76

TRAVAUX DU CERIC

EUROPE – A CONTINENT OF IMMIGRATION?

LEGAL CHALLENGES IN THE CONSTRUCTION OF EUROPEAN MIGRATION POLICY

EUROPE : UN CONTINENT D'IMMIGRATION ?

DÉFIS JURIDIQUES DANS LA CONSTRUCTION DE LA POLITIQUE EUROPÉENNE DE MIGRATION

7th International Workshop for Young Scholars (WISH)

7e Rencontre Internationale des Jeunes Chercheurs (RIJC)

Sous la direction de

DANIEL THYM ET FRANCIS SNYDER

BRUYLANT

Pour toute information sur notre fonds et les nouveautés dans votre domaine de spécialisation, consultez notre site web : www.bruylant.be

© Groupe De Boeck s.a., 2011
Éditions Bruylant
Rue des Minimes, 39 • B-1000 Bruxelles

Tous droits réservés pour tous pays.
Il est interdit, sauf accord préalable et écrit de l'éditeur, de reproduire (notamment par photocopie) partiellement ou totalement le présent ouvrage, de le stocker dans une banque de données ou de le communiquer au public, sous quelque forme et de quelque manière que ce soit.

Imprimé en Belgique

Dépôt légal 2011/0023/189

ISBN 978-2-8027-3502-1

Contents

Sommaire

Introduction and Acknowledegments
Daniel Thym and Francis Snyder 1

PART I
NEW PARADIGMS FOR EUROPEAN MIGRATION LAW?

PARTIE I
NOUVEAUX PARADIGMES
POUR LE DROIT DE MIGRATION EUROPÉENNE?

1 – Immigration and its Imperatives
Joyce Chia 13

2 – 'We want you! But...' Recruiting Migrants and Encouraging Transnational Migration Through Progressive Inclusion
Anuscheh Farahat 37

3 – Trafficking in Human Beings: The EU Approach between Border Control, Law Enforcement and Human Rights
Sarah H. Krieg 63

4 – Stemming the flow? Discourses and Practices on Migration in Italy
Emanuela Paoletti 85

PART II
ENTRY CONTROLS: EFFICIENCY VERSUS HUMAN RIGHTS?

PARTIE II
CONTRÔLES D'ENTRÉE:
EFFICACITÉ contre DROITS DE L'HOMME?

5 – Institutionnalisation et gestion des frontières extérieures de l'Union européenne: quelle situation juridique pour les migrants?
Hélène Jorry 115

6 – The fight against illegal migration and death at the border
Maarten den Heijer
139

7 – Dublin Regulation and Boat Arrivals: What Burden-Sharing Model for the EU?
Frendehl Warner
165

8 – Challenges in external dimension of EU Justice and Home Affairs on the example of EU – Ukraine cooperation in migration and border management policies
Elżbieta Kaca
197

PART III
EQUAL TREATMENT OF THIRD COUNTRY NATIONALS AND UNION CITIZENS?

PARTIE III
ÉGALITÉ DE TRAITEMENT DES RESSORTISSANTS DE PAYS TIERS ET DES CITOYENS de l'UNION?

9 – La portée de l'article 12 du traité instituant la Communauté européenne vis-à-vis des ressortissants de pays tiers: une évolution?
Chloé Hublet
225

10 – Race Equality and TCNs, or how to fight discrimination with a discriminatory law
Sara Benedi Lahuerta
253

11 – Free Movement of Third Country Nationals in the European Union? Main Features, Deficiencies and Challenges of the new Mobility Rights in the Area of Freedom, Security and Justice
Sara Iglesias Sánchez
279

PART IV
EVOLVING FEATURES OF SECONDARY MIGRATION LAW

PARTIE IV
JURIDICTIONS ET GOUVERNANCE MULTI-NIVEAUX

12 – Income Requirements in Community Law
Eva Hilbrink 303

13 – Justice as a Common Denominator of EU Member State – Citizenship Policies
Ieva Kalnina 325

14 – La directive 'retour' : directive de la honte ou progrès dans la construction d'une politique européenne en matière d'immigration ?
Fabien Le Bot 347

PART V
SOCIAL INTEGRATION :
IMMIGRATION AND THE NATION-STATE

PARTIE V
INTÉGRATION SOCIALE : IMMIGRATION ET L'ÉTAT-NATION

15 – 'Cultural Defence' of Nations : Cultural Citizenship in France, Germany and the Netherlands
Liav Orgad 379

16 – "EU Citizen – Market Agent, Political Player or a New Dimension of the Personal Identity. Is There any Chance for a 'Supranational Nation' on EU Level ?"
Martin Belov 405

17 – Secularism as the Privatisation of Religious Identity : Religion, Education and the Social Integration of Migrants in a Post-Christian Europe
Eoin Daly 431

Table des matières

1 – Pages

Introduction and Acknowledegments 1
Daniel Thym and Francis Snyder

I CONTINUING THE WISH TRADITION 1

II EUROPE – A CONTINENT OF IMMIGRATION? 2

II.1 New Paradigms for European Migration Law? 2

II.2 Entry Controls: Efficiency versus Human Rights? 4

II.3 Equal Treatment of Third Country Nationals and Union Citizens? 5

II.4 Evolving Features of Secondary Migration Law? 6

II.4 Social Integration: Immigration and the Nation-State? 7

III ORGANIZING THE BERLIN WISH 8

PART I
NEW PARADIGMS FOR EUROPEAN MIGRATION LAW?

PARTIE I
NOUVEAUX PARADIGMES
POUR LE DROIT DE MIGRATION EUROPÉENNE?

1 – Immigration and its Imperatives 13
*Joyce Chia** 13

I INTRODUCTION 15

II THE FRAMEWORK OF IMPERATIVES 15

A Modelling imperatives 18

B The content of the imperatives 21

III THE IMPERATIVES AND IMMIGRATION 23

IV SHOPPING FOR NEW VENUES 30

V JUDICIAL MANOEUVRES 34

VI CONCLUSION

2 – 'We want you! But...' Recruiting Migrants and Encouraging Transnational Migration Through Progressive Inclusion
Anuscheh Farahat 37

I PROGRESSIVE INCLUSION AND CONGRUENCE AS MIGRATION-RELATED PRINCIPLES IN INTERNATIONAL LAW 39

A The Human Rights-Based Principle of Progressive Inclusion 39

a) Inclusion as a Human Rights Agenda 40

b) The Emergence of the Principle of Progressive Inclusion in the Human Rights Discourse 43

B Tensions and Conflicts – The International Legal Principle of Congruence between a State's Territory, Authority and Citizenry 46

C Static versus Flexible Migration – Philosophical Concerns and Conceptions of Migration 47

D Similarities and Differences – diverging answers to similar questions 51

II STRATEGIES OF PROGRESSIVE INCLUSION IN THE LONG-TERM RESIDENTS DIRECTIVE AND THE DRAFT FRAMEWORK DIRECTIVE 53

A Uncoupling the Residence Status from its Territorial Connection 53

B Legal Recognition of Multiple Ties by a Solidified Residence Status – Approximating migrants' rights to citizens' rights 57

III THE TENSION BETWEEN PROGRESSIVE INCLUSION AND CONGRUENCE – THE STATIC CONCEPTION OF MIGRATION IN THE CONDITIONS OF ACQUISITION OF THE LONG-TERM RESIDENT STATUS 59

IV PROGRESSIVE INCLUSION AS A LEGAL ARGUMENT – OPENING NEW LEEWAY 61

3 – Trafficking in Human Beings: The EU Approach between Border Control, Law Enforcement and Human Rights
Sarah H. Krieg 63

INTRODUCTION 64

I PROBLEM REPRESENTATIONS IN LAW 66

II CRITICAL ANALYSIS OF THE EU FRAMEWORK DECISION ON COMBATING TRAFFICKING IN HUMAN BEINGS 67

A Problem Representation of Trafficking in Human Beings 68

B Law Enforcement versus Human Rights Approach 74

C (Irregular) Migration as the Problem? 78

III BY WAY OF CONCLUSION 82

4 – Stemming the flow? Discourses and Practices on Migration in Italy 85

Emanuela Paoletti

I INTRODUCTION 86

II MIGRATION DISCOURSE IN ITALY 88

III ANALYSIS OF THE EVOLVING ITALIAN MIGRATION POLICIES 96

IV ITALIAN-LIBYAN AGREEMENTS ON MIGRATION 103

V IMPACT OF ITALIAN MIGRATION DISCOURSES ON ITALO-LIBYAN RELATIONS 108

VI CONCLUSION 110

PART II
ENTRY CONTROLS: EFFICIENCY VERSUS HUMAN RIGHTS?

PARTIE II
CONTRÔLES D'ENTRÉE:
EFFICACITÉ CONTRE DROITS DE L'HOMME?

5 – Institutionnalisation et gestion des frontières extérieures de l'Union européenne: quelle situation juridique pour les migrants? 115

Hélène Jorry 116

INTRODUCTION

I LA GESTION INTÉGRÉE DES FRONTIÈRES EXTÉRIEURES: UNE DIMENSION MAJEURE DE LA LUTTE CONTRE L'IMMIGRATION ILLÉGALE 117

A Une européanisation progressive des politiques de surveillance et de contrôle des frontières extérieures 117

B L'agence européenne FRONTEX, clé de voûte institutionnelle dans la lutte contre l'immigration clandestine 120

C Entre incertitudes juridiques et difficultés opérationnelles 124

II UNE STRATÉGIE EUROPÉENNE D'ENDIGUEMENT DES FLUX MIGRATOIRES AUX CONFINS DE L'EUROPE 128

A Une pratique généralisée de la déterritorialisation des contrôles aux frontières extérieures 128

B La persistance d'interstices de non-droit, source d'insécurité juridique pour les migrants 130

C Du contrôle des frontières au contrôle des individus 136

6 – The fight against illegal migration and death at the border
Maarten den Heijer 139

I INTRODUCTION 139

II CHANGING MIGRATION PATTERNS AND THE FIGHT AGAINST ILLEGAL MIGRATION 142

III THE DUTY OF SEARCH AND RESCUE 146

A A shipmaster's duty to render assistance 147

B The responsibilities of coastal state 151

IV THE OBLIGATION OF RESCUE AND THE 'MIGRANT FACTOR' 157

V THE POTENTIAL ROLE OF COMMUNITY LAW 158

VI CONCLUSION 162

7 – Dublin Regulation and Boat Arrivals: What Burden-Sharing Model for the EU?
Frendehl Warner 165

I DUBLIN REGULATION AND ASYLUM BURDEN SHARING 165

A The Current Situation: The EU's 'Mediterranean Problem' 165

B Paper Focus and Methodology 167

II DUBLIN REGULATION AND (LACK OF) BURDEN-SHARING MECHANISMS IN THE EU 169

A The Dublin Regulation and the Need for Burden-Sharing 169

B The Concept of 'Burden-Sharing' in International Relations 170

a) Burden-Sharing in International Relations 171

b) Existing Formal Burden-Sharing Arrangements in International Relations 172

C Burden Sharing in the Asylum Field 173

D The History of 'Burden-Sharing' in the EU 176

E Resistance to Formalise Asylum Burden-Sharing 179

II UNOFFICIAL BURDEN-SHARING PRACTICES IN THE EU? 181

A Boat Arrivals in the Mediterranean 181

Case 1: Turkish-registered ship, Calabria, December 1997 181

Case 2: Cap Anamur, Lampedusa, June 2004 182

Case 3: Francisco y Catalina, Malta, July 2006 185

B EU Responses Fulfilling a Burden-Sharing Purpose? 186

III WHAT BURDEN-SHARING MODEL, IF ANY, FOR THE EU? 189

a) Cooperation to ensure a division of labour and greater contributions from allies 189

b) Strong leadership leading the Alliance 190

c) Multi-Level Alliances 191

d) Temporary Arrangement 192

IV DUBLIN, BURDEN-SHARING AND THE FUTURE OF EU ASYLUM SYSTEM 193

V CONCLUSION 194

8 – Challenges in external dimension of EU Justice and Home Affairs on the example of EU – Ukraine cooperation in migration and border management policies 197

Elżbieta Kaca 197

I INTRODUCTION 199

II GENERAL SCOPE OF THE COOPERATION 206

III MANAGEMENT OF IRREGULAR MIGRATION FLOWS 206

A Readmission agreement 209

B Visa policy 211

C Capacity building projects – overview 213

IV BORDER MANAGEMENT PROGRAMMES 221

V CONCLUSION

PART III
EQUAL TREATMENT OF THIRD COUNTRY NATIONALS AND UNION CITIZENS?

PARTIE III
ÉGALITÉ DE TRAITEMENT DES RESSORTISSANTS DE PAYS TIERS ET DES CITOYENS DE L'UNION?

9 – La portée de l'article 12 du traité instituant la Communauté européenne vis-à-vis des ressortissants de pays tiers: une évolution? 225

Chloé Hublet 226

INTRODUCTION

I L'ARTICLE 12 CE ET SON APPLICATION AUX RESSORTISSANTS D'ETATS TIERS: REMARQUES PRÉLIMINAIRES 227

A 'Dans le domaine d'application du traité' 228

B 'Sans préjudice des dispositions particulières' 231

II L'ARTICLE 12 CE ET SON APPLICATION AUX RESSORTISSANTS D'ETATS TIERS 232

A Les arguments en faveur de l'interprétation classique de l'article 12 CE 233

a) La jurisprudence 233

b) Les accords d'association, de coopération, la pratique des visas, la directive 'résidents de longue durée' (RLD) 233
c) Le traité de Lisbonne 234
B Les arguments à l'encontre de l'interprétation classique 235
a) La jurisprudence 235
b) L'effet utile de la lutte contre le racisme 236
c) Une compréhension correcte des termes 'dans le domaine d'application du présent traité' 241
C Conclusion quant à l'application de l'article 12 CE aux ressortissants de pays tiers 244
III LES CONSÉQUENCES DE L'APPLICATION DE L'ARTICLE 12 CE AUX RESSORTISSANTS DE PAYS TIERS 245
CONCLUSION 249

10 – Race Equality and TCNs, or how to fight discrimination with a discriminatory law
Sara Benedí Lahuerta 253
I INTRODUCTION 253
II THE APPROACH OF EU RACE-RELATED LAW TO RACIAL DISCRIMINATION TOWARDS TCNs 256
A Article 13 EC: the root of the problem 256
B The Scope of the RED: some considerations regarding TCNs 257
C Limitations of the FD compared to the RED 259
III CONSEQUENCES OF THE APPLICATION OF THIS LEGISLATION TO TCNS 261
A The hierarchy of persons 263
B The hierarchy of equalities 266
IV OPEN DOORS FOR INCLUSIVE INTERPRETATIONS? 270
A Nationality discrimination. An open door in Article 12 EC? 271
B Inclusive interpretation of the concept of 'racial discrimination' 272
V CONCLUSION 275

11 – Free Movement of Third Country Nationals in the European Union? Main Features, Deficiencies and Challenges of the new Mobility Rights in the Area of Freedom, Security and Justice
Sara Iglesias Sánchez 279
I INTRODUCTION 279
II THE NEED OF A COMPREHENSIVE SYSTEM OF MOBILITY RIGHTS FOR THIRD COUNTRY NATIONALS: HUMAN RIGHTS

OBLIGATIONS, INTERNAL MARKET RATIONALE AND THE IMPLICATIONS OF THE AREA OF FREEDOM, SECURITY AND JUSTICE 280

A Does the rationale of the Internal Market entails the endowment of free movement rights to third country nationals? 281

B One step forward in European integration: the Area of Freedom, Security and Justice and the right of free movement as a fundamental right 283

III A NEW SYSTEM OF MOBILITY RIGHTS WITHIN THE EU? RATIONALE, LEGAL BASIS AND METHODOLOGY 286

A The legal basis for the extension of free movement rights and the different methodologies for its development 287

B The rationales underlying the introduction of mobility rights in the EU Directives on migration 289

C Legal features of the new mobility rights 290

IV ASSESSMENT: PROBLEMS, INCONSISTENCIES AND CHALLENGES IN THE SYSTEM OF MOBILITY RIGHTS FOR THIRD COUNTRY NATIONALS 292

A The lack of systematic coherence in the regulation of mobility rights 292

B The insufficient insertion of mobility rights in the Internal Market dynamic 295

C Inconsistencies with other fields of Community law 296

V CONCLUDING REMARKS 298

PART IV
EVOLVING FEATURES OF SECONDARY MIGRATION LAW

PARTIE IV
JURIDICTIONS ET GOUVERNANCE MULTI-NIVEAUX

12 – Income Requirements in Community Law 303

*Eva Hilbrink** 303

I INTRODUCTION 304

II THE POWER OF INCOME REQUIREMENTS 304

A Prevention 305

B Consistency 305

C Balancing interests 306

III INCOME REQUIREMENTS REGARDING UNION CITIZENS AND THEIR FAMILY MEMBERS

A Preliminary limitations to the employment of income requirements 306
B Income requirements regarding economically inactive Union citizens 308
C The material scope of the sufficient means requirement 309
D Enforcing income requirements 312
E Conclusion 314

IV THE DIRECTIVE ON FAMILY REUNIFICATION OF THIRD COUNTRY NATIONALS 315
A Income requirements in Directive 2003/86 315
B Interpretation of the income requirements 316
C A Court of Human Rights-based approach 317
D A Court of Justice-based approach 318
E Evaluation of Directive 2003/86 by the European Commission 321

13 – Justice as a Common Denominator of EU Member State – Citizenship Policies
Ieva Kalnina 325

I INTRODUCTION 325

II STATE VS. THE MIGRANT: CRITICAL ASSESSMENT OF STATE OBJECTIVES IN NATURALIZATION POLICIES 328
A Naturalization from the State's Perspective: Preserving the Nation-State? 328
a) Loyalty: national security, good character, single allegiance 329
b) Integration: language skills, societal knowledge, sense of belonging 332
B Naturalization from the Migrant's Perspective: Citizenship with No Strings Attached 335
a) Migrant's Main (Dis)Incentives for Naturalization 335
b) Stability and Enhancement of the Permanent Resident Status as a Disincentive for Naturalization 337

III JUSTICE AND EFFICIENCY AS CORE VALUES IN STATE NATURALIZATION POLICIES 338
A Recent Proposals for Improvement of State Naturalization Policies in the Legal Doctrine 339
B Terms of Justice 341

IV CONCLUSION: RECOMMENDATIONS FOR A MORE MEANINGFUL NATURALIZATION PROCEDURE 345

14 – La directive 'retour' : directive de la honte ou progrès dans la construction d'une politique européenne en matière d'immigration ? 347

Fabien Le Bot

I LE CONTEXTE D'ADOPTION DE LA DIRECTIVE 'RETOUR' 347

A Le contexte matériel : la naissance d'une politique européenne en matière de retour 349

B Le contexte décisionnel : le fonctionnement de la procédure de codécision 351

C Le contexte politique : l'opportunité de l'intervention communautaire 354

II LA VOLONTÉ AFFICHÉE D'ADOPTER UNE POLITIQUE DE RETOUR EFFICACE 357

A Le principe du retour des étrangers en situation irrégulière 357

B Les modalités d'exécution de la décision de retour 362

III LA NÉCESSITÉ RECONNUE DE GARANTIR LES DROITS FONDAMENTAUX 367

A La mise en place de garanties procédurales 367

B Le maintien de conditions de vie digne 371

IV CONCLUSION 374

PART V
SOCIAL INTEGRATION :
IMMIGRATION AND THE NATION-STATE

PARTIE V
INTÉGRATION SOCIALE : IMMIGRATION ET L'ÉTAT-NATION

15 – 'Cultural Defence' of Nations : Cultural Citizenship in France, Germany and the Netherlands 379

Liav Orgad 379

INTRODUCTION 381

I THE NEW CHALLENGE OF MIGRATION 381

A Liberal Democracy and Migration 383

B Radical Religion and Radical Liberalism 384

II 'CULTURAL DEFENCE' OF NATIONS 384

A The French *Communauté* 387

B The German *Kulturnation* 390

C The Dutch *Inburgering*

III A TWO-STAGE SOLUTION: ADMISSION, CITIZENSHIP AND CULTURE 393
A Admission and Political Liberalism 393
B Naturalization and National Constitutionalism 396
IV FROM THEORY TO PRACTICE 400
A 'Recognise, Respect, Accept' and 'Adhere, Identify With' 400
B Constitutional Essentialism 401
C Family Members, Refugees and Foreign Workers 402
CONCLUSION 404

16 – "EU Citizen – Market Agent, Political Player or a New Dimension of the Personal Identity. Is There any Chance for a 'Supranational Nation' on EU Level?"
Martin Belov 405
I INTRODUCTION 405
II MAIN PARADIGMS PERTAINING TO THE CORRELATION BETWEEN THE DEVELOPMENT OF THE EU MULTILEVEL POLITY AND THE CITIZENS' STATUS 407
III THE DEFICIENCIES OF THE EU THAT SERVE AS INSTITUTIONAL IMPEDIMENTS ON THE SUPRANATIONAL IDENTITY BUILDING OF THE EU CITIZENS 411
IV THE DUAL STATUS OF THE EU CITIZENS – MARKET AGENTS OR POLITICAL PLAYERS? 417
V IS THERE ANY CHANCE FOR A "SUPRANATIONAL NATION" ON EU LEVEL? 424
VI CONCLUSIONS 428

17 – Secularism as the Privatisation of Religious Identity: Religion, Education and the Social Integration of Migrants in a Post-Christian Europe
Eoin Daly 431
I INTRODUCTION: THE CHALLENGE OF MIGRATION FOR EUROPEAN SECULARISM 432
II THE PRIVATISATION OF RELIGIOUS IDENTITY AS THE PROTECTION OF RELIGIOUS FREEDOM AND EQUALITY 435

III CONFESSIONAL SCHOOLS AS A MULTICULTURALIST AND COMMUNITARIAN CHALLENGE TO SECULARISM: THREATS TO INDIVIDUAL AUTONOMY IN A POST-SECULARIST POLITICS OF RELIGIOUS RECOGNITION 438

A Migrants, religious identity and confessional schools: a framework of collective or individual rights? 438

B Migrants, individual rights and confessional schools: suspect claims to religious 'pluralism' 443

IV THE POLITICAL APPROPRIATION OF THE IDEAL OF RELIGIOUS FREEDOM: A RATIONALE OF RIGHTS, OR DISCOURSE OF POWER? 448

V CONCLUSION: THE RECOGNITION OF RELIGIOUS IDENTITY BEYOND THE CONTEXT OF PUBLIC EDUCATION, AND THE SIGNIFICANCE OF SYMBOLISM 452