

Paper 3

*The Social Borders of the European Union's Immigration Policy,
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Summary: 1. – Introduction - 2. – From the horizontal approach to the category based approach to economic migration: the parabola of the Commission policy from Tampere to the aims of Europe 2020 – 3. – Before Lisbon – 4. – After Lisbon – 5. Back to the Rule of law? - 6. – The directive permits and equal treatment for regular workers and the equal treatment for irregular workers (after the *Tümer* case).

1. - *Introduction* – The paper focuses on the EU social model and its «double», that is to say the others, those left out, the non-EU citizens who come to seek work in the context of processes of economic migration, or who already have a job even if not always declared. The essay faces the theme of migrant workers in the context of EU common policy after Lisbon. It focuses on two related levels of discussion that consider the Mediterranean emergence part of a reflection that cannot be disregarded. We consider that the recurring emergency (since 2001) still continues to be the cause justifying exceptions to the rights of migrants. The waived rights are mainly of three types: citizenship, mobility and social inclusion rights. After reconstructing the evolution of the common EU policy (see par. 2 – 4), we argue that the structural response to the emergency passes through the affirmation of a systemic inclusive approach.

Taking into consideration the institutional framework, as outlined in the Treaties, the analysis highlights the link between emergency and Rule of Law, to be rethought through a most significant contribution of the international rules. *Our purpose is to recognize that the EU can overcome the obstacles of the revision of the competence settings provided by the Treaties without any formal modification.*

The interpretative perspective hereby proposed takes into account the promotion of the principle of equal treatment recently affirmed by the Court of Justice in the *Tümer* case, on 5 November 2014 (C-311/13). The protective function of labour law lies in this preliminary significant reaffirmation. In particular, the enhancement of the principle of equal treatment leads to two major results:

- it recognizes renewed theoretical and practical relevance to the powers vested by Title X of the TFEU, Social Policy, to the detriment of the permanent turn to Title V, Freedom Security and Justice, concerning the employment of immigrant workers, especially if irregular;
- it challenges the idea that every measure of affirmation of the rights of illegal immigrants produces irregularities and that the only instruments available to the (national and EU) authorities are the refoulement procedures for illegal immigrants.

This article seeks to focus on and explain those “irresistible” factors that affect these regulatory choices on immigration by supporting a social integration process within the EU, which is accompanied by a parallel process of social negation *vis-a-vis* non-EU subjects. One of the most obvious signs of this process is a transformation of the regulatory approach concerning economic migration from a horizontal to a category-based perspective, rather than a movement directed towards employment seeking, (instead of some rules exclusively dedicated to defined categories such as seasonal workers or highly qualified workers). In an attempt to provide an up-to-date reading of the most recent acts in the law of this subjects, the analysis will also focus on dir. 2011/98/UE, the so-called directive concerning permits and equal treatment of non-EU regular workers, which reminds one of the first formal statement of such a principle in 1974, as well as on the recent Dir. 2014/36/eu of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal.

2. – *From the horizontal approach to the category-based approach to economic migration: the parabola of the Commission policy from Tampere to the aims of Europe 2020* – If a precise birthday can be found for the common policy concerning immigration in the European Union, it is certainly the date of the European Council held in Tampere on 15th and 16th October, 1999. On that occasion and after the Amsterdam Treaty came into force the preceding May, the projected targets attained their maximum extent. The development prospects, however,

were evaluated as inadequate if compared against their initial premises. Later experience, in fact, overwhelmingly demonstrated that, at least in economic migration, the official consensus achieved by the Council was only apparent (Carrera 2011). The directive proposal concerning the conditions of entry and residence of non-EU citizens who intend to undertake employment or self-employment (Com (2001) 386 def., of 11 July 2001) – which is the principal result of the positions taken in Tampere – has never been approved by the Council. The failure of that directive proposal is clearly seen in the forced withdrawal of the proposal by the Commission¹, formalized five years later. The reason lies in the impossibility of reaching an agreement within the Council, between the most representative states.

More than ten years later, this episode represents a crucial unsolved problem in economic migration. Standardized rules for access to employment in the 28 member states do not exist yet², showing that, as in the past, the inconsistent dialectic between the Commission and the Council seems to be destined to affect future projected developments characterized by the evident hostility of the member states to renouncing specific responsibilities which is much more evident in this sphere than in others.

Even if the responsibilities of the Union in this sphere have greatly increased in a short time particularly with requests, action plans, programmes, positions, documents, projects, this has passed always under the *banner* of that dialectical relationship between the member states and the Commission, which characterizes the whole route covered by the common policy concerning economic migration in a real and visible way. Following the failure of the 2001 proposal, economic migration became part of a global policy concerning general immigration rather than employment: it is no longer subject to direct and immediate (hence problematic) regulation by the Union but has lost focus and has watered down and mixed with other matters. That's to say that only the indirect political approach has allowed the Commission to include rules concerning foreign workers among the projected tasks starting from the responsibilities in Title IV TEC first, and Title V TFEU, second (excluded even from scholars and from policy makers in Title X) (Peers 2008).

3. – *Before Lisbon* – After 2001, with all the weight of the 2001 violent events, which had such an impact on the development of rules concerning economic migration, three steps defined the overall approach to the movement of non-EU persons for employment. The first step came between 2005 and 2007. It was characterised by the adoption of the Green Paper on economic migration at the beginning of 2005³. This Paper was anticipated by the discussion within the Council of The Hague held later that year in December and by the following

¹ Cf. *European Commission, Withdrawal of Commission Proposal Following Screening for their General Relevance, their Impact on Competitiveness and Other Aspects*, 2006/C 64/03 published in the Official Journal of the European Community 17 March 2006.

² The same can ideally accompany the complicated events of the earlier decision no. 85/381/EEC, when another attempt was made to draw up a first draft concerning immigration.

³ In the *Introduction*, penultimate section, the Commission explains that the initiative “does not aim [...] either to illustrate the policies of the EU 25, or to compare them to those of other regions in the world, but rather to point out the main problems and possible options for a Community legislative discipline concerning economic immigration. In doing so, the Commission has taken account of the reservations and worries raised by the member states during the discussions which took place concerning the 2001 directive and proposes possible alternatives”. In the *Conclusions*, first section, it adds: the “Commission holds that the admission of migrants for economic motives is the milestone in the policy concerning immigration and it is therefore necessary to deal with it at a European level in the context of a progressive evolution of a coherent Community policy for immigration”. «Coherence» and «progression» are terms that accompany every single consideration on this matter, joined by the term «global», which effectively obscures the economic/employment question.

Commission's Plan for Legal Migration, in which the selective dismantling of the figure of the worker became the model for the Commission's subsequent Legislative and Work Programme adopted in November 2006⁴. At that time the already approved directive proposals and those still to be approved concerning employment of foreigners appeared, while a directive proposal was inserted concerning the rights of foreign regular workers. This one, indeed, disappeared from the list the following month at the European Council in Brussels at the end of the Finnish presidency. The conclusions reaffirmed the unease of some member states about taking decisions in these matters euphemistically expressed in the formula "fully respecting national powers" and made evident in the attitude assumed during negotiations of the subsequently approved directives (Carrera 2011).

Scholars pointed out that the basic deficiency of the policy set out by the EU is the so-called *proximity*, with some of the more significant and representative member states of the Union showing that in the dialectical relation between the Commission and the Council, the latter has prevailed. If such proximity with the single or several national interests allows the approval of the acts, it is the same proximity which puts at risk: *the overall approach of the Community and the building of a comprehensive immigration policy rooted in the principles of solidarity and openness whose long-term effects would bring efficiency in terms of security of employment and a high level of protection for the legal employability and working conditions of immigrant workers* (Carrera 2011).

Before the Lisbon Treaty came into force, the so-called Labour Immigration Policy, taking into consideration the principles of subsidiarity and national proximity, was deemed to be substantially without transnational coherence – even if expressed in different terms – divided between the various needs of national labour markets, fluctuating on the basis of local economic needs and bound up with the political priorities of each member state. The merely formal common policy was substantially represented by the different rules and policies in the 28 EU States, an only apparent unity which inspires the EU immigration strategy.

4. – *After Lisbon* – With the restyling of the powers and the generalization of the ordinary directive approval procedure carried out at Lisbon, has the overall picture changed? The basic question to ask is if the Commission's strategy concerning economic migration has become proactive after 13 December 2007, stimulated by the rules that came into force two years later.

⁴The activism of the Commission and the Council in 2005 to overcome the impasse caused by the failed agreement on the 2001 proposal was considerable also on the basis of the mandate received at the Council of The Hague at the end of 2004 (Communication of the Commission to the Council and the European Parliament, The programme of the Hague: ten priorities for the next five years, Partnership for the renewal of Europe in the areas of freedom, security and justice, Com(2005) 184 def.). After the Green Paper on economic migration [Com(2004) 811 def., of 1st November 2005], the Commission published the first document of reply to the consultation the following 30th November 2005 (Communication of the Commission to the Council and the European Parliament – Action priority in response to the challenges of immigration – First initiative taken after the Hampton Court meeting, Com(2005) 621 def.), during the six month English presidency of the Council, followed on 21 December 2005 by the Communication of the Commission, Action Plan on Legal Immigration [Sec(2005) 1680, Com(2005) 669]. With regard to the Council, we should remember the Note of the Presidency on the global approach to immigration: priority actions regarding Africa and the Mediterranean (15744/05 presented at Brussels on 13 December 2012, notes which are inspired by the Pact on immigration and asylum of 2008) and the Conclusions of the Presidency to the European Council at Brussels of 15th and 16th December 2005 (SN 15914/01/05, 30/12/05). It is worth noting that the outcome of the consultation on the Green Book of 2005 is a demonstration of the dialectical relationship between Commission and Council. The conclusions were widely laid aside, as S. Carrera recalls in *Building a Common Policy on Labour Immigration ... cit.*

To fully understand the real situation concerning developments following the Lisbon Treaty, at least two further geopolitical steps must be added to complete the developing picture briefly outlined: the signing of the European Pact on immigration and asylum proposed by the French presidency of Nicolas Sarkozy on 15 and 16 October 2008 (Carrera, Guild 2008); the Stockholm Programme of May 2010, and the following action plan which gives guidelines for intervention by the Union in this matter so as to link up to (more or less completely) the objectives of Europe 2020. The French doctrine, in particular, recognises the central role of the French president in the definition of a clear physiognomy of the EU common policy: “So there isn’t a European immigration policy, but a European police of foreigners governed by the commands of the labour market” (Chemillier-Gendrau 2007).

The directives approved between 2008 and 2009 are the tangible result of this kind of policy, as stemming from the Council document of 2005 on the global approach to immigration of which the 2007 legislative programme is the tangible result politically supported by the Pact of 2008⁵. The Pact, presented as brand new to the great media attention, does nothing but re-propose measures already approved and focuses on the concept of chosen immigration (*choisie*), a policy with a strongly utilitarian approach, various speeds, and the tendency to put the foreigner in a precarious legal status (Daugareilh 2012). A series of checks taken from the theoretical analysis of the models carried out in the 80s, showed their complete inadequacy in particular with regard to the development of *ad hoc* international relations, which appear to be much more efficient.

One cannot but notice an imbalance, a kind of identity crisis between EU immigration policy which claims to aspire to a global policy and which, on the other hand, can only focus on the repression of illegal immigration and on the strengthening of frontier controls. With regard to economic immigration, the political apparatus is judged fragmented, incoherent, restrictive, inefficient, unfocussed (Carrera, Faure Atger, Guild, Kostakopoulou ...), a long series of adjectives that have brought the scholars, with particular regard to the evolution of EU policies, to wonder if such a programmatic picture can be held to be compatible with the strategic priorities of Europe 2020 and capable of contributing to their achievement. In particular, this question arises where they indicate «inclusive growth» as the specific target that the Commission proposes to reach even by facilitating and promoting mobility of the workforce within the EU. This is proposed in order to guarantee a greater balance between labour supply and demand, with adequate financial support from the structural funds, in particular from the European Social Fund (ESF), as well as to promote a policy of worker migration which is both global and long-term so as to respond to the priorities and needs of the labour markets with the necessary flexibility⁶.

It is the paradigm of the border as a metaphor for the barrier that seems to inspire EU policy.

⁵ Although having merely a programmatic political value, the Pact establishes with clarity the distinguishing marks of the common EU policy. In particular, the five points which rather characterize it should be remembered: 1. To organize legal immigration taking account of the priorities, the needs and the precise reception capacities of every member state and to favour integration ; 2. Combat irregular immigration, in particular, making secure and efficient the return of foreigners in irregular situations to their country of origin or towards a country of transit; 3. Improve the efficiency of external border checks; 4. Construct a Europe for asylum; 5. Consolidate a global partnership with the countries of origin and transit to encourage co-operation between migration and development. Worth noting in the context of Objective 2, is the undertaking by member states to resort to the regularizations case by case only for humanitarian or economic motives. The horizontal policy for economic migration is thus definitively abandoned.

⁶ Communication of the European Commission 2020, *A Strategy for an intelligent, sustainable and inclusive growth*, Brussels, 3.3.2010, Com(2010) 2020 def.

Precisely today the term «barrier» seems to be the most suited to catch the moods of the legislators, not only national, and to mark the most recent regulative results, the real theme of this research as indicated in the foreword. With the disappearance of the physical borders shown on geographical maps (the internal borders of the EU, for example), one notes a multiplication of borders in the economic, political, anthropological and social reality. Law cannot remain unaffected by this dynamic; on the contrary, it can seek to enlarge or reduce the extent at the level of the European Union too. In this context, the presumed neutrality of law seems more a theoretical alibi than a fact of legislative reality as the recent experience of labour law concerning immigration shows. In this respect it has been noted that the topic of economic mobility from outside the Union assumes a peculiar value as shown by the reconstruction above and witnesses the development of a policy with the vice of exclusion imported into EU law-making from the struggle against irregular immigration rather than its opposite – the virtuous relationship between citizenship and employment. The status of irregular is not even a risk or a threat; it becomes simply a juridical situation of those people who stay irregularly on the territory of a member state while the Union works out *ad hoc* juridical instruments to which must be given particular attention: behind the rhetoric of the struggle against irregular immigration hides the criminalization of foreigners in irregular situations and following this, their expulsion.

It is clear that a regulatory system that considers the foreigner as a threat or someone deserving repression must be strictly examined also on the basis of its respect for fundamental human rights (even if moving to find employment). From a labour law point of view economic efficiency and respect for human rights are complementary. The labour law approach in particular does not distinguish between legal and illegal immigration; as a consequence, the role of the employment contract is crucial besides the fact (highly significant for the entire disciplinary balance of labour immigration law) that labour law gives precedence to the status of worker over that of migrant.

Arguing from the French doctrine (Daugareilh 2012), the uncomfortable slope on which EU law has placed labour experts makes one constantly wonder whether the worker has to be punished or protected. A far-from-simple reply, which requires a reconstruction of the entire multi-layered context regarding the safeguards for personal rights up to the relevance of questions concerning so-called decent work, and which touches on the roles of the various courts as guardians of fundamental rights (Lo Faro 2008; Daugareilh 2006).

Whether these observations are to be considered valid for the post Lisbon Treaty period it is not an easy question to answer given that a large number of acts passed after 2009 are the result of earlier policies and programmatic decisions. Yet to be evaluated completely is, therefore, the reality of the EU order strongly shaken by the inflow of people following the so-called «Arab Spring», events that bring one to see EU policy as a clear example of the failure of a «non policy» in the field of migration. These events have not helped to qualify the Mediterranean countries as decision makers but always as spectators in this field.

The extreme difficulty in finding a complete answer to such a wide question does not mean we cannot offer a further comparative element to the technicalities of the discussion. Article 68 TFEU recognizes the European Council's responsibility in “strategic direction of the legislative programme and its application in the area of freedom, security and justice”. On 4 May 2010 the Programme of Stockholm, which gives political form and substance to Title V

of TFEU, was published in the Official Journal of the European Union⁷. It deserves attention for the part of the single planned actions indicated with the relative deadline among which the undertaking to draw up a Code for legal immigration (to be published between 2013 and 2014) should not be forgotten. Scholars have already publicly proposed a long and thorough draft, the interest in the code seems to lie in the fact that it will be a kind of basic text on the subject (by itself already innovative), intended moreover to consolidate the existing regulations concerning immigration (as explained by point 6.1.4 of the Stockholm Programme) and to impact, as quickly as possible, on immigration for economic reasons. It should be noted indeed that the Council (Peers 2012), at point 6.1.3 of the Programme, invites the Commission, among other tasks «to evaluate the impact and the efficiency of the measures adopted in this sphere so as to determine if it is necessary to strengthen the existing legislation, also in relation to categories of workers presently not covered by the Union's regulations». The specific point is really enigmatic. It seems like an attempt, if not to recover the integrity of the entire migration policy, much less than an open prospective for a renewed initiative of a horizontal type on the employment of foreigners ten years after the failure of the proposal 386 of 2001, interesting in the political dialectic between European Commission and Council (which, compared to the 2007-2010 period, involves considerable changes in the representatives of the national governments).

An indirect way, perhaps, to repair the fault of the (substantial) fragmentation of the initiative concerning employment also in light of the economic-financial crisis and of the impact produced on the foreign workforce. By comparing the Commission's 2005 Green Paper on economic migration with the 2012 Report on Immigration, some useful suggestion can be found, helping to formulate a reply given that the crisis is an integral part of the reasoning about the economic contribution of foreigners in the EU, which remains central. The Commission reaffirms that "economic migration remains (...) an important element to make up for an insufficient workforce, above all in the context of an ageing EU population and in an international market where there is strong competition with non-European countries for talent, these also hit by a lack of skills". It adds that "more than contributing to economic growth, the migrants offer our society a social and cultural contribution". For all these reasons "the Commission proposes to start again concerning economic migration by setting up before the end of 2012 a consultation which promotes a wide debate with the member states, the social institutions and the various interested parties, on the role that European policies should have so as to exploit the potential of economic migration in a period of crisis in terms of political action by the Commission" [p. 5]. EU harmonization in this specific area limited itself to the approval of several directives (dir. 2008/115, dir. 2009/52), a series of acts intended to regulate 32.5% of almost 2.5 million first stay permits for non-EU citizens for the undertaking of paid employment⁸.

Awareness of the failure is not even concealed, the reply to the question just posed does not appear reassuring: ten years later it goes back to the beginning, showing that the regulatory

⁷ The Stockholm Programme was adopted by the Direction *Justice and Home Affairs* in December 2009. The scheduled plan came the following 20 April: Communication by the Commission to the European Parliament, to the Council, to the European Economic and Social Committee and to the Committee for the Regions, Create a space of freedom, security and justice for the citizens of Europe Action Plan for the realization of the Stockholm Programme (Com(2010) 171).

⁸ In the *Third annual report on immigration and asylum* (p. 3) in which the reported data can be found, it is added that the remainder of the entries is divided among family motives (30.2%) and study motives (20.6%), whilst the remaining 17% comprises motives of protection, stay without work permit, ...).

initiatives concerning labour immigration policy are always below expectations.

The new Communication from the Commission to the European Parliament, the Council, The European economic and social Committee and the Committee of the Regions, *A European Agenda on Migration* of 2015 (Com(2015) 240 final) adopts the same approach: the four pillars drew to manage migration better still focus on the external borders' security and aim at the reduction of push factors towards irregular entry and stay. The distinction between legally admitted and irregularly staying workers is the fundamental approach of EU new Agenda, together with an increase of the returns rate and a better enforcement of the Employers Sanctions Directive. On the labour law and social policy side, the categorisation of migrants still continues to be the guiding light of the Commission, despite the Bluecard experience had already shown all its weaknesses. The modernisation of Visa, with the creation of a new "Touring Visa" concerning non-EU citizens travelling through the Schengen area for a period between 90 and 180 days, will complete the picture, adding complexity, separations and bias. Scholars are indeed moving into a complete different direction: a group of researchers⁹ re-propose a series of guidelines to deal with the topic of immigration, and not only economic immigration. The recommendation n. 1 (*The understanding of immigration*) contains the recurrent statement, repeated but unheard up to today: "*The correlation between employment policy and migration should therefore be taken very seriously and developed further*".

5. *Back to the Rule of law?* - As highlighted above (see §1), the emergency situation caused by the Mediterranean tragedies suggests rethinking Europe's policy and considering migration within the social perimeter of EU Law. One of the most important reasons to do so in our opinion is that migration policy challenges the EU rule of law.

Scholars and policy makers have already faced this debate from several points of view. The first important question stemmed from the asylum politics and regulations. This happened in different ways and directions. On one side, issues concerning the asylum requests have shown and put under the spotlight the struggle for authority that has been engaged from the various actors and institutions dealing with the emergency problems that rose in the recent years. Scholars clearly reported the involvement in this fight of the different foreign affairs and military actors of several Member states. At the same time, we assisted to a struggle between Member states and EU institutions (Carrera, den Hertog, 2015, 1, Bogdandy, Ioannidis, 2014, 59). Most recently, the long debate that preceded the coming into force of the Triton Jo and the take over of the Italian mission Mare Nostrum focused on the question whether EU and Frontex did not have any mandate and capabilities to carry out SAR (Search and Rescue) operations. The Agency said it couldn't focus on SAR under the applicable rule of law framework. Referring to this last event, scholars observed that the rule of law can be used, and indeed has been used, to refrain from taking action (Carrera, den Hertog, 2015, 10). On the other hand, as we will demonstrate here, one might say that the asylum issues have shown how the rule of law and the principles of legality and democracy might be challenged when dealing with migration. We can get to the same conclusion approaching the migration issues from the economic point of view. The Rule of law principle is challenged in different ways and to different degrees: in the relation between the EU legal order and national laws, in the dialectics with international institutions and conventions (such as the ILO convention n. 143/75) and within the EU legal system, putting under stress the equality principle.

⁹ S. Carrera, A. Faure Atger, E. Guild, D. Kostakopoulou, *Labour Immigration Policy in the EU ...*, spec. 11.

From our point of view, the struggle between the EU institutions and Member States and more in general between the different authorities and actors playing both at national and at EU level, is the result of the understanding of a thin, limited concept of the Rule of law, restricted to the respect of the legal basis and competences in the law-making. But Rule of law has a greater and higher meaning when linked to his twin brothers «democracy» and «fundamental rights». Matched together, the three open to other important issues.

So we think we should move from a more substantive conception of the Rule of law.

According to Bogdandy and Ioannidis theory on systemic deficiency in the Rule of law, member states are presumed to respect the values of democracy, fundamental rights and Rule of law on which the EU is rooted. This kind of presumption is essential, being the national administrative and judicial apparatus the arm that enacts EU law. Indeed it is up to Member states' authorities to guarantee an effective and uniform application of EU law. Even if infringements to the law are a normal feature in any legal system, when they get to a certain degree, being persistent, widespread and threatening the principles of democracy and Rule of law, we can say there's a Systemic deficiency (Bogdandy, Ioannidis, 2014, 60).

So, even if the respect of human rights falls within national competences, and even if there's a presumption of compliance with art. 2 Teu by Member States, this presumption might be overtaken where evidence of the systemic deficiency can be sustained (Bogdandy, Ioannidis, 2014, 91) When this happens, according to the ECJ¹⁰, there is room to suspend the secondary EU law and, according to the most exact doctrine, to interfere with the national sphere, at least under certain conditions (Bogdandy, Kottmann, Antpöhler, Dickschen, Hentrei, Smrkolj, 2012, 508).

In order to ascertain a systemic deficiency in the Rule of law of course, it is not enough to have some violations: one can figure a systemic deficiency allowing the intervention of the EU institutions only in case of "extreme situations", such as the State failure or the certainty of systematic violations of human rights: there are some legal criteria to help drawing the concept and applying it correctly.

First, the breach of the law must create a situation of future uncertainty. We argue that this is exactly what is happening with the migrants' categorisation policy: not allowing migrants to rely on the opportunity to get a permanent permit, or preventing them from changing the kind of permit they have or from moving freely within the EU area, or not respecting the principle of equality as it has been stated in the UN conventions and in the Cfreu.

It is important to highlight that the concept of Systemic Deficiency does not create any new obligation for the member states and it doesn't even expand the EU field of action. Whether it allows a wider competence of the EU authorities is going to be discussed here. Asylum issues have already given the EU authorities the opportunity to go over the competence settings in order to guarantee the respect of human rights. It has been noted that art. 3 of the 2007/2004 Regulation as amended by Regulation 1168/2011 (Frontex regulations) give the Frontex Executive Director the competence to suspend an operation when human rights breaches occur, and it has been observed that the amendment reinforced the rule of law framework in different ways, most of all by strengthening the principle of non-refoulement. Moreover, the EU Ombusman has opened its own initiatives inquiries on the forced return of migrants and it is well known, at least in Italy, that the Dublin Regulations haven't been fully applied during the emergency in the Mediterranean Sea (Carrera, den Hertog, 2015, 6).

¹⁰ See ECJ, 21 December, 2011, C-411/10, *N.S. and Others*, and ECJ, 5 Septembre 2012, C-355/10 *European parliament v. Council of the European Union*, supported by European Commission.

There is also some relevant case law on this issues. In *N.S.*, the Dublin regulations were not applied in order to safeguard the asylum seekers' fundamental rights. In that case Mr. N.S., appealed against the decision of UK authorities to transfer him back to Greece, which is the place where he should have applied for asylum according to the Dublin Regulation. The Court, taking into consideration that the systemic deficiency in the asylum procedures assessed in Greece would have infringed Mr. N.S. rights, stated that Member States should not transfer asylum seekers to another Member state if there are "substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment". It is noteworthy that the fundamental rights protected here were not linked to citizenship as it did happen in *Zambrano*¹¹. Fundamental rights and the respect of the rule of law here stand alone, meaning that they do not need the crutch of citizenship to get into force. In *C-355/10*¹², the EU Parliament took action against the Council for the annulment of Council Decision 2010/252/Eu of 26 April 2010 because it exceeded the Schengen Borders Code limits (as the contested decision to make SAR operations had to be adopted with a legislative act and not with an implementing measure). The Court stated that, even if void, the effects of the contested decision should be maintained until a new regulation is set because "the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required" (point 78). In this case too, the fundamental rights concerned were those of non-EU citizens.

Coming back to the issues of economic migration, from our point of view, the use of the Systemic Deficiency theory in the analysis of the legal framework might help at least in two different ways: firstly it might highlight and thus help understanding the challenges to the legal order that the political choices made in the recent years entail. Secondly, it might become in the future the legal basis on which the EU institutions may root a new horizontal approach to migration. It may justify a more invasive intervention of the EU, overlapping national competences in this field. To tell the true, a revision of the competence settings is not necessary at all, for more than one reason: because the EU institutions already have a relevant shared competence on the basis of the subsidiarity principle, and because they have a shared competence also on the side of social policy. The attraction of economic migration under Title X Tfeu allows a path shift in migration policies. We believe that to solve many of the problems stemming from migration issues, it would be enough to give the priority to the worker status in respect of the migrant one: in other words, it would be a big deal if the labour standards were applied to all workers, with or without permits, with or without a legally binding contract, just on the basis of the coming to force of labour standards (the equality principle included).

Coming to the ways in which the Rule of law is threatened by the dynamics between the EU legal order and national laws in the economic migration field, we might start observing that the Visa system has already shown how systemic deficiency in some sectors may affect legality and the rule of law. Groenendijk highlighted that the use of a double permit policy, like the German one, forcing people to choose between the EU long term permit or the national one, is a way for member states to escape from EU rules. And the same dynamics are working with the blue-card system. Its failure – with more or less 16.000 permits issued all

¹¹ ECJ, 8 m arch 2001, C-34/09, *Ruiz Zambrano*.

¹² ECJ, 5 Septembre 2012, C-355/10 *European parliament v. Council of the European Union*, supported by European Commission.

over Europe - shows that the double track, both national and European, drawn for economic migration, is still challenging the legal EU framework.

We can now add that the questions issued by the attractiveness of skilled workers debate are not so different: the lack of efficient employment services jeopardises both the European employment strategy and the EU competition for skilled workers. The double permit system developed in many EU countries here seems to hurdle the development of the EU policies seriously. Data clearly show that there are two different dynamics. On one side, the most skilled workers prefer other destinations such as Usa or Australia to Europe; on the other side, there is a great problem of over-qualification (Kahanec, 2015, 48). Starting from the first issue mentioned above, the classic economic theory suggests that the shortage of skills depends on some market failures, like a lack of information or excessive regulations in training systems, industrial relations or migration rules. So, the first kind of measures suggested are the ones that try to ease the matching and to offer facilities to those who intend to migrate. This kind of intervention is the one adopted in the blue-card directive. However, policies based on a preferential treatment have some important limits. First they are frequently based on a too narrow measurement of the demand of skills (Kahanec, 2015, 49), and if one considered the difficulties and inefficiencies of the public services we have with this kind of issues for instance in Italy, he could realize how limited this kind of approach might be. Of course one of the most important hurdles in the mobility still lies in the recognition of foreign qualification and skills systems¹³. But maybe it would be a too severe analysis observing that the skills shortage in itself stands there witnessing the failure of the EES. Grounded on the «more jobs better jobs» flagship, the mismatch between offer and demand of skilled workers show the limits of the open method of coordination, on the one hand, and the lack of efficient employment services, on the other.

Even on the basic ground of the respect of law, and leaving aside broader understandings of the concept (see *infra*), the Rule of law requires non only the respect of the law by public authorities and Courts but also by the private actors (Bogdandy, Ioannidis, 2014, 63). This means that there is a failure in the rule of law even when there is a disrespect of the law by private parties. As regards economic migration, this might happen both when migrants are illegally employed and when the minimum standards and equality of rights are infringed. Uncertainty on the opportunity to remain in a country after having worked there, though illegally, jeopardises the right to an effective remedy and a fair trial. When the law, and as far as our issues are concerned, when the migrants' workers rights are broken with regularity and when the infringements are broadly ignored¹⁴, when institutions are seen unable to obtain law observation, and when, in the same time, member states do not implement the EU law correctly, as stated in *El Dridi*¹⁵ and in *N.S.*, and when extraordinary long administrative procedures jeopardise migrants' rights, we can say that the Rule of law is threatened.

Given a broad meaning to the Rule of law linked to fundamental rights, a severe challenge comes from the great bazaar of inequalities in migrants' working conditions. The question comes to a crossroad between national, EU and international conventions. The differences in working and staying conditions between long-term permits, blue card or seasonal permits

¹³ The professional Qualifications Directive applies to selected third country citizens: family members of EU citizens (dir. 2004/38), refugees (dir. 2004/83) long term residents (dir. 2003/109) EU Blue Card Holders (2009/%) researchers (dir. 2005/71), but with several limits: it does not impose the recognition of those Qualifications acquired in third countries but only the ones acquired in a EU State

¹⁴ According to Bogdandy and p. 79 the quality of contract enforcement is an indicator of systemic deficiency is

¹⁵ EWJ, 28 April 2011, C-61/11, *El Dridi*.

owners look like a labyrinth of precariousness and discrimination. Most scholars have already considered the categorisation and sectorial approach as discriminatory in nature; the reduction of labour and social security rights drawn by the recent directive on seasonal workers, so-called the directive of suspicion, challenges the ILO standards and has some social and economic costs that have already been highlighted (Cholewinski, 2015, 23). We refer here both to the reduction of Europe's attractiveness for skilled workers and to the broader societal costs incidental to the creation of a second class of workers and individuals. From a legal point of view, the categorisation policy challenges severely the principle of non-discrimination stated in art. 21 of Cfreu, and indirectly in dir. 43/2000/EC, engendering a broad set of problems concerning the legitimacy of secondary law. Moreover, the discriminatory effect goes hand in hand with the uncertainty of rights, again affecting the EU Rule of law. It has clearly been noted that one of the effects of categorisation in the complexity of law, with different words for the same legal issue, subject regulated in different ways in the various directives and so on.

Finally, given the Systemic deficiency in the Rule of law in the sector of economic migration, what kind of instruments and measures can we display? The highway is of course art. 7 TEU: the suspension of Member States rights until the State does not respect art. 2 TEU. Nevertheless this is a very strong remedy that might never be applied, because of its severe drawbacks and because of the inadequacy of the remedies provided to solve the problems of systemic deficiency (Bogdandy, Ioannidis, 2014, 84). Despite that, special mechanisms of cooperation and verification and specific adjustment programmes, similar to the one drawn for the EU economic governance, can be put into force. Will Europe fight the systemic deficiency in migrants' rights with the same resolution it had with the economic crisis?

Can we consider the respect of the legal framework in the field of labour law as a precondition for economic stability and thus link the economic programmes and scores to this goal? According to the Systemic Deficiency Rule of law theory there is room for EU institutions to set conditions for the purpose of putting pressure on member states to adopt reforms; there is room for technical assistance to member states to implement policies aiming at restoring the legal framework; most of all, we believe there is finally room for a shift from the area of freedom security and justice to the social policy chapter.

One step beyond in this direction has been done with *Tümer* case.

6 . – *The directive permits and equal treatment for regular workers and the equal treatment for irregular workers (after Tümer case).* - The directives approved on the basis of the dispositions of Title V TFEU (ex Title IV TEC) are a tangible, concrete example of the general policies discussed above: normative binding acts intended to translate general institutional and policy lines into concrete rules for economic migration. It is a great opportunity to reflect not upon the social model of the EU citizen but on his double, the mirrored image of the non-EU workers (also irregular).

Work is precisely the main object of our attention.

The production *before* and *after* Lisbon does not appear to be marked by a substantial interruption between past and present, a break actually recorded in 2001 with a decisive change of direction on this topic, marked by support for criminalization and for every form of migration control, politically sustained by the struggle against terrorism after the attacks of September 11. A clear trace of the relevance of security can be found in the abandonment of

the term «circulation» from the rubric of Title V of TFEU¹⁶.

In this context, an important signal in this process was launched by the Court of Justice in its judgment *Tümer*, recalling that the principle of equal treatment in EU law with regard to regular workers is stated by art. 12 Dir. 2011/98¹⁷.

It is a very simple case. A worker who lost his residence permit becomes irregular. The Dutch government believes that he cannot be considered as an employee under dir. 80/987 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.

In its observations to the Court, the Netherlands Government argues that «Directive 80/987 does not apply to ‘illegally staying third-country nationals’, since Article 137(2) EC, the legal basis for that directive, does not cover third-country nationals. The application of Directive 80/987 to that category would, moreover, be contrary to the European Union’s policy on immigration and, in particular, to Directive 2003/109, which confers a right to equal treatment, notably in relation to social security, only on third-country nationals who are legally resident in a Member State. In that regard, it would be enough to state, first, that — as the Advocate General pointed out in point 51 of his Opinion — competence under Article 137(2) EC to adopt minimum requirements to improve living and working conditions, that is the objective referred to in Article 136 EC, is not limited so as to concern only the living and working conditions of nationals of Member States, to the exclusion of third-country nationals».

We stress two passages where the Court writes - faced with the Dutch resistance to the payment of wages to the worker (irregular occurred, an employer in insolvency):

- that Under Article 1(1) of Directive 80/987 «that directive applies to employees’ claims arising from contracts of employment or employment relationships and existing

¹⁶ Leaving out the sectors of asylum and management of frontiers, to dwell on immigration, indicating for demands of completeness, the dir. 2003/86 concerning family reunifications and dir. 2003/109 relating to the status of non-EU citizens living long term in the EU. *After* Lisbon or rather the project desired in the French semester of immigration chosen and concerted, is accompanied to approval by four directives (in substantial continuity with the programmatic acts of 2005 and 2006) and the preparation of two others waiting for approval. Secondly, the same legislator is based on the repressive-punitive logic (of employers: dir. 2009/52) without any concern for the position and/or the vulnerability of the irregular workers, and to the tactic of expulsion of irregular workers, in general (dir. 2008/15) two directives which have the same logic, as the totality of the doctrine which analyses them concludes. At the present state and leaving out any operation of future regulative consolidation through a European Union immigration code, more or less innovating given regulative arrangements, the intervention of the European Union legislator for employment can base himself firstly on the fragmentation of the operative model through an internal distinction between the positions of non-EU workers of low and high qualifications (dir. 2009/50); or between seasonal and non-seasonal workers as indicated (dir. 2014/36/eu of the European Parliament and of the council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal) or again can distinguish mobility outside the company from mobility with a company as inserted in the proposal (Com(2010) 378 def.). Dir. 2011/98 deals with a single request procedure for the issue of a permit allowing non-EU citizens to stay and work in a member state and to a common set of rights for non-EU workers who reside regularly in a member state. That directive seems to be an intervention which renders uniform rights and procedures «reductive proposal in respect of 2001», a cautious attempt to reaffirm the responsibilities (almost exclusive of the member states) and at the same time, to regularize the procedures and affirm a downgraded principle of equal treatment for regular workers.

¹⁷ Art. 12, dir. 2011/98 is concerned with the right to equal treatment for regular workers, widely set aside the conformity of which to the Convention ILO 143/75 is needed; this latter shares the same object of regulation but a different field of application. The same Recital 28 recognises that the directive «ought to apply without prejudice the most favourable dispositions contained in the law of the Union and in the applicable national instruments».

against employers who are in a state of insolvency within the meaning of Article 2(1) of that directive»;

- In that regard, it should be noted that, in view of the social objective of Directive 80/987 and the terms of Article 1(1), under which the directive is to apply ‘to employees’ claims arising from contracts of employment or employment relationships’, the definition of the term ‘employee’ necessarily refers to an employment relationship that gives rise to a right, held vis-à-vis the employer, to receive payment for work done. In the present case, those elements are present in the definition of the term ‘employee’ under the civil law of the Netherlands.

The Advocate General Bot, in his conclusion, had already recognized that:

«To my mind, the exclusion from the scope of Directive 80/987 of persons who may properly be described as ‘employees’ under the general rules of national law is at odds with the essential purpose of that directive and liable to frustrate its effectiveness. In my opinion, although that directive allows Member States to define the term ‘employee’, it none the less requires them to do so in such a way that the definition used to determine the scope of the measures transposing that directive matches the definition in force in their national employment law, so that any ‘employee’ within the meaning of national law will be eligible for the guaranteed settlement of pay claims. In other words, the geometry of the definition of ‘employee’ cannot vary according to whether the relationship in question is between the worker and his employer or between the worker and the guarantee fund. Secondly, making the right to the guaranteed settlement of pay claims conditional, in the case of an employee who is a third-country national, upon legal residence is not, to my way of thinking, consistent with the principle of equal treatment and non-discrimination. That principle is a general principle of EU law enshrined not least in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, the provisions of which are addressed both to the institutions, bodies and agencies of the European Union and to the Member States when they are implementing EU law, as is clear in particular from Article 51(1) of the Charter. Now, when, within the framework of the reference to national law under Article 2(2) of Directive 80/987, a Member State defines the categories of employee to which that directive is to apply, it is implementing EU law and must therefore observe the principle of equal treatment and non-discrimination. According to settled case-law, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. The Court has held that the elements which characterise situations, hence their comparability, must be determined and assessed in the light of the subject-matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account. According to the Court, the same approach must be taken, *mutatis mutandis*, in assessing whether national measures implementing EU law are consistent with the principle of equal treatment. As I pointed out earlier, it can be seen from the information provided by the referring court that, under Netherlands civil law, third-country nationals who are illegally resident may have the status of employees and may seek the payment of remuneration on the basis of their employment contract. However, Article 3(3) of the WW reserves different treatment for them in the event of the insolvency of their employer, in that it excludes them from the right to the guaranteed settlement of their outstanding pay claims. Such a difference in treatment is not objectively justified» (Opinion Bot, point 68-76).

This new series of reflections arising from labour law appear to originate in EU immigration

policy, the double of the social model of the origins in which it has not stopped mirroring itself, also imposing an unavoidable question of method about the “categorisation” or the “isolation” of questions about the employment of migrant workers opening juridical considerations within the dimension of ‘Social Europe’.

Even if one discusses the very existence of the European social model, its final construction needs an extra balancing between security and social solidarity (for foreigners), not only by taking advantage of the opportunity offered by the link with that slender competence sanctioned by art. 153, lett. g, TFEU, but in more general terms, with respect to the competences implied in Title V regarding labour immigration policy. The search for a social perimeter within which EU labour law matters need to be taken into consideration must include, rather than exclude, questions about non-EU citizens. Such an extension seems to inevitably require a genealogical re-reading of the community social dimension, between a consolidated past, far from the present, but a perhaps less uncertain future of the enhancement of the multi-layered rights of the individuals in movement.

When the principle of equal treatment is applied in areas excluded (irregular workers), it is unlikely to be stopped. Remember the *P* case?

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