. Consequently, an expulsion under these circumstances would not be compatible with the Community legal system, as it would suppose the denial of the freedom of movement.<sup>70</sup> The existence of previous criminal penalties,<sup>71</sup> especially if those penalties are imposed by a fact contrary to Community law prescriptions—such as the requirement of a special document to allow a migrant EU worker<sup>72</sup> entry into a national territory—would not be compatible with the Community legal system. On the other hand, according to Article 9.2 of Council Directive 64/221/EEC, the national administrative authority cannot, except in special emergency situations, make an expulsion decision of a EU resident before the competent authority has given its decision.<sup>73</sup> Regarding

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<sup>65</sup> See Case 36/75 *Rutili v. Minister for the Interior*, 1975 E.C.R. 1219 1231; Case 30/77, *Regina v. Bouchereau*, 1977 E.C.R. at 2013. see Charles Tomuschat, *La libre circulation et le status politique des ressortissants communautaires*, C.D.E. 58 1976; Trevor C. Hartley, *Public Policy and International Free Movement: a Critical Comment on the Rutili Decision*, 1 *Eur.L.Rev.* 473 (1976). See also D. Simon, *Ordre Public et Libertés Publiques dans les Communautés Européennes*. R.M.C. 201 (1976).

<sup>66</sup> See Case *Rutili v. Minister for the Interior*, 1975 E.C.R. at 1231.

<sup>67</sup> See Case 36/75 *Rutili v. Minister for the Interior*, 1975 E.C.R. at 1229-230.

<sup>68</sup> See Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. at 1352, [1975] 1 C.M.L.R. 1 (1975); see Case 67/74, *Bonsignore*, 1975 E.C.R. at 307; Case 36/75 *Rutili v. Minister for the Interior*, 1975 E.C.R. at 1235; see Case 30/77, *Bouchereau*, 1977 E.C.R. at 2009-10; Case 348/96, *Re Donatella Calfa*, 1999 All E.R. (EC) 850.

<sup>69</sup> See Case 48/75, *Royer*, 1976 E.C.R. at 515-516.

<sup>70</sup> See Case 118/75, *Watson and Belmann*, 1978 E.C.R. at 1198-1199.

<sup>71</sup> See Case 30/77, *Regina v. Bouchereau*, 1977 E.C.R. at 2009-2010; see Case 131/79, *Regina v. Secretary of State for Home Affairs, ex parte Mario Santillo*, 1980 E.C.R. 1601; Case 348/96, *Re Donatella Calfa*, 1999 All E.R. (EC) at 850.

<sup>72</sup> See Case 8/77, *Sagulo et al.*, 1977 E.C.R. at 1505.

<sup>73</sup> See Case 175/94, *Gallagher*, 1995 E.C.R. I-4253, (In relation to the expulsion of an Irish national from the British territory because he was suspected to be a IRA member).

formal requirements, the Court has required that the communication to the affected person of the restrictive measure adopted against him/her must be motivated. This requirement intends to allow a future appeal before the authorities of that Member State,<sup>74</sup> or at least to allow his/her defense,<sup>75</sup> and additionally requires the immediate adoption, after having been communicated,<sup>76</sup> of the decision.

As for the limitation on grounds of public morality, the same requirements are applied. In every solved case, the plaintiff has practiced or is suspected to have practiced prostitution. The expulsion of a Community national from the territory of a Member State based on public morality must respect the possibility of an appeal to that decision prior to its execution, in the same conditions as would apply to the nationals of that State.<sup>77</sup> In addition, the method and manner of communicating the measure to the affected worker must be directed toward him in a comprehensible manner, both in its content and effects, in order to allow his/her defense. Another applicable requirement in this situation is that the limitation to freedom of movement must be based on the personal behavior of the person charged. If the reason for the expulsion is prostitution and it is not legally forbidden to its own nationals, the practice of that activity cannot be used to expel a migrant Community national.<sup>78</sup>

Finally, public health limitation has been scarcely considered by ECJ case law. In regards to this issue the Court has agreed with a restrictive interpretation of this restriction, considering that the power of Member States to limit free movement of persons on grounds of public health does not intend to leave the public health sector—out of the sphere of application of the principles of freedom of movement, rather it considers this sector as a global economic sector and from the point of view of employment access. It intends to have the capacity to deny the entry or stay within their territory to people whose entry or stay in the State would pose a risk for public health.<sup>79</sup> Recently the ECJ has had the opportunity to talk about this limitation of free movement of persons and of fundamental human rights. The Court has stated that:

competent authorities of Member States shall control, in favor of public health protection, import of medicines used only under medical prescription in the State of import. However, these controls should be established in a

<sup>74</sup> See Case 36/75, *Rutili v. Minister for the Interior*, 1975 E.C.R. at 1233; Case 48/75 *Royer*, 1976 E.C.R. at 517.

<sup>75</sup> See Case 131/79, *Regina v. Secretary of State for Home Affairs, ex parte Mario Santillo*, 1980 E.C.R. 1600.

<sup>76</sup> See Case 36/75 *Rutili v. Minister for the Interior*, 1975 E.C.R. at 1235, and Case 131/79, *Regina v. Secretary of State for Home Affairs, ex parte Mario Santillo*. 1980 E.C.R. at 1601. (This exigency would not be fulfilled if the measure to be adopted, for example expulsion, is applied some years after having been communicated).

<sup>77</sup> See Case 98/79, *Pecastaing v. Belgium State*, 1980 E.C.R. 713.

<sup>78</sup> See Joined Cases 115 and 116/81 and *Adoui v. Belgian State and City of Leige, Cornuaille v. Belgian State*, 1982 E.C.R. 1665 1707-1708 and 1708-1709.

<sup>79</sup> See case *Gil*, cit. supra, p. 1589.

way that they comply with the respect of fundamental rights as they have been previously explained.<sup>80</sup>

**(d) The Restriction of Free Movement of Workers on the Grounds of Nationality within Public service employment.**

According to one of the latest restriction of Article 39 of the ECT, some types of labor activities may be excluded from the prohibition of discrimination on grounds of nationality. Specifically, it concerns employment which is to be carried out within the public sector of Member States.<sup>81</sup> The Court has firmly asserted that, considering the fundamental character of the principles of free movement of persons and of equal treatment, repeals admitted by Article 39.4 cannot exceed the purposes that this clause was conceived for. The exception contemplated by this provision, access to employment in the public sector, and the nature of the legal link between the worker and the public service is irrelevant.<sup>82</sup> This exception excludes from the possible sphere of application of Article 39 of the ECT a series of jobs involving any degree of participation, direct or indirect, in functions “which are characteristics of specific public service activities, as long as they involve some public power and responsibility in the safeguard of the general interests of the State, and they suppose, on their holders' side, the existence of a particular relationship of solidarity with the State, as well as reciprocity in rights and duties on which the link of nationality relies.”<sup>83</sup> Excluded employment are only those that, considering its inherent tasks and responsibilities, may have those characteristics. That is the reason why, for example, teachers,<sup>84</sup> nurses at State hospitals, captains and deputy captains of merchant navy,<sup>85</sup> national research institute workers,<sup>86</sup> foreign language assistants at a university<sup>87</sup> or employment in public sectors such as

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<sup>80</sup> See Case 62/90, *European Commission v. Germany*, 1992 ECR I-2609. (The possibility for a migrant worker to introduce with him/her, in the Member States, medicines for his/her personal use).

<sup>81</sup> See D. Lopez Garrido, *El acceso a la función pública en la Europa de los Doce* 35 R.V.A.P. 131, 137 (1993); see J.L. Moreno Perez, *La libre circulación de trabajadores en las Administraciones Públicas de los países comunitarios*, R.L. 438 (1994); J.L. Moreno Perez, *La condición de nacionalidad en el acceso a los empleos públicos*, 1991.

<sup>82</sup> See Case 152/73, *Sotgiu v. Deutsche Bundespost*, 1974 E.C.R. 162-163.

<sup>83</sup> See Case 149/79, *Commission of the European Communities v. Kingdom of Belgium*, 1980 E.C.R. 3901.

<sup>84</sup> See Case 66/85, *Lawrie-Blum v. Land Baden-Wurttemberg*, 1986 E.C.R. at 2147; see Case 473/93, *European Commission v. Luxembourg*, 1996 E.C.R. B257-58.

<sup>85</sup> See Case 307/84, *EC Commission v. France*, 1986 E.C.R. 1725; Case 37/93, *European Commission v. Kingdom of Belgium*, 1993 E.C.R. I-6295.

<sup>86</sup> See Case 225/85, *EC Commission v. Italian Republic*, 1987 E.C.R. 2625.

<sup>87</sup> See Case 66/85, *Lawrie-Blum v. Land Baden-Wurttemberg*, 1986 E.C.R. at 2147; Case 33/88, *Allue and Coonan v. University of Venice*, 1989 E.C.R. 1609; see also Case 4/91, *Bleis v. Ministere de l'Education Nationale*, 1991 E.C.R. I-5640-5641. (However, as local legislative measure, that measure under which a teaching institution required applying teachers the passing of an exam of the language of that State, would not be discriminatory, even if that language is minority and it is not very used.) see also Case 379/87, *Groener v. Minister for Education and City of Dublin Vocational Education Committee*, 1989 E.C.R. 3993.

postal service, rail transport or supply of water, gas, electricity, orchestras<sup>88</sup> or private security services,<sup>89</sup> are not excluded.

### B. Prohibition of Discrimination on Grounds of Nationality and Freedom of Establishment (Article 43 TEEC).

Another of the important freedoms of the initially called "Common Market" was the freedom of establishment of enterprises and professionals in any of the signatory Member States, thereby favoring the economic flow. Freedom of establishment aims to improve integration in the sphere of non salaried activities. This freedom will also be subject to many claims before the ECJ: a straight connection is evident with the principle of non-discrimination for reason of nationality from the moment that it implies the movement of its beneficiaries throughout the territory of the Community.<sup>90</sup>

As for the freedom of establishment and the prohibition to discriminate by reason of nationality--foreseen in the old Article 53 of the ECT (presently repealed) and now included in article 43 ECT--the Court had already established the direct effect of this provision, an effect that cannot be denied by a non-existent or incomplete transposition of directives set to comply with this right.<sup>91</sup> Also in this case, there must be a wide interpretation of who the beneficiaries are: the nationals of all Member States, without discrimination by reason of residence or nationality.<sup>92</sup> However, also in this sphere there is also a clear limitation since freedom of establishment cannot be applied to purely domestic situations that have no relation to Community law.<sup>93</sup> Moreover, this right does not need a national legislative action to be applicable, since it can be implemented at a national level through constitutional principles, if they are clear and accurate enough to individualize situations and beneficiaries. But it cannot be admitted that national authorities have a discretionary power of interpretation in the validation of degrees and diplomas, as there is an automatic equivalency for them under a Community directive.<sup>94</sup> The requirement to possess a national diploma is considered per se discriminatory.<sup>95</sup>

<sup>88</sup> See Case 173/94, *European Commission v. Kingdom of Belgium*, 1996 E.C.R. I-3282.

<sup>89</sup> See Case 114/97, *European Commission v. Spain* [1988].

<sup>90</sup> See I. Hiniesta Borrajo, "Las libertades de establecimiento y servicios", in *Tratados de Derecho Comunitario Europeo. Estudio sistemático desde el Derecho Español*, vol. II, 149. (However, this study offers a case-law approach to the freedom of establishment and services, strictly from the fundamental rights point of view, so it is related since the beginning to the principle of non discrimination. Regarding this subject, see V. Abellan Honrubia, "La contribución de la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas a la realización del derecho de establecimiento y la libre prestación de servicios", in D.J. Liñan Noguera, *El Derecho comunitario Europeo y su aplicación judicial*, Madrid, 1993, 771.

<sup>91</sup> See Case 271/82, *Auer v. Ministere Public*, 1983 E.C.R. 2744; Case 5/83, *Criminal Proceedings against Rienks*, 1983 E.C.R. 4245; Case 107/83, *Paris v. Klopp*, 1984 E.C.R. 2987.

<sup>92</sup> See Case 115/78, *Knooks v. Secretary of State for Economic Affairs*, 1979 E.C.R. 409 (for plumbers); Case 61/89, *Criminal Proceedings against Bouchoucha*, 1990 E.C.R. 2029, (for the massager, osteopath and naturopath).

<sup>93</sup> See *Joined Cases 54/88, 91/88 and 14/89, Nino et al.*, 1990 E.C.R. -B549. See also Case 152/94, *van Buynder*, still not published officially.

<sup>94</sup> See Case 29/84, *European Commission v. Germany*, 1985 E.C.R. 1676.

<sup>95</sup> See Case 71/76, *Thieffry v. Coseil de l'orde des Avocats a la Cour de Paris*, 1977 E.C.R. 765. See Comments on this subject by D.M.W. Pickup, *Reverse Discrimination and*

In this content, prohibition of discrimination by reason of nationality consists of the non establishment of new measures submitting the setting up of professionals from other States to a regulation more severe than the one reserved to national professionals, no matter the legal regime of the enterprise.<sup>96</sup> In the same way, if it is not discriminatory to request the obligatory registration in the professional association to carry out a professional activity,<sup>97</sup> this would be discriminatory if the absence of registration is due to the fact that the degrees presented are not validated, degrees that could be validated under the directive for such subject.<sup>98</sup> A national regulation is allowed to establish different situations if it is not applied in function of the economic operators' nationality and if it only takes into account the setting place of the economic activities.<sup>99</sup> Thus, that regulation or provision will not be considered discriminatory even if it creates a situation affecting the competitive capacity of the economic operators established in its territory in relation to economic operators established in other Member States, if it makes no difference, direct or indirectly, in nationality.<sup>100</sup> A national act whose accomplishment is especially difficult for other Community nationals, both for legal and physic persons, will neither be considered discriminatory if it is applied in the same way to the nationals of that State.<sup>101</sup> So, for instance, when recognizing the freedom of establishment of a lawyer, the fact that he/she has another professional office in another Member State is not important.<sup>102</sup> As it is a fundamental freedom granted by the Treaty to Community nationals and it has got a direct effect,<sup>103</sup> even those nationals who try to enforce it in their own State get benefits from this freedom, if the professional skills entitling to free establishment in that country have been acquired under this Community freedom in another Member State.<sup>104</sup>

ECJ has stood for an extensive interpretation of the concept of freedom of establishment, and it has included in its interpretation not only freedom to

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Freedom of Movement for Workes, 25 C.M.L.Rev. 135 (1986). A criterion that the Court will later support in relation to the profession of architect and doctor. See Case 11/77, *Hugh Patrick v. Ministre des Affaires Culturelles*, 1977 E.C.R. 1204; Case 246/80, *Broekmeulen v. Huisarts Registratie Commissie*, 1981 E.C.R. 2329.

<sup>96</sup> See Case *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 1162.

<sup>97</sup> See Case *Auer v. Ministere Public and Order National des Veterinaires de France*, 1983, E.C.R. 2727, 2744; Case *Rienks*, 1983 E.C.R. at 42454246; Case 292/86, *Gullung v. Conseil de l'ordre des Avocats du Barreau de Colmar et de Saverne*, 1988 E.C.R. 111, 140.

<sup>98</sup> See Case *Auer v. Ministere Public and Order National des Veterinaires de France*, 1983 E.C.R. at 2744; and case *Rienks*, 1983 E.C.R. at 4246.

<sup>99</sup> See Case 31/78, *Bussone v. Italian Ministry for Agriculture and Forestry*, 1978 E.C.R. 2445.

<sup>100</sup> See Case 155/80, *Summary Proceedings Against Sergius Oebel*, 1981 E.C.R. 1981.

<sup>101</sup> See Case 182/83, *Fearon & Company Limited v. Irish Land Commission*, 1984 E.C.R. 3677, 3686-3687.

<sup>102</sup> See Case 107/83 *Orde des Avocats au Barreau de Paris v. Klopp*, 1984 E.C.R. at 2989-2990.

<sup>103</sup> See Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, 1974 E.C.R. 1299.

<sup>104</sup> See Case 115/78 *Knoors v. Secretary of State for Economic Affairs*, 1979 E.C.R. at 409.



access to the activity, but also to its exercise in wide terms.<sup>105</sup> This extensive interpretation is the beginning of the idea applied long before considering free movement of workers as a fundamental right recognized by the Treaties. Now that interpretation is applied to freedom of establishment of professionals, and it is contrary to any restrictive interpretation of this right as well as of those related to it. The Court will say that the exercise of a professional activity involves for a person the right to access to a place where to put in practice his/her activity, and (if necessary) the right to ask for a credit bank in order to get a place for his/her activity, as well as the right to use them as housing. Due to these reasons, restrictions contained in the normative on housing in the place of work may suppose a barrier to freedom to provide services. Every restriction on housing access or on different facilities that these nationals receive to release their financial burden must be considered as a barrier to the exercise of the professional activity.<sup>106</sup> The existence of a normative vacuum in a Member State regarding the possible direct effect of this right and its possibility to be invoked by Community nationals will also be considered discriminatory, as it suppose a degree of uncertainty for those who are not nationals in a State.<sup>107</sup> In addition, administrative practices—which can be modified by Public Service and which are not rightly published—cannot be considered to comply in a valid way the obligations of the Treaty.<sup>108</sup>

Case law in this subject has not referred very often to public policy, public safety and public health limitations. It has neither referred to the restrictions related to Public Service employment which, under article 45 ECT are also applicable in the case of freedom of establishment. However, the Court has stated that an extension of the exception allowed by article 45 ECT to the whole of a profession could not be accepted, except if those activities were linked in such a way that the freedom of establishment intended to compel the interested Member State to allow the professional exercise, even occasional, by no nationals, of public service activities.<sup>109</sup> The feature of fundamental right, enjoyed by freedom of establishment and freedom to provide services, has been pointed out by the Court in the *Heylens case*, referred to the wish of a Belgian national to provide his services as a football coach in France. The Court stated that, as free access to employment is a fundamental right for any member of the European Community, the existence of a jurisdictional way of appeal against every decision of a national authority preventing the exercise of that right is essential to grant the effective protection of the individual's right.<sup>110</sup> This case law has been reasserted afterwards by the ECJ in *Vlassopoulou case*, where it has said that the examination of the equivalence between knowledge and

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<sup>105</sup> See Case 197/84, *Steinhauser v. City of Biarritz*, 1985 E.C.R. 1827.

<sup>106</sup> See Case 63/86, *Commission of the European Communities v. Italian Republic*, 1988 E.C.R. 29, 52-53.

<sup>107</sup> See Case 38/87, *Commission of the European Communities v. Hellenic Republic*, 1988 E.C.R. 4430 (Regarding the activities of professional and trainee journalists, advertising and professional activities related to tourism).

<sup>108</sup> See *Id.* The Court continues with the criterion it defended against the same State in case 168/85, *Commission v. Hellenic Republic*, 1986 E.C.R. 2945.

<sup>109</sup> See Case 2/74 *Reyners v. Belgium State*, 1974 E.C.R. at 654-56.

<sup>110</sup> See Case 222/86, *UNECTEF v. Heylens*, 1987 E.C.R. at 4117.

attitudes proved by the foreign degree and those required by the normative of the Member State must be made by national authorities following a procedure according to the requirements —related to the effective protection of fundamental rights for every Community national— of Community law. So, all the decisions made by national authorities, related to that examination, must be liable to a judicial appeal allowing to check its legality in relation to Community law and allowing the affected to know the reasons of the decision made.<sup>111</sup>

### C. Citizenship of the Union: free movement of persons as civil right.

Citizenship of the Union, established in the Treaty on the European Union (TEU), is also the result of a Community policy searching the approach of the nationals of the different Member States. Traditionally, it has been believed that the Europe of citizens should be built through the arousal of the Community population, through the development of an authentic European identity.<sup>112</sup> But the European identity depended on the arousal of the population. So, it was established a policy of external symbols that showed the belonging to the Community, and that consolidated that Community identity. In this incipient citizenship where included a series of material elements: the adoption of its own flag and anthem, of the same passport for all the Community nationals,<sup>113</sup> of a common driving license.<sup>114</sup> The aim was to create a homogeneous European model for a series of formalities of daily life that made easier the development of that identity; to create, through a series of special rights conferred to Community nationals with a clear instrumental nature, a citizenship in service of the Union. However, the Treaty of the European Union overpasses this aim and creates an authentic status of citizen of the Union that is completely different: the establishment of a Union in service of the citizen.<sup>115</sup>

The material sphere of that status is not homogeneous, but it entails two kinds of elements. On one hand, a series of specific rights conferred to the citizens. On the other hand, a series of specific means of protection that supposes, despite its location, important differences with the aforementioned. In the same way, the rights that the TEU recognizes for the Community citizens are of different kinds. From this point of view, article 18 ECT embodies two rights traditionally linked to the Community economic sphere and that, consequently, are not of new creation. It is a constitutionalization of the *acquis communautaire* in relation to freedom of movement and residence.

#### (a) Free movement and free residence rights

Article 18 ECT establishes:

<sup>111</sup> See Case 340/89, *Vlassopoulou v. Ministerium für Justiz*, 1991 E.C.R. E357, I-2385.

<sup>112</sup> See C.A. Stephanou, *Identité et citoyenneté européennes*, 343 R.M.C. 3039 1991.

<sup>113</sup> See Council Resolution, OJ 1982 C179/1.

<sup>114</sup> See Directive 91/439, related to driving license, OJ 1991 L237/1.

<sup>115</sup> Vide A. Mangas Martín, "La ciudadanía de la Unión Europea", in *El Defensor del Pueblo en el Tratado de la Unión Europea, Jornadas celebradas los días 2 y 3 de noviembre de 1992*; Cátedra J. Ruiz-Giménez de estudios sobre el Defensor del Pueblo, Madrid: Universidad Carlos III, 1993, p. 15-68, specially pages 19-20 and 3233.

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.
2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act in accordance with the procedure referred to in Article 251. The Council shall act unanimously throughout this procedure.

It is obligatory to start stating the reiteration of two rights existing in the Community sphere since its origins. The TEU has made quite more precise the enjoyment of these rights, but it does not establish new ones, though it sets a constitutional link between these rights and the citizenship of the Union, what enhances its situation. Freedom of movement and residence of persons is one of the basic freedoms in which the Treaties of Rome are based.

Regarding the institutional action, it has to be pointed out, since the beginning, the attempts of the Commission to create a single regulation of this subject. As it is conscious of the exclusion of some categories in the ECT, the Commission proposed a single directive where a generalized right to free movement were recognized, a directive that also were in benefit of those nationals excluded when putting in practice the adequate articles of the Treaty.<sup>116</sup> However, the Council, perhaps trying not to separate from the logic that inspired those texts from the beginning, did not give way to this point, despite the recommendations of the Addonino Committee,<sup>117</sup> and it kept on joining the freedom of movement and residence with the exercise of an economic activity. So, the Council did not recognize a generalized freedom of movement and residence depending only on the status of Community national. In 1989 the Commission retired its proposal and presented three different projects of directives, considering economic criteria, which were in favor of a generalized freedom of movement and residence for self employed persons and retired wage earners, as well as for students.<sup>118</sup> Finally, in 1990, the Council passed three decisive directives on this subject, what fulfilled in a high degree the Commission's proposals.<sup>119</sup> The only restrictive criterion in the directives

<sup>116</sup> See directive proposal from the Commission to the Council of July 1979, related to the Member State national's right of residence within another Member State's territory, COM (79) 215 final, published in JOCE C 207, 8/17/1979, p. 14 and modified 6/6/1985 see Steinhouer v. City of Biarritz, OJ 1985 C171/4.

<sup>117</sup> See EC Bulletin, Supp. OJ 1985 C175/276. (In its second report, June 1985, A people's Europe, the Addonino Committee had stated that "the right of a citizen of a Member State of the Community to reside in any other Member State of his free choice is an element of the right to freedom of movement", reason why it was proposed that the European Council shall adopt a principle decision recognizing the generalized right to freedom of residence for all the citizens of the Community). Vide EC Bulletin, Supl. 7/85, p. 14.

<sup>118</sup> See Amended Proposal For a Council Directive on the Right of Residence for Students, OJ 1990 C26/15.

<sup>119</sup> See Council Directive, OJ 1990 L180/26; Council Directive OJ 1990 L180/28. (Related to the right to residence); Council Directive, OJ 1990 L180/28. (Related to the right to residence of wage-earning workers and retired selfemployed persons.); Council Directive OJ 1990 L180/30. (Related to the right to residence of students. The last directive has been denied by the Court in case 295/90, European Parliament v. Council of the European Communities,

has an economic nature: the beneficiaries must previously prove that they have the sufficient economic resources for not become a burden for the Social Security of the residence State. Restrictions, though there are not so many, keep on basing on the future or past economic status of the beneficiary. On the other hand, still continues the necessity to get a residence permit renewable every five years.

In this situation, article 18 supposes an important breach with the traditional conception of these two freedoms, as it stands for, at least theoretically, a generalized right for freedom of movement and residence in favor of Community citizens. That means that, in first place, the economic dimension of both rights is left aside to make them depend exclusively on the political status of its titular, that is, having the condition of citizen of the Union. In second place, and as a direct consequence, the personal sphere of actuation is amplified and generalized.<sup>120</sup>

However, once established these rights, the problem is in the remain of some limitations to them. So, if, on one hand, the terms of the first paragraph are categorical in the subject of the establishment for every citizen, of the right to move and reside freely, just after, in the second paragraph, the submission to the limits established in the treaties and in derived law is explained. That is, the limits of article 39.3 ECT related to public policy, public security and public health, as well as the conditions imposed by the three directives of 1990 related to the economic resources, to the illness insurance and to the period of stay, would be applicable to this new provision of primary law. It is difficult to conciliate a general proclamation with an important series of limitations. Thus, we could wonder if the establishment of the inherent guarantees of the right to freedom of movement and residence, after their inclusion in a constitutional text, questions the restrictive conditions imposed by these provisions of secondary law as regarding its enjoyment. However, it seems that restrictions related to the period of the stay shall be abolished because they affect the substance of the right to reside freely in another Member State.<sup>121</sup> However, as the limitations of articles 39.3 and 45 ECT are still enforced, according to the terms of article 18 ECT, and according to case law of the ECJ, there will be

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1992 E.C.R. I-4193). (Although its effects will be applied until the enforcement of a new directive on this subject, what shall happen after the adoption of Council Directive OJ 1993 L317/59. *see* A.C. Evans, Nationality Law and European Integration, 16 E.L.R. 190/15 1991. (A general comment of the three directives related to citizenship).

<sup>120</sup> *See* Amended Proposal For a Council Directive on the Right of Residence for Students, OJ 1990 C26/85. (A clear wish in the project of article X4 of the Commission, that said that this right would be recognized "no matter if they carry out or not an economic activity"); *see* Trevor C. Hartley, Constitutional and Institutional Aspects of the Maastricht Agreement, 42 I.C.L.Q. 213-237 1993. (The main effect of the consecration as a generalized right, even if it is subject to the same previous limitations and conditions).

<sup>121</sup> *See id.* at article 6.1. (The Spanish proposal on citizenship was in this sense, as it said: "1. Every citizen of the Union has the right to move and resided freely and without time restrictions in the territory of the Union". The Commission shared the same opinion, since it established in article X4: "1. Every citizen of the Union has the right to move and reside freely and without time restrictions in the territory of the Union, no matter if they carry out or not an economic activity."). *see id.* at 85. (However, this will to insist on the abolition of time limitations for residence was not included in any of the two proposals, where this article has always had the redaction included in the TEEC).

differences between the own nationals and those from another Member State related to the enjoyment of these rights. Or, at least, there will be differences in relation to the possibility that the shelter Member State has to expel a Community national under those restrictions, a measure that can be adopted in no case against its own nationals.<sup>122</sup>

#### Conclusion

The permanence of a series of restrictions and not of others has been explained by the different nature of the instrument that establishes them. As conditions imposed by articles 19 and 43 TEEC are in a Treaty and, consequently, are part of primary law, they have primacy on the norms of derived law adopted to make easier its application. That is the reason why it is said that restrictions in derived law shall be repealed, as far as they are not compatible with these rights.<sup>123</sup> On the other hand, if the Treaty introduces a result obligation, the Court could judge the compatibility of the measures adopted to make easier the application of those rights with their content, and the Court will even be able to repeal them.<sup>124</sup>

What seems obvious, after these considerations, is that the TEU is also far away from the recognition of a really generalized right of residence and movement, such as the Court<sup>125</sup> has recently said. That has been stated by the maximum jurisdictional institution of the Community with the denial, so far and despite the referred conventional provisions, of the existence of a right to freedom of movement and residence in any of the Community States. Thus, our first premise, the disappear of nationals borders, is still, in a high degree, an illusion and a handicap for a real integration of Europe's peoples.

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<sup>122</sup> See Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. at 1352; see Joined Cases 115 and 116/81 and *Adoui v. Belgian State and City of Leige*, *Cornuaille v. Belgian State*, 1982 E.C.R. 1665 1707-1708 and 1708-1709.

<sup>123</sup> See VERGÈS, *Droits fondamentaux et droits*, cit. supra, p. 89; LIÑAN NOGUERAS, *De la ciudadanía . . .*, cit. supra, p. 86, who understands that article 46.1 TEEC restrictions will be only to continue enforced, that is, restrictions based on public policy, public security and public health, but only related to nationals from third States.

<sup>124</sup> See *id.*

<sup>125</sup> See Case 378/97, *Criminal Proceedings Against Wijzenbeek*, 1999, E.C.R.-I-6207.