European Union and Immigration Law (II)

Co-funded by the European Union

UNIVERSITY OF SIENA, SCHOOL OF ECONOMICS AND MANAGEMENT

JEAN MONNET MODULE "EUCOLAW" THE EUROPEANIZATION OF CONSTITUTIONAL LAW. THE IMPACT OF EU LAW ON NATIONAL SOURCES OF LAW, FORM OF GOVERNMENT, RIGHTS AND FREEDOMS.

COMPARATIVE LAW, 29-3-2017 PROF. GIAMMARIA MILANI

Summary

- 1. Immigration in Europe
- 2. A multilevel issue
- 3. The international level
- 4. The European level
- 5. The national level

4. The European level

Immigration

- The European immigration law is not limited to the recognition of human rights to migrants, which is derived from the fact that the Union is founded on the values of respect for human dignity and human freedom.
- The construction of a European immigration law has now reached an advanced level and today constitutes the main source of limitation of national law; it consists of the primary law provisions contained in the Treaties, the secondary law contained in the European acts and the case law of the Court of Justice of the European Union.

Immigration

- The construction of European immigration law has developed along three phases.
  - In a first phase, which reaches up to the entry into force of the Maastricht Treaty in 1993, there was no provision in the European Treaties that assigned to the EU institutions functions on immigration; only a series of recommendations and opinions, not binding, were approved at this time.
  - In the second phase, which runs from 1993 to 1999, the year of entry into force of the Amsterdam Treaty, the European immigration law was part of the third pillar on which was based the European Union designed by the Maastricht Treaty; Title VI, containing provisions on cooperation in the fields of justice and home affairs, provided for the possibility to adopt measures on immigration and asylum; however, the intergovernmental approach and the continued attempt of States to maintain their sovereignty in these matters slowed the development of a European immigration law, which in fact continued to be made up of non-binding sources.
  - The Amsterdam Treaty opens the third stage and, in fact, allows the start of construction of the European immigration law. The issue is moved from the third to the first pillar, under which the Community approach, in contrast to the intergovernmental one, allows the approval by the European institutions of binding rules for all Member States.

Immigration

- Since the entry into force of the Amsterdam Treaty, the European policy on immigration has been built on the basis of five-year programs approved by the European Council to define priorities, objectives and instruments.
  - The first program, signed in Tampere in 1999, is characterized by an approach in favor of the entry of migrants arriving from third countries and provides for the adoption of five directives addressed to different categories of immigration: family reunification, long-term residence, study, research and work.
  - The second program, signed in The Hague in 2004, was affected by the atmosphere made tense by the growth of international terrorism and poses among its objectives the fight against illegal immigration and trafficking in persons.
  - The third program, signed in Stockholm in 2009, continues along the line opened in 2004, even though, unlike the previous ones, does not define in a clear and precise way objectives and tools.
  - In 2015, the European Commission adopted a European Agenda for immigration based on four pillars: reduce the incentives for irregular migration, strength border management with the aim of saving lives, implement a strong European common asylum policy and define a new policy on legal migration.

Immigration

- The competence of EU in matters of immigration is founded today in the TFEU: in the provisions contained in Chapter II (policies on border, asylum and immigration) of Title V (Area of Freedom, security and justice) there is a need to develop, at EU level, a common policy on the control of persons at the external and internal borders (art. 77), on asylum, subsidiary protection and temporary protection (art. 78) and on immigration, in particular as regards the management of migration flows, fair treatment of nationals of third countries, prevention and fight against illegal immigration and trafficking in human beings (art. 79).
- Based on these provisions, the EU approved a set of directives that provide today a common framework for the European Union Member States; these directives seem to respond to different objectives.

Immigration

- Among the aims of the first two acts adopted, Directive 2003/86/EC and Directive 2003/109/EC, there is to ensure, to the individuals who enjoy of these provisions, rights and obligations comparable to those of EU citizens, to ensure their fair treatment and to promote the integration of immigrants.
- Directive 2003/86/EC contains measures to guarantee the right to family reunification for citizens of third countries residing in the Union: to do so, after determining the substantive scope of the Directive (Art. 4), it regulates possible requirements that may be provided by the Member States with regard to the economic situation, integration and length of residence (art. 7-8).
- Directive 2003/109/EC defines the rules to get the long-term resident status: in implementing the Directive, which applies to those residing in the territory of a Member State for at least five years (art. 4), the States can apply also in this case the fulfillment of the requirements relating to the economic situation and integration (art. 5).

Immigration

- Different seems to be the objective of the next three directives adopted on immigration: Directive 2004/114/EC, Directive 2005/71/EC and Directive 2009/50/EC seem to be moved by the intention of attracting immigrants that could contribute to the economic, social and cultural development of Europe and increasing its global competitiveness. They establish for this purpose a common framework to regulate and promote the entry and mobility of students, trainees and volunteers (Directive 2004/114/EC), researchers (Directive 2005/71/EC) and highly skilled workers (Directive 2009/50/EC).

Immigration

- An analysis of European legislation on immigration reveals the lack of common measures with regard to the discipline of migrations for work reasons. The Directives just mentioned along with other more recently adopted, on migration for seasonal employment reasons (Directive 2014/36/EU) and intra-corporate transfers (Directive 2014/66/EU) deliver a rather incoherent framework. The lack of a consensus among Member States on how to regulate the matter, coupled with the fact that treaties reserve to the States the power to determine the number of immigrants in search of work to be accepted, imply a weak influence of EU on this important source of immigration.

Citizenship

- At EU level, there has been an attempt to limit the absolute power of States in the matter of citizenship. An important element that characterizes the European landscape is the creation of the European citizenship.
- The first project, in this sense, was presented by Italy for the European summit in Paris in 1972, then resumed at a later summit in Paris in 1974: in the latter were established two working groups to study, respectively, the passport union and the definition of "special rights" granted to European citizens.
- The theme was, later, several times the subject of the European Council's work and the basis for many proposals of the European Parliament who went so far as to propose the allocation to the Union of the competence to determine the rules on acquisition and loss of the status of European citizen.
- The European citizenship is finally established by the Maastricht Treaty. The Treaty on European Union, which entered into force in 1993, has placed at art. 8 the establishment of the European citizenship, providing dispositions on the acquisition of European citizenship and its contents. Following the changes to the Treaties and, finally, the Lisbon Treaty, the provisions on European citizenship are contained in Articles 20-25 TFEU.

Citizenship

- As for the methods of acquisition and loss of Union citizenship, Art. 20 TFEU states that " Every person holding the nationality of a Member State shall be a citizen of the Union". It is evident, therefore, as the competence in determining the holders of European citizenship is of the Member States: the European citizenship, as a consequence, has been defined as "ancillary" "derivate" "dual" or "complementary" citizenship since it does not replace that of the Member States.
- The Amsterdam Treaty of 1999, amended the relevant provisions: in accordance with that amendment, currently the art. 20 TFEU, after defining the ownership of Union citizenship, states that "Citizenship of the Union shall be additional to and not replace national citizenship".

Citizenship

- As for the contents of the European citizenship, art. 20 TFEU adds that: “Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language”.
- The following articles of the TFEU, 21-25, specify content and guarantees of these rights, as well as articles 39-46 of the Charter of Fundamental Rights of the European Union (title "Citizenship").

Citizenship

- Even within the EU framework the chosen root is to avoid to put limits on the freedom of States to determine the rules for the acquisition and loss of citizenship. This approach was also confirmed by the Court of Justice that, even before the establishment of European citizenship, has had occasion to rule on the possible presence of limits set by European law to the competence of States.
- The case Micheletti (1992) is, in this sense, the fundamental starting point for the analysis of the Court's jurisprudence. The European court has reaffirmed the principle of the competence of States: in the same judgment, however, the Court also states that that competence must be exercised in accordance with European law. The Court did not clarify how the European law may limit the freedom of States to define the modalities of the acquisition or loss of citizenship. Nevertheless, the Court has in some ways advanced the possibility of such limits, provoking a debate on the sustainability, within the European Union, of a regime of exclusive competences of States.

5. The national level

Immigration

- The space remaining in favor of the national law about immigration is limited, being contained within the boundaries drawn by the TFEU, in particular in art. 79 of the Treaty.
- After establishing the objectives of the European Migration law, that article determines, in para. 2, the EU competences: (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification; (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; (c) illegal immigration and unauthorized residence, including removal and repatriation of persons residing without authorization; (d) combating trafficking in persons, in particular women and children.

Immigration

- We have to remember that the EU can only act within the powers conferred by the Treaties (Art. 5 TEU). Furthermore, since the competence of the Union in the area of freedom, security and justice is shared (Art. 4 TFEU), Member States may legislate if the Union does not exercise the competence in the assigned matters (art. 2 TFEU).
- The Union has made extensive use of its competence on immigration by approving directives governing the various categories of migration. However, given that the European institutions have used the instrument of directives to exercise their powers in this area, the Member States maintain the possibility to choose the form and the methods to use to achieve the objectives laid down by directives: such acts, in fact, oblige the states with regard only as to the results to be achieved (art. 288 TFEU).

Immigration

- A general limit to the Union's competence in this field is contained in art. 72 TFEU, which states that the provisions of the Treaty relating to freedom, security and justice " shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". This clause thus allows states to adopt measures relating to the implementation of the migration policy, and in particular the conditions for the entry of individuals from third countries on their territory, derogating from the European law if it is necessary to maintain the public order.

Immigration

- A second limitation is the quota management of immigrants that the state decides to accept on its territory. Art. 79 TFEU states that “This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed". The provision touches a sensitive issue, which is that of work immigration.

Immigration

- Finally, there is a sector, closely linked to the issue of immigration, in which the UE competence is limited: that of integration. Art. 79 TFEU provides that the Union may "establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States". The Union has, therefore, a competence in the field: it is a support and coordination competence, for the exercise of which, pursuant to art. 2 TFEU, the Union may "carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas". Two of the directives approved on immigration refer to the integration measures and conditions that may be required by national laws to individuals; both, however, give to Member States a wide margin of appreciation.

Citizenship

- It has been said previously, that the attempts made at international level to limit the absolute discretion of States have had few results: this does not mean, however, that international law has had no impact on the national laws. The accession of European States to the treaties for the protection of human rights and the conventions devoted specifically to questions of citizenship have led to the introduction and spread of different principles that are now common principles.

Citizenship

- Another important result due to the influence of international law over national law is the presence of instruments aimed at reducing cases of statelessness. All states now provide for automatic acquisition of citizenship procedure for newborns who would otherwise be stateless. Also provisions that facilitate the acquisition of citizenship for stateless individuals are quite commons. Equally important is the tendency to facilitate the acquisition of the citizenship for refugees and children of refugees.
- Another point to note is that dual citizenship seems now an accepted practice in Europe. In partial contrast seem to move the countries of Central and Eastern Europe which, for factors related to recent historical developments and policies, often adopt provisions contrary to the possibility of dual citizenship.

Citizenship

- Beyond these trends favored by the widespread adherence to the principles expressed at the international level, other common elements exist with regard to the different procedures for the acquisition of citizenship.
- As for the citizenship acquired at the birth, two elements seem to constitute the common framework for EU Member States: the presence, in a combined way, of the criteria of jus sanguinis and jus soli, and, at the same time, the clear predominance of the first upon the second. This is not a recent trend; it has its foundation in the migratory situation of European states, that in the past were mainly countries of emigration, which has pushed the national legislators to favor the criterion of jus sanguinis in order to maintain the bond of migrants with the countries of origin.

Citizenship

- The totality of the EU Member States now adopts as prevalent criterion for the acquisition of citizenship jus sanguinis. Jus soli is used in limited cases or to meet specific needs.
- The most common application is certainly to avoid cases of statelessness: it is often provided that the individual acquires citizenship at birth if his parents are stateless or unknown or nationals of States that provide only jus soli transmission of citizenship.
- Other times, the criterion of jus soli finds space as a "correction" of the jus sanguinis principle: it can be provided, for example, that if one is born from only one parent that is citizen of that State, the acquisition of citizenship, or at least his direct acquisition or his acquisition without additional requirements, is subject to birth on the territory.
- Also the use of the criterion of the double jus soli, valid for the "Third generation immigrants", is quite spread: in fact, many countries require that the person born on the territory of a State from foreign parent born in that state in turn acquire citizenship automatically at birth.
- More rare is instead the use of jus soli for "Second generation immigrants", ie for those who are born on the territory of a State by foreigners born abroad. In this case, the way most used for the granting of citizenship, in European Union countries, is that of naturalization.

Citizenship

- Naturalization presupposes the individual's will to become a member of a State. This will is expressed through the fulfillment of conditions set by the State; it maintains, in some cases, a certain discretion in deciding that the individual meets the requirements set by law, although the common trend in European countries is to minimize such discretion by determining more detailed conditions and formalizing the verification procedures.
- Both if the acquisition of citizenship is automatic and if the state can continue to enjoy a certain discretion, these modes of acquisition of citizenship have in common the necessary will of the individual expressed through the satisfaction of certain legal requirements.
- The main requirement is that of the residence: it can vary as to the number of years required, while it is quite common the fact that such residence has to be legal and continuous.
- Also integration requirements are quite commons: considered, in general, as a symptom of a more restrictive approach in the field of nationality law, knowledge of language, institutions and culture of a country is now required in almost all European countries.
- The State usually add others requirements to those of residence and integration: age, sufficient financial resources, good character, lack of criminal record, proof of not pose a threat to public order and security; will to continue to reside in the territory of the State; oath of allegiance to the state.

Citizenship

- In addition to the "normal" procedure for granting citizenship there are often a number of "simplified procedures", which are characterized by the need to meet fewer requirements or less stringent requirements: these procedures are applicable, for example, for the citizens of States considered socially or culturally close, for former citizens, for foreigners who demonstrate scientific, academic, sporting, professional merit or show that the acquisition of citizenship can bring benefits for the State.
- Simplified procedures are also foreseen for refugees and stateless persons. The other mode of acquisition of citizenship, such as marriage or adoption, are often characterized by the presence of requirements that are less numerous and stricter than those set for normal naturalization.