



URGE WORKING PAPER 9/2006

Free movement of persons and European solidarity

Stefano Giubboni

University of Florence and URGE

stefano.giubboni@unifi.it

URGE is the Research Unit on European Governance of the Collegio Carlo Alberto Foundation

Address: URGE, Collegio Carlo Alberto, Via Real Collegio 30, 10024 Moncalieri (Turin), Italy

Website: www.urge.it

“And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders [...]. The Constitution was framed [...] upon the theory that the people of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not in division” .
U.S. Supreme Court, *Edwards vs. California*, 314 U.S. 160 (1941), at 174

1. Introduction

There is an innate, one might say constitutive, ‘tension’ between freedom of movement within the European Community/Union and the principle of solidarity, a tension which has increased in step with the progressive enlargement over the years – to the point of becoming almost generalized – of the circle of potential beneficiaries of the (associated) right to cross-border access to the social benefits guaranteed by the respective national welfare systems (see more recently van der Mei 2003, p. 1ff.). And that tension, which has been present from the start, reaches its absolutely highest point in face of the prospect of complete ‘universalization’ of the right to move freely within the Union. For it is unquestionable that the tendency towards extending such a freedom to ‘all’ poses a real ‘challenge’ for social security systems; which is to say, a challenge to the very notion of European solidarity, to its ‘intensity’ and to the forms in which it is realized within the Community legal order.

What is more, it is not by chance that this tension features to an ever-increasing degree in the delicate and complex ‘balancing of interests’ operations that the Court of Justice of the European Communities is called upon to carry out in this respect (see Mather 2005, p. 330). Hence, following a close examination of the latest developments in Community case-law on cross-border access to social rights in the European Union Siofra O’Leary had all good reason to emphasize the existence of an ‘increased tension between migration in the EC and the protected sphere of national citizenship’ (O’Leary 2005, p. 59), coupled with an increasingly pronounced reduction of the sphere of ‘social sovereignty’ reserved to the Member States (for this terminology, and on these topics, see in particular Ferrera 2000; Id. 2005b; and, earlier, Leibfried and Pierson 1995).

From the very start, the founding treaties have ensured workers (initially only employees) who ‘migrate’ within the Community a sound network of social guarantees, on the presumption that equality of access to the social rights recognized by the respective national welfare systems constituted an essential precondition for the very exercise of freedom of movement in the context of the common market. Even Article 69 of the ECSC Treaty already sought, in its paragraph (4), to establish embryonic guarantees in this direction by, in particular, obliging Member States to endeavour ‘to settle among themselves any matters remaining to be dealt with in order to ensure that social security arrangements do not inhibit labour mobility’. But it is with the Treaty of Rome that these principles are set out in their full significance, albeit initially only in favour of employees and members of their families, and also with detailed specification of the normative techniques best suited to the purpose, starting from that focused on co-ordination of the diverse national legislation on social

security, which in the Community context already reaches, at a stroke, its highest levels of development and 'sophistication' with Regulation 3/58 (see *ex multis* Watson 1980; Cornelissen 1996; Pennings 2003; Cinelli 2005). The principle of equality of treatment among Community workers as regards access to employment and conditions of work and employment (Article 39, formerly 48, EC) and also social security protection (Article 42, ex 51, of the Treaty), with the attendant tendency towards the de-territorialization of social security systems brought about by supranational rules on co-ordination (Sindbjerg Martinsen 2005), has therefore represented a favoured vehicle for the construction of a genuinely European dimension of social solidarity, in that it has opened up to beneficiaries of the relative freedom of movement almost full access to 'social citizenship' rights (Marshall 1992) as defined by the Member States of the Community (Ball 1996; Giubboni 1998).

There is thus an innate, indeed 'constitutive', link between recognition of the right to move freely within the Community and the opening-up of national social protection systems to 'migrant' citizens of other Member States. In this sense, the affirmation of a principle of freedom of movement for persons – even if it is confined to workers or at any rate economically active persons, who as such participate in market processes – always necessitates some measure of commonality of the forms and mechanisms of solidarity in which national welfare state systems find their substance. It always demands some kind of exercise of 'solidarity among strangers', to borrow the well-known expression used by Habermas (2001, p. 102): an exercise which is in a way reinforced and qualified – and therefore made more 'demanding' as a principle – by the fact that those strangers are actually 'foreigners', citizens of other Member States (but hypothetically also of non-Community countries).

It is, however, obvious that the degree or intensity of this exercise of solidaristic commonality (of all or some) of the benefits offered by national social protection systems varies according to the 'basis of entitlement to access' claimed by the 'Community migrant' concerned and the extent of his integration into the fabric of the host Member State. It is one thing to allow access to national social protection (and solidarity) systems to citizens of other Member States who move about the Community as *workers*, whether employees or self-employed, or at any rate as *economically active persons*. It is quite another matter to open up national welfare systems to *all* European citizens *as such*, regardless of whether or not they participate in the economic process. On the other hand, and at a different level, it is one thing to regulate the access to Member States' social citizenship benefits of individuals who have demonstrated a high degree of integration into the host society by virtue of a lengthy period of continuous residence in their new country of choice. And it is quite a different matter, *vice versa*, to regulate the rights to cross-border access to social and welfare benefits of individuals who have only recently entered the host Member State. In fact, the degree – and the actual 'model' – of solidarity involved in the various cases differs significantly; and this still remains so today in Community law, inevitably reflected, even in Directive 2004/38, in differentiated rules tailored to diverse balances and degrees of regulation.

The notion of redistributive (social) justice (*iustitia distributiva*) – which underpins welfare systems and which embodies the principle of solidarity to which such systems give concrete effect (Balandi 2005) – presupposes, in actuality, 'a bounded world: a group of people committed to dividing, exchanging and sharing social goods, first of all among themselves' (Walzer 1983, p. 31). And the transnational opening-up of this 'bounded world', this social

solidarity system which is in principle territorially closed (van der Mei 2003, p. 5; Ferrera 2005a, p. 15; Id. 2005 b, p. 53 ff.), cannot but take place in accordance with justifying normative criteria and degrees of 'disclosure' which differ in proportion to the degree of 'integration' explicit in the diverse situations arising in the broad spectrum of Community manifestations of the free movement of persons.

The present paper aims to reconstruct the system of Community rules regarding the free movement of persons within the European Union from the point of view of the justifying criteria for the cross-border access to national welfare state systems of different categories of 'migrant'. The underlying idea is that the diverse situations identifiable in the context of the Community legal order allow, and indeed to some extent call for, a normative treatment which is at least partly differentiated according to the differing degree to which they feature the 'tension' with the principle of solidarity which always attends the free movement of persons with the Union (cf. in the same sense Barnard 2005; Dougan, Spaventa 2005). The emphasis is placed on diverse degrees and also models of solidarity which, at least at the present stage in the European integration process, justify correspondingly graduated and differentiated forms of cross-border access to Member States' social and welfare benefits for the various categories of person who move about within the Union. These are the elements which – together with a brief glance at comparative experiences – will be dealt with in particular in the analysis presented below.

2. Free movement, access to welfare and rules of the market

The occupational status of the individual – and in particular his categorization as an employee, i.e. a person working for and under the direction of another in a relationship of subordination – has historically constituted, and continues to constitute, the main channel of cross-border access to the social and welfare benefits guaranteed by the various Member States within their own borders. The extensive interpretation of the notion of a 'worker' presumed by Article 39 EC which quickly became established in the case-law of the Court of Justice of the European Communities well beyond the traditional limits imposed on the concept of a relationship of subordination in many national legal systems (see *ex multis* Barnard 2000, p. 133ff.) has made it possible to open up this channel of 'social integration' to a vast range of relationships and activities of even modest economic importance. The particular breadth attributed by the Court to the concept of a worker, even when faced with 'atypical' or non-standard work activities of fairly limited content and regularity, the sole limit being when the economic activity performed by the individual concerned is on such a small scale as to be classed purely marginal, has been widely reported (see, just by way of example, Rossi 1994). As a result, the combination of the extensive interpretation of Article 39 EC and the equally broad construction given to the notion – virtually all-encompassing – of a 'social advantage' deriving from Article 7 of Regulation 1612/68 has enabled workers categorized as being in a relationship of subordination and the members of their families to enjoy full and, in a sense, privileged access to the social citizenship systems operated by host Member States, even in spheres and contexts where no actual connection with an employment relationship exists (see e.g. van der Mei 2003, p. 33ff).

Furthermore, the history of interpretation of the rules on co-ordination of national social security regimes has followed a totally convergent path. From this point of view as well, the Court of Justice has adopted a highly 'integrationist' type of approach, demonstrating a wish to espouse from the start an extremely broad and dynamic notion of the worker/insured person as well as – from the point of view of the objective scope of the rules – a fairly extensive concept of social security. The fact that, starting from as early as its historic *Unger* judgment of 1964, the Court has centred the notion of a beneficiary of the supranational co-ordination regime on the worker's coverage by a social security system rather than on his being in a current employment relationship has enabled it to free the notion as relevant for the purposes of Regulation 3/58 and subsequently Regulation 1408/71 from that prescribed for the purposes of Article 39 EC and Regulation 1612/68 (we need only refer to Pennings 2003, p. 41ff). This shift from the figure of a worker to that of a person covered by social insurance (G. and A. Lyon-Caen 1993, p. 231ff.) has lent the scope *ratione personae* of the Community regime of co-ordination of national social security systems an autonomous development dynamic (see, in particular, Sindbjerg Martinsen 2004) naturally extended beyond the confines of the employment relationship, first in terms of work as an employee and then as a self-employed person. It is in this approach adopted from the start and then consistently followed by the Court of Justice that the progressive extension of the range of persons caught by the rules on co-ordination – which Regulation 883/2004 has now made universal, with the focus on the Community citizenship relationship – finds its distant origin. And the widening of the scope *ratione materiae* of the Community regulations on social security likewise has just such a case-law origin. In this case it is mainly the broad construction given to the notion of 'social security', with the corresponding considerable narrowing of the opposing notion of 'social assistance' and hence the substantial reduction of the areas excluded from the scope of Regulation 1408/71, which has driven the expansion of the material scope of the Community rules. The chequered history of the emergence and regulation of special benefits of a non-contributory nature (see van der Mei 2002), albeit bringing about a normative balance more attentive to the requirements and interests of the Member States than that initially imposed by the Court of Justice (Sindbjerg Martinsen 2005, pp. 100-101), is nevertheless emblematic of the expansionary dynamic lent to the rules on co-ordination by Community case-law. The introduction of a 'mixed' type of benefit, i.e. cash benefits of a non-contributory nature, confirms – apart from affirmation of the non-exportability rule – that European workers have been granted full admittance into the Member States' social solidarity systems extending even to their broadest spheres, or contexts in themselves farthest removed from the commutative logic of exchange implied by the social security protection of the employment relationship.

The fact that workers have access *even* to social benefits which truly embody – in its most general and, as it were, 'purest' form – the principle of social solidarity underpinning national welfare state systems does not contradict the market-related *ratio* or basis of their freedom of movement within the common market but, quite the contrary, constitutes a wholly consistent development of it. At least in the original approach adopted by the founding treaties, freedom of movement is granted *unconditionally* to employees (and self-employed workers) *in their capacity as* economic agents, actors of the process of production and European market integration. In this sense, the rules on free movement deriving from Articles 48 (now 39) and 51 (now 42) EC follow a classic model of transnational market

citizenship (Streeck 1996, p. 158, note 71) in which the employee, no differently from the holder of the right of establishment or the freedom to provide services, is legally construed as a '*Marktbürger*' (Ipsen 1964), i.e. 'market citizen' (see, more recently, Everson 1995; Freedland 2001), and by virtue of this fundamental status has access, on a basis of equality, to the social rights recognized in the host Member State *including* where these relate to areas of social intervention far removed, as such, from the labour market. Hence, access to welfare benefits not connected, even indirectly, with the labour market is also justified on the strength of the *economic* basis of the freedom of movement guaranteed to workers '*qua* units of a production factor' (Mancini 1989, p. 596). As has been rightly observed, in such situations it is the 'direct contribution to the economic life of the host community [which] enables the foreign worker to overcome the exclusive nature of the group identity, and to benefit from the assimilation model as regards access to (even non-contributory, non employment-related) social benefits' (Dougan and Spaventa 2005, at p. 190).

Essentially, therefore, it is a solidarity model of the 'occupational' or 'categorical' type which forms the basis of and justifies intra-Community access to the social rights of workers, whether employees or self-employed persons, within the Member States of the European Union, even to the point of granting entitlement to social benefits which are non-contributory (Article 10a of Regulation 1408/71) or directly of a social assistance nature (Article 7 of Regulation 1612/68). Nevertheless, the idea which underlies – and therefore justifies and legitimates at substantive level – the Community worker's cross-border access to social rights remains, from this point of view, tied to a commutative-type logic of reciprocal exchange between the contribution to the production process (and to the process of construction of the common market) supplied by the migrant and his (full) socio-economic integration into the host Member State (cf. Garth 1986, p. 96). In other words, it is still the economic function performed by the employee or self-employed worker within the common market which justifies full and direct access to the social rights guaranteed by the host Member State, even when the social benefits in question correspond to a 'redistributive' or 'asymmetric' idea of solidarity (Ferrera 2005a, p. 31) and not that of strictly 'commutative' solidarity (for the use of this terminology, albeit with reference to a different context, see Christensen and Malmstedt 2000, p. 70).

Nor should it be overlooked that the affirmation of a principle of fully equal social treatment for the Community migrant worker likewise represents, in itself, a response to a particular economic *ratio*. For the principle whereby the Community migrant must be guaranteed the same treatment as a national worker, both as regards the terms and conditions applicable to the employment relationship and as regards social security and social protection more generally, also corresponds to a clear objective of preventing distortion of the competitive process in the common market and – more specifically – to the transparent intention to avoid 'social dumping' phenomena. The *lex loci laboris* principle, which Regulation 883/2004 also adopts (and in some ways reinforces) as a general principle of the co-ordination of social security systems, derives its normative (as well as economic) foundation precisely in this respect, i.e. in this objective of promoting fair competition in the common market. The intriguing criticisms that are sometimes levelled against this principle in the context of a sophisticated and elegant theoretical construct advocating the adoption of the *lex loci domicilii* criterion at least for social benefits of the non-contributory or 'redistributive' type (see Christensen and Malmstedt 2000; Sakslin 2000; Numhauser-Henning 2003) essentially

overlook, in fact, the force of the 'ultimate basis' represented by *lex loci laboris*, namely, that it embodies a regulatory principle imposed in defence of the fair progression of the competitive process in the single market (Pennings 2005) and, in short, for the protection of national labour law and social security systems (see Lyon-Caen and Sciarra 1998). And it is in this more profound sense that the aptness of the definition of the rules on the free movement of workers – and on their correlated social protection – as an integral part of a '*wettbewerbspolitisch motiviertes europäisches Arbeitsrecht*' (Fuchs and Marhold 2001, p. 8) has to be appreciated.

A purely market-related logic also forms the basis of the transfrontier access to social benefits guaranteed by national systems afforded to individuals who invoke – as recipients – the free provision of services in the internal market. This channel of cross-border access to primary benefits of the national welfare state – mainly in the field of health protection and medical and health care – has only more recently emerged in the context of the thrust devoted to furthering the construction of the internal market, here too given impulse by an innovative case-law of the Court of Justice of the European Communities, the first signs of which actually date back as far as the second half of the 1980s. The latest developments in Community case-law were, in fact, already foreshadowed *in nuce* in the famous *Cowan* case in which, in its judgment of 1989, the Court of Justice felt constrained to recognize the entitlement of a British tourist who had been the victim of a mugging in France to a form of compensation provided for such situations under French law explicitly configured as a social benefit expressive of the bond of 'national solidarity' and, as such, deliberately confined to citizens of the Member State in question. The judges in Luxembourg acknowledged that restriction of the compensation at issue exclusively to French citizens constituted an infringement of the principle of non-discrimination on the basis of nationality capable of prejudicing the exercise – from the point of view of the recipient – of the freedom to provide services in the internal market as one of the fundamental freedoms recognized by the Treaty. But it is only in more recent times that the more mature fruits of this new dynamic of access to *social* rights through the exercise of an *economic* freedom could have been appreciated. The line of case-law inaugurated in 1998 with the *Decker* and *Kohll* judgments (on this see, by way of example, van der Mei 2003, p. 287ff; Hatzopoulos 2005a) has profoundly changed the coordinates of the already complex Community geography of cross-border access to rights and benefits of a social nature. As a result of this case-law there exists today – as is well-known – a full right to enjoy non-hospital medical care in another Community country, a right which is not subject to forms of prior authorization by the competent authorities of the Member State to which the 'migrant' patient belongs and which derives directly from Article 49 EC. Hence, the European citizen is entitled in any case to reimbursement of the expenses incurred for such medical care, albeit based on the tariffs laid down by the Member State to which he belongs. Authorization – for which the individual can anyhow apply if he intends to obtain full reimbursement of the expenses incurred in the Member State in which medical treatment has been received – is nowadays still required solely for medical services of a specifically hospital nature. Even in this case, however, the situations in which authorization can be legitimately refused by the Member State responsible for reimbursement have been subsequently circumscribed by the Court's case-law, which has made them entirely subject to forms of judicial control (see again Hatzopoulos 2005a, pp. 142-144).

In such situations, access to the social solidarity mechanisms instituted at Member State level is based on a radical interpretation of the concept of 'market citizenship' underlying the rules on the economic freedoms of movement. Here, in fact, the principle of occupational solidarity which justifies the social protection guaranteed to Community migrant workers becomes lost in or, rather, is replaced by, an outright logic of market-related exchange in which the social service provided by the temporarily host Member State, despite being supported by the forms of public-law logic generally inherent in the organization of national welfare states, is classed *tout court* as a service of an economic nature.

The result is that the tension between the free movement of persons and the principle of (national) solidarity is in a way heightened by the creeping 'marketization' (Freedland 2001 and, more generally, Cassese 2002, p. 98ff.) of the nation state's essential social functions which is implied by such active and all-encompassing use of Article 49 EC. So it is not by chance that the principle of national solidarity has been invoked by the Member States as a form of *defence* against dynamics of economic integration – and particularly of the liberalization of services – regarded as potentially destabilizing to the viability, *in primis* financial, of national social protection systems. The Court of Justice itself – albeit to a more cautious and restrained degree than that applied in its case-law on the legitimacy of national 'social security monopolies' (see Giubboni 2001a; Id. 2006, p. 197ff.) – has recognized that the principle of solidarity has a limited 'defensive' relevance (Hervey 2000b; Barnard 2005) which justifies, for example, rules on prior authorization for hospital treatment abroad as necessary in order to ensure the financial stability and scope for long-term planning, and therefore very 'feasibility', of public health systems capable of providing high-quality and inclusive services.

Nevertheless, the fact of bringing major areas of national welfare states within the ambit of the rules on the free movement of services poses fairly complex regulatory dilemmas extending beyond the actual possibilities of a purely defensive use of the principle of social solidarity. This is demonstrated unequivocally by the chequered history of the 'Bolkestein Directive' Proposal on liberalization of the provision of services in the internal market under the shadow of the country-of-origin principle. In its final amended version, the Commission's Proposal (see COM(2006) 160 final) appears to constitute a significant reappraisal, or perhaps more accurately a drastic reduction (if not abandonment), of the force and actual scope of application of the country-of-origin principle, and therefore the potentialities (for negative integration in the form of regulatory competition) of the underlying principle of mutual recognition (cf., by way of example, Barnard 2004, p. 17ff.; Giubboni 2006, p. 251ff.). It must, nonetheless, be borne in mind that this principle is *already* strongly established in the settled case-law of the internal market and is affirmed in particularly incisive terms in all decisions by the judges in Luxembourg on *non*-discriminatory obstacles to the exercise of economic freedoms – especially (but not only) the free movement of services (see, purely by way of example *ex multis*, Poiares Maduro 2001; Toner 2004; Lezzi 2003, p. 395ff.). What is more, this case-law – which is usually referred back to the theory of 'market access' (see, for critical comment, Spaventa 2004) – has in a sense already gone *farther* than the principle of country of origin and mutual recognition in that it has opened up an almost unlimited opportunity for economic operators to challenge the Member States' regulatory choices by resorting to 'arbitration' by the Court in Luxembourg. From this point of view it is no exaggeration to say (particularly in the wake of the *Gebhard* and *Carpenter* judgments) that 'it is possible – at least

to a certain extent – to attack rules which merely regulate an economic activity, even when there seems to be no intra-Community specificity’ and that ‘almost any rule could be construed as falling within the scope of the Treaty’ (Spaventa 2004, pp. 749-750; in similar terms, recently, see also Hatzopoulos 2005b, p. 1607).

3. Free movement, access to welfare and the citizenship principle

Although the case-law on Article 39 EC is enough in itself to have been described as the first core element for the construction of an incipient form of social citizenship ‘under the constraints of an employment-oriented concept of freedom and European integration’ (Leibfried 1993, p. 147; but see in the same sense, among others, Garth 1986, p. 97; D’Antona 1994), there is no doubt that it is only with the increasingly incisive application of Articles 12 and 18 of the Treaty that the Community legal order has moved in the direction of ‘a more universalistic view of citizenship founded on the notion of inclusiveness as an essential component of Europe’s identity’ (Kenner 2003, p.327). In the ‘radical’ (Tomuschat 2000) reading of the provisions on citizenship of the Union that it has developed starting from its judgment in the famous *Martínez Sala* case the Court of Justice has given the rules on transnational access to welfare a new and at least partly unexpected dynamism and direction of development, so much so that there is good reason to talk of a real ‘change of paradigm’ (Reich 2005, p. 678). In the view of some authors, the active use of Article 18 in conjunction with Article 12 in such case-law has already brought about the transition from a logic of market citizenship to a mature and now complete concept of European (social) citizenship which is becoming freed from the requirements and limits of economic integration (see in this sense White 1998, p. 139).

The solidarity model which is emerging from this case-law – and which is serving to legitimize cross-border access to social and welfare rights for European citizens who are *economically inactive* – is indeed broader and more inclusive than, and in that sense qualitatively different from, that presumed by Article 39 EC. What is emerging, in effect, is a different solidarity paradigm, centred on the figure of the citizen *as such*, which is increasingly general and universalistic and so not ‘category-based’ in that it is not governed by the individual’s functional position in the transnational production process or his economic role in the common market. As Michael Dougan and Eleanor Spaventa (2005, p. 208) have tellingly put it, ‘the introduction of Union citizenship shifts the focus away from a purely market-oriented notion of belonging, whereby entitlement to benefits is a direct result of the economic output produced by the frontier worker, towards a broader notion of inclusion, whereby entitlement to benefits is recognized also for those whose claim to membership of the solidaristic community can be established through non-economic links [...]’.

Although lack of space precludes a detailed examination here of the abundant case-law of the Court of Justice on the principle of equality of treatment based on citizenship of the Union (see at length O’Leary 2005, p. 66ff.; Barnard 2005), the emergence of this paradigm of social citizenship and solidarity, becoming an alternative to that offered by the market citizen model, is undeniable. The Court has gone as far as supplying what are somewhat creative interpretations, in some instances *praeter legem* (see Reich 2005, p. 68), of the (formerly

'residual') freedom of movement afforded by the Community legal order to (economically inactive) European citizens on the basis of an inclusive paradigm of European citizenship which to some extent reduces the restrictive import of the 'financial self-sufficiency' condition expressly imposed by the Community legislators and once again reiterated by them – albeit with significant moderating innovations – in Directive 38/2004 (see Hatzopoulos 2005b, pp. 1609-1610).

Although in *Martínez Sala* it may still not have been entirely clear that citizenship of the Union confers an autonomous entitlement to welfare rights, in its subsequent *Grzelczyk* and *Baumbast* judgments the Court of Justice took a decisive step towards affirming social protection rights deriving *directly* from the combined provisions of Articles 12 and 18 of the Treaty (see *e plurimis* van der Mei 2003, p. 49ff.; Reich 2005, p. 679ff.; but see also, in a partly different sense, Mather 2005, p. 727ff.). The Court states, first of all, that 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for' (*Grzelczyk* judgment, para. 31). This statement – later confirmed in subsequent case-law on the subject – was actually to be given full enshrinement in the very formulation of Directive 38/2004 in that the latter reorganizes the rules on freedom of movement for persons within the Union on the basis of *status civitatis* and so centres the system around European citizenship, which thus, at least in formal terms, is no longer of merely residual importance compared with 'functional' relationships and positions, i.e. those linked to the functioning of the common market in labour and services (cf. Hatzopoulos 2005b, p. 1623).

But it is unquestionably in the recognition of social protection rights autonomously connected with the (mere) fact of being a citizen, and not with the individual's functional status in the common market, that the most striking evidence is to be found of the thrust towards 're-empowering citizenship' (again Hatzopoulos 2005b, p. 1605) effected by the Court even beyond what might have been expected from the literal content of the Treaty and secondary-law provisions (see Giubboni 1998). In terms of a principle, the statement that, in instituting citizenship of the Union and linking with it the right to move about within the Union, the Community countries have accepted 'a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary' (again the *Grzelczyk* judgment, para. 44), is particularly telling. Furthermore, Directive 38/2004 establishes 'a much greater social responsibility for each other's citizens' (Sindbjerg Martinsen 2005, p. 95), especially in introducing the innovative provision of an unconditional right of residence – with full access to the social rights guaranteed by the host Member State – for citizens of other Member States who have resided continuously in the host State for five years or more.

The Court is tending to interpret the scope of the principle of equality of treatment deriving from Article 12 EC extremely broadly, extending it to all aspects of the social and economic life of the 'migrant citizen' (see Borelli 2003, p. 633). In thus offering a broad reading of the Treaty's scope *ratione materiae*, the Court appears to be adopting a substantive view of the European citizen's freedom of movement which in this respect is no different from that which has always been assumed on the basis of Article 39 EC. It is thus rejecting the principle

of equality of treatment deriving from Article 12 in terms of substantive and not purely formal equality.

The consequences of this conceptual approach would be significantly intensified if the Court of Justice were to follow the Opinion delivered by Advocate General Kokott in Case C-192/05 (*K. Tas-Hagen*), the last, to my knowledge, in the abundant line of cases concerning the application of Articles 12 and 18 of the Treaty. Although it is not possible here to go into the details of the complex case brought before the Court, it is worth emphasizing that the Advocate General considers that citizens of the Union can invoke the right to freedom of movement *even* when the matter at issue or benefit being claimed are *not* regulated by Community law (as indicated in particular in point 33 of his Opinion). The reason is that only if this is so can real expression be given to the nature of the right to free movement of citizens of the Union as a *fundamental freedom*. And indeed, as a fundamental freedom not only is Article 18 directly applicable and must be interpreted extensively but it has a scope that cannot be restricted to individual matters (see point 34 of the Opinion). As with the other classic fundamental freedoms of the internal market, the scope of Article 18 cannot, in the Advocate General's view, be restricted to those matters in respect of which the Community has exercised its competences, notably by adopting harmonization measures, because – if this were the case – it would prejudice the direct applicability of the rule in making it dependent on the initiative of the Community legislators, and thereby deprive it, inadmissibly, of its status as a fundamental freedom (point 36 of the Opinion).

Strictly speaking, Advocate General Kokott's recommendations to the Court do not represent anything essentially new by the way of an approach and a solution, in so far as the judges in Luxembourg have already expanded the objective scope of the principle of equality of treatment deriving from Article 12 EC to the point of making it almost unlimited. It is true, in fact, that already in *Grzelczyk*, 'the Court went one step further by indicating that the mere exercise of free movement rights guaranteed by Community law is sufficient to bring a person or situation within the scope of Community law, without there being a need to specifically consider whether the benefit applied falls within that scope' (van der Mei 2005, p. 225). Nevertheless, the stringent consistency of reasoning in Advocate General Kokott's Opinion embodies a new emphasis and rigour in terms of application. For it seems clear that total acceptance of the line of reasoning followed by Advocate General could result in placing the freedom of movement deriving from Article 18 EC on an almost entirely equal footing with the other 'classic' freedoms of the common market, with major implications regarding possible censure by the Court directed against 'obstacles' to its exercise.

It may in any case be said that to a large extent the Court *already nowadays* interprets the freedom recognized by Article 18 as a fundamental freedom, as a European *constitutional* right (cf. Baquero Cruz 2002, p. 97; O'Leary 2005, p. 75). Already today, in fact, the Court subjects restrictions on the exercise of this freedom laid down by secondary Community law – and in particular the requirement for financial self-sufficiency and sickness insurance cover it imposes in the case of the 'economically inactive' citizen (see, nowadays, Article 7 of Directive 38/2004) – to a fairly rigorous application of the proportionality test. Which means that it can be maintained that the process of 'fundamentalization' of the freedom of movement of the European citizen *ut sic* has to a large extent already taken place through the influence of the Court of Justice's case-law, thereby pre-empting, as it were, any potential effects of the complete constitutionalization of a provision such as that now contained (

offering little that is 'innovatory' compared with the law as it stands at present: see Giubboni 2001b, p. 631; Reich 2005, p. 676) in Article I-10(2)(a) and Article II-105(1) of the Treaty establishing a Constitution for Europe.

However, it would be a mistake to underestimate the consistent *limits* to the exercise of the fundamental freedom provided for under Article 18 EC which are *still* recognized by the Court of Justice (and even before it, of course, by the Community legislators), and in particular the limits to its capacity to confer an autonomous entitlement to cross-border access to welfare benefits for the European citizen. These limits – as will be discussed in more detail below in the concluding section – relate back directly to the basic question tackled in the present study. That is to say, they touch on the core of the inevitable and innate tension between a *full* freedom of movement for persons within the Union and a *merely* 'decentralized', i.e. constructed only at national level, guarantee of social security and assistance benefits, thereby bringing us back to the question of the forms and degree of social solidarity 'among strangers' which the European Community is capable of instituting (and politically legitimated to institute) at supranational level.

The Community legislative framework is still fairly clear-cut in depicting the free movement of economically inactive citizens as a right which is *conditional upon* a kind of 'reverse means test (or affluence test)' (Ferrera 2005a, p. 31; and see also Giubboni 2005). Economically inactive European citizens who intend to transfer their residence to another Member State of the Union for more than three months are still required to provide proof that they have 'sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence' and have 'comprehensive sickness insurance cover in the host Member State' (Article 7(1)(b) of Directive 2004/38). Recourse by these individuals to the social assistance system of the host Member State continues to constitute – generally speaking – a ground for loss of the right of (non-permanent) residence even though – in conformity with the corpus of established case-law – expulsion may not be the automatic consequence of such recourse (Article 14(2) and (3) of the Directive).

The legitimacy of these conditions has not been called into question *as such*, or discussed in itself, nor could it be so at the present stage of the integration process, given that it is founded in observance of the limits laid down for implementation provided for under Article 18(2) EC (and see, in wholly corresponding terms, Article I-10 of the Constitutional Treaty). Although the ability of the Member States to limit exercise of the freedom provided for under Article 18 by applying such conditions – as redefined by Directive 2004/38 – has been circumscribed and even, it might be said, significantly reduced, it has certainly *not* been eliminated by the Court of Justice's case-law (see Mather 2005, p.742).

Furthermore, the Member States still retain tight control over the conditions for entitlement, and hence transnational access, to their social assistance systems, in that – at least in the case of individuals seeking employment and economically inactive Community citizens – they are still able to impose, albeit within the limits permitted by the proportionality principle, a minimum period of residence as a condition of eligibility (see O'Leary 2005, pp. 65 and 71). Social assistance constitutes in that respect a sphere of social (national) sovereignty (solidarity) which is still largely and effectively controlled by the Member States of the Union. As Maurizio Ferrera (2005a, p. 30) has tellingly written, 'Here the external wall of national systems is still buffered by Member States' prerogatives on rules of residence' and

'lateral accesses are still barred'. And in this context it is worth noting that the meaning of social assistance is much broader than the rather marginal and residual concept traditionally used by the Court of Justice in interpreting Regulation 1408/71. Here, as quite clearly emerges from Article 24 Directive 2004/38 (as well as Article 11 Directive 2003/109), the term 'social assistance' is intended to have 'its own autonomous meaning, indeed covering any non-contributory welfare benefit or service which would amount to an encumbrance upon the public purse' (Dougan, Spaventa, p. 214), even if (and, one might go so far as to say, *especially if*) these benefits are guaranteed by the host State as a matter of subjective right and not on a discretionary base.

In its recent and already famous *Collins* judgment the Court of Justice – mindful of the risks, but perhaps even more so of the political importance (and prominence in the media) of the 'spectre' of 'welfare tourism' – has sent the Member States a substantially reassuring message regarding the unassailability of their prerogatives on controlling the mechanisms of cross-border access to welfare rights. For in that judgment the Court concluded that the Treaty does not preclude national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement, provided that such a requirement is justified – as in the case at issue – by objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions. The aim of ensuring the existence of a 'strong and legitimate' link with the employment market of the host country (Roberts 2004; Hellsten 2004) – and the underlying but no less evident one of preventing forms of movement of persons directed solely at profiting 'parasitically' from the differences in social protection that exist between the Member States – therefore justifies the imposition of residence rules, albeit in observance of the proportionality test.

On the other hand, the awareness of the dangers – real or imaginary – of destabilizing national welfare systems associated with the risk of 'benefit tourism' thus demonstrated by the Court of Justice is nothing new, but something which the judges in Luxembourg have demonstrated on many occasions and in contexts that were not, it might be said, suspicious (I am thinking here, for example, of the *Snares* judgment, on which see Christensen and Malmstedt 2000, pp. 82-84, and Hervey 2000a, p. 244).

In underlining the principle whereby the freedom of movement of the economically inactive citizen tends to stop at the threshold where such persons become an *unreasonable* burden on the social assistance system of the host State (see Borelli 2005, p. 521), the Court has also shown a clear measure of 'political realism' as well as 'due' adherence to the obligations imposed by the regulatory position as it stands. In so doing, in fact, the Court demonstrates that it does not wish, and is unable, to abdicate from the function of carrying out a necessary balancing of the interests at stake: of arriving at a fair balance between on the one hand the broadest guarantee of freedom of movement for European citizens, and on the other the financial stability of national welfare state systems (cf. Rossi 1994, pp. 111-112). This propensity towards caution and self-restraint is often discernible in the case-law of the Court, which has on many occasions been concerned to measure the possible 'fiscal impact' or redistributive effect of decisions mainly touching on the most 'internal' (and protected) areas of the Member States' social sovereignty (see, for example, what is rightly observed by Pennings 2003, p. 264, particularly as regards the abundant case-law history of Regulation 1408/71).

4. Potentialities and limits of an 'open and post-national' European social citizenship

In an article which may now be considered a classic among studies on 'integration through law', Bryant Garth (1986) demonstrated that the affirmation of an unconditional right of *all* American citizens, *including the needy*, to movement within the United States was made essentially possible in the early 1940s by virtue in particular of the institution, following Roosevelt's New Deal legislation, of an initial – albeit reduced – form of social assistance at (also) *federal* level. Having long before acquired full political and constitutional unity reflected (as more directly of interest here) in the absolute subordination of state citizenship to national citizenship, the former being a mere 'appendix' to the latter consequent upon the establishment of residence in the state of choice (Garth 1986, pp. 101 and 109), with the New Deal the United States also achieved a first unification at the level of a common – albeit minimum – federal social responsibility regarding the material living standards of Americans (cf. also Graser 2001; van der Mei 2003, p. 178ff.).

In its historic *Edwards vs. California* decision of 1941, the US Supreme Court saw fit to repeat the eloquent words of Justice Cardozo – 'The Constitution [...] was framed upon the theory that the peoples of the several States must sink or swim together, and in the long run prosperity and salvation are in union and not division' – because, as it then went on to say, 'Recent years, and in particular the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character. The duty to share the burden, if not wholly to assume it, has been recognized not only by State governments but by the Federal government as well. The changed attitude is reflected in the Social Security laws under which the Federal and State governments cooperate for the care of the aged, the blind, and dependent children'. And likewise in the Supreme Court's subsequent case-law, emphasis is consistently placed on this very close correlation 'of the U.S. right to travel to the notion of primary federal citizenship and some federal responsibility for social welfare in the states' (Garth 1986, p. 101).

In a Weberian sense, so to speak, the European Union clearly lacks both of the objective preconditions (pre-eminence of federal citizenship and partial 'federalization' of forms of social protection against poverty) which allowed the US Supreme Court to affirm an unconditional right to travel as a constitutional right of American citizens. And although the indications arising from comparison with an experience which is in some respects so far removed from that of the construction of American federalism may be misleading and should therefore be treated with all due caution, there is no doubt that they tend to reinforce a certain skepticism regarding the real possibilities of similarly arriving at, in the Community context, a *full* and *unconditional* freedom of movement *for all* (cf. Leibfried 1993; Giubboni 1998).

For one thing, in the Community context the individual Member States still have an almost total monopoly regarding definition of the requirements governing national citizenship, and hence the very fact of belonging to the European Union (see, for example, Cartabia 1995, p. 4ff.; Cartabia and Weiler 2000, p. 227ff.; Condinanzi, Lang and Nascimbene 2003, p. 10ff.). In the Community constitutional order citizenship of the Union is a corollary or 'appendix' of national citizenship, and the relation between citizenship and residence is the exact reverse of that which characterizes the federal order of the USA (for an elegant critical examination of this aspect see Davies 2005). We are therefore (still) quite a long way away from the model of

an 'independent citizenship decoupled from nationality and based instead on the condition of residence on the Union's territory' (Mather 2005, p. 725). With the consequence that the preconditions – as already suggested – for 'decoupling free movement from citizenship, and attaching it to residence' (Reich 2005, p. 694) do not (as yet) exist.

For another thing, although the European Union is not an entire stranger to redistributive functions, albeit ones performed essentially with reference to the inter-State (or perhaps rather inter-regional) dimension, it is the national community which continues to constitute, in the highly developed welfare states which stud the political geography of the Old Continent, the natural context of reference for social solidarity (see D'Antona 1998, now 2000, especially p. 240). It is quite right to say, at least as regards the structures relating to welfare, that solidarity 'is [...] a fundamentally national concept' (Hatzopoulos 2005a, p. 167). Nor is it by chance that the notion of solidarity is encountered – in the case-law of the Court of Justice itself – in predominantly 'defensive' terms, that is to say, as an 'antidote' (Giubboni 2006, p. 153ff.) to excessive infiltration of Community rules on competition and the internal market into the regulatory and distributive arrangements of national welfare states (cf. also Sciarra 2003).

Obviously, this does not mean that the European legal order is not itself expressive of a high degree of solidarity, which is in any case inherent in the very concept of a 'Community' (Cinelli 2005, p.116). Particularly since the Amsterdam revision, the principle of solidarity more and more explicitly connotes qualifying profiles of the Community legal order, and it is not by chance that it is at the centre of the web of values affirmed by the Charter of Fundamental Rights of the European Union and the Constitutional Treaty (Balandi 2005). But the solidarity which underpins the recognition of fundamental social rights in the Community legal order does not reach into the protected sphere of national welfare provision. The solidarity which underpins the full assimilation/integration of the foreign migrant (worker) into the welfare system of the host society finds its source in the solidaristic bonds embracing the national community. The transnational solidarity and subsidization guaranteed to foreign migrants by Community law relies upon a model of 'vicarious responsibility: novel expectations of social solidarity engendered at the supranational level are actually discharged (in the sense of paid for) by the Member States through their domestic welfare budgets' (Dougan, Spaventa 2005, p. 189). And it is precisely for that reason that 'the assimilation model directly challenges – or at least seeks actively to redefine and reshape – traditional national thresholds of belonging to and exclusion from the solidaristic community' (ibid.).

It is true that the European system, as reshaped by the more recent case-law of the Court of Justice, can no longer be described in the terms in which Leibfried (1993, p. 145) described it, namely as a free trade area 'where receiving welfare leads to the classic 'poor laws' remedial procedures: ship the poor back to their place of origin (in the EC)'. The Court of Justice has played an active 'solidarity making' role (Ferrera 2005a, p. 32); the 'radicalization' of the principle of non-discrimination among European citizens has made it possible to bring about – in the words of the judges in Luxembourg themselves, as quoted above – 'a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States' (cf. Reich 2005, p. 680; van der Mei 2003, p. 147ff.). In this sense the Court has already achieved some measure of *positive* integration between national social protection systems (Hatzopoulos 2005b, p. 1615) to the extent of essentially establishing in favour of the

Community citizen, even before any intervention by the legislators, a kind of presumption of legitimate residence combined with autonomous access to social protection in the host Member State.

What is more, even the Community legislators have moved – albeit more cautiously – in the same direction and, in large measure, codified this case-law *acquis*. In the formulation of the Directive 38/2004 (but to a certain extent also in that of Directive 109/2003 concerning the status of third-country citizens who are long-term residents in the Member States) it is precisely the principle of solidarity which is used as basic justification for the conferment – and gradation – of the rights to residence and social protection of the various categories of Community migrant envisaged by these provisions (cf. Barnard 2005). It is, in fact, closely consistent with the principle of solidarity – and with the diverse models in which it is given practical effect – to make a distinction between on the one hand the position of workers (whether employees or self-employed) and persons who are economically active in any form and, on the other hand, that of European citizens who do not participate in (and therefore *make no contribution* to) the economic process. And by the same token, it is consistent with the principle of solidarity – which by definition tolerates and even requires gradations according to differing degrees of integration in and membership of the (national) redistribution collectivity – to make a distinction between the position of citizens who have a history of long-term residence and that of individuals who have not yet established a strong and permanent link, i.e. one of full integration, with the social fabric of the host Member State.

And it is precisely the essentially *national* roots and basis of social solidarity principles which explain these differences and these limits and also explain why the European Union still remains – and is in all probability destined to remain – a long way away from the affirmation of a universal right to freedom of movement which is *completely* unconditional. In this sense, transnational solidarity as regards Community citizens who are economically inactive cannot but remain conditional, and in particular can only be affirmed to the extent that it does not jeopardize the viability of *national* welfare systems (see Borelli 2005, p. 528).

Overcoming these limitations would necessitate a degree of positive integration of the various national systems far greater than that which can be achieved ‘via the judicial route’ (see Giubboni 2005; Borelli 2005, p. 529) or with the normative technique of co-ordination of national social security systems (for example through a reinforcement of the criterion of a link based on residence and *lex loci domicilii*). It would, in fact, be necessary to arrive at the *political* construction of a specifically *European* sphere of redistributive solidarity, and hence at some supranational form of welfare which combines, directly at Community governance level, social rights to a benefit for persons in need with corresponding duties of solidarity (and contribution). In other words, the only way in which the constitutive tension that exists between the free movement of persons within the Community and the national organization and provision of welfare benefits could be at least partly removed is through measures taken for the partial ‘centralization’ at European governance level of (non-contributory) forms of social protection (see at length Graser 2001; van der Mei 2003, p. 208ff., giving an interesting analysis of the various ‘technical’ solutions feasible in this respect). As Garth (1986, p. 160) wrote at the conclusion of his comparative survey, ‘Completely open mobility within the Community would require Member States with a higher standard of living to give up an important measure of control over their own social welfare policies and their ability to construct and maintain their own, separate welfare states. [...] Full exposure would require a

commitment to the Community welfare state – at whatever level it could be maintained – above the interests of individual Member States’.

Even if we choose to ignore the complex theoretical problems posed by such a viewpoint, and in particular the fundamental objection that the European Union lacks, in any case, the input-oriented democratic legitimation necessary for such a purpose (see especially Scharpf 1999; Majone 1996; and, for a summary of these issues, Giubboni 2006, p. 259ff.), it is difficult to imagine, at least at the present stage in the Community integration process, a specifically European area of redistribution linked to the constitutionalization of fundamental social rights to benefits guaranteed directly at Community governance level (see Closa 1996 and, more recently, Ferrera 2005a, especially p. 36). For example, the approach adopted in 2004 in regulating the movement rights of workers who are citizens of the new Member States does not give grounds for optimism regarding the prospects of any such ‘qualitative’ development of the idea of European solidarity (see the critical comments made in this respect by Reich 2005; Cremona 2005; Carrera 2005). Today, following the constitutional crisis opened up by the referendum results in France and the Netherlands, we are perhaps living through one of the least favourable and least promising – to put it mildly – moments for optimistic outbursts regarding the future of European solidarity.

References

- Balandi G. G. (2005), *La solidarietà come componente non esclusiva di un ordinamento e la Costituzione per l'Europa*, in *Rivista del Diritto della Sicurezza Sociale*, p. 439 ff.
- Ball C. A. (1996), *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order*, in *Harvard International Law Journal*, vol. 37, no. 3, p. 307 ff.
- Baquero Cruz J. (2002), *Between Competition and Free Movement. The Economic Constitutional Law of the European Community*, Hart Publishing, Oxford – Portland.
- Barnard C. (2000), *EC Employment Law*, Oxford University Press, Oxford.
- Barnard C. (2004), *The Substantive Law of the EU. The Four Freedoms*, Oxford University Press, Oxford.
- Barnard C. (2005), *EU Citizenship and the Principle of Solidarity*, in M. Dougan, E. Spaventa (eds.), *Social Welfare and EU Law*, Hart Publishing, Oxford – Portland, p. 157 ff.
- Borelli S. (2003), *Libera circolazione dei lavoratori subordinate*, in *Digesto – Discipline Privatistiche, Sezione Commerciale, Aggiornamento*, vol. 2, UTET, Turin, p. 628 ff.
- Borelli S. (2005), *Il campo di applicazione soggettivo della normativa comunitaria di coordinamento dei sistemi di sicurezza sociale*, in *Rivista del Diritto della Sicurezza Sociale*, p. 509 ff.
- Carrera S. (2005), *What Does Free Movement Mean in Theory and Practice in an Enlarged EU?*, in *European Law Journal*, p. 699 ff.
- Cassese S. (2002), *La crisi dello Stato*, Laterza, Rome – Bari.
- Christensen A., Malmstedt M. (2000), *Lex loci laboris versus lex loci domicilii – An Inquiry into the Normative Foundations of European Social Security Law*, in *European Journal of Social Security*, vol. 2/1, p. 69 ff.
- Cinelli M. (2005), *La sicurezza sociale nei principi dell'ordinamento comunitario*, in M. Cinelli, S. Giubboni, *Il diritto della sicurezza sociale in trasformazione*, Giappichelli, Turin, p. 115 ff.
- Closa C. (1996), *A New Social Contract? EU Citizenship as the Institutional Basis of a New Social Contract: Some Sceptical Remarks*, EUI Working Papers, RSC no. 48, European University Institute, Florence.
- Cornelissen R. (1996), *The Principle of Territoriality and the Community Regulations on Social Security (Regulations 1408/71 and 574/72)*, in *Common Market Law Review*, p. 439 ff.
- Cremona M. (2005), *EU Enlargement: Solidarity and Conditionality*, in *European Law Review*, p. 3 ff.
- D'Antona M. (1994), *Armonizzazione del diritto del lavoro e federalismo nell'Unione europea*, now in Id., *Opere*, vol. I, *Scritti sul metodo e sulla evoluzione del diritto del lavoro – Scritti sul diritto del lavoro comparato e comunitario*, edited by B. Caruso, S. Sciarra, Giuffrè, Milan, 2000, p. 325 ff.
- Davies P. (2005), *"Any Place I Hang My Hat?" or: Residence is the New Nationality*, in *European Law Journal*, p. 43 ff.
- Dougan M., Spaventa E. (2005), *"Wish You Weren't Here ...". New Models of Social Solidarity in the European Union*, in Id. (eds.), *Social Welfare and EU Law*, Hart Publishing, Oxford – Portland, p. 181 ff.
- Everson M. (1995), *The Legacy of the Market Citizen*, in J. Shaw, G. More (eds.), *New Legal Dynamics of European Union*, Clarendon Press, Oxford, p. 73 ff.

Ferrera M. (2000), *Integrazione europea e sovranità sociale dello Stato-nazione: dilemmi e prospettive*, in *Rivista Italiana di Scienza Politica*, p. 393 ff.

Ferrera M. (2005a), *Towards an "Open Social Citizenship"? The New Boundaries of Welfare in the European Union*, in G. de Búrca (ed.), *EU Law and the Welfare State. In Search of Solidarity*, Oxford University Press, Oxford, p. 11 ff.

Ferrera M. (2005b), *The Boundaries of Welfare. European Integration and the New Spatial Politics of Social Protection*, Oxford University Press, Oxford.

Freedland M. (2001), *The Marketization of Public Services*, in C. Crouch, K. Eder, D. Tambini (eds.), *Citizenship, Markets and the State*, Oxford University Press, Oxford, p. 90 ff.

Fuchs M., Marhold F. (2001), *Europäisches Arbeitsrecht*, Springer, Wien – New York.

Garth B. G. (1986), *Migrant Workers and Rights of Mobility in the European Community and the United States: A Study of Law, Community, and Citizenship in the Welfare State*, in M. Cappelletti, M. Seccombe, J. Weiler (eds.), *Integration Through Law*, Vol. 1, *Methods, Tools and Institutions*, Book 3, *Forces and Potential for a European Identity*, Walter de Gruyter, Berlin – New York, p. 85 ff.

Giubboni S. (1998), *Libertà di circolazione e protezione sociale nell'Unione europea*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, p. 81 ff.

Giubboni S. (2001a), *Social Insurance Monopolies in Community Competition Law and the Italian Constitution. Practical Convergences and Theoretical Conflicts*, in *European Law Journal*, p. 69 ff.

Giubboni S. (2001b), *Solidarietà e sicurezza sociale nella Carta dei diritti fondamentali dell'Unione europea*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, p. 617 ff.

Giubboni S. (2005), *Cittadinanza e mercato nella disciplina comunitaria di sicurezza sociale. Spunti per un dibattito sul Regolamento n. 883 del 2004*, in *Rivista del Diritto della Sicurezza Sociale*, p. 223 ff.

Giubboni S. (2006), *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective*, Cambridge University Press, Cambridge.

Graser A. (2001), *Confidence and the Question of Political Levels – Towards a Multilevel System of Social Security in Europe?*, in D. Pieters (ed.), *Confidence and Changes – Managing Social Protection in the New Millennium*, EISS Yearbook 2000, Kluwer Law International, The Hague – London – Boston, p. 215 ff.

Habermas J. (2001), *The Postnational Constellation. Political Essays* (translated, edited and with an introduction by M. Pensky), Polity Press, Cambridge.

Hatzopoulos V. (2005a), *Health Law and Policy: the Impact of EU Law*, in G. de Búrca (ed.), *EU Law and the Welfare State. In Search of Solidarity*, Oxford University Press, Oxford, p. 111 ff.

Hatzopoulos V. (2005b), *A (More) Social Europe: A Political Crossroad or a Legal One-Way? Dialogues between Luxembourg and Lisbon*, in *Common Market Law Review*, p. 1599 ff.

Hellsten K. (2004), *Access to Social Protection. Citizenship, Work, Residence*, in R. Langer, M. Saksliin (eds.), *Co-ordinating Work-Based and Residence-Based Social Security*, Forum Juris, Helsinki, p. 21 ff.

Hervey T. K. (2000a), *Social Security: the European Dimension*, in N. Harris, *Social Security Law in Context*, Oxford University Press, Oxford, p. 231 ff.

Hervey T. K. (2000b), *Social Solidarity: A Buttress Against Internal Market Law?*, in J. Shaw (ed.), *Social Law and Policy in an Evolving European Union*, Hart Publishing, Oxford – Portland, p. 31 ff.

- Ipsen H. P. (1964), *Europäisches Gemeinschaftsrecht*, in *Neue Juristische Wochenschrift*, p. 340 ff.
- Kenner J. (2003), *EU Employment Law. From Rome to Amsterdam and Beyond*, Hart Publishing, Oxford – Portland.
- Leibfried S. (1993), *Towards a European Welfare State? On Integrating Poverty Regimes into the European Community*, in C. Jones (ed.), *New Perspectives on the Welfare State in Europe*, Routledge, London – New York, p. 133 ff.
- Leibfried S., Pierson P. (1995), *Semisovereign Welfare States: Social Policy in a Multitiered Europe*, in Id. (eds.), *European Social Policy Between Fragmentation and Integration*, The Brookings Institution, Washington, D. C., p. 43 ff.
- Lezzi L. (2003), *Principio di equivalenza, mutuo riconoscimento e libertà di circolazione delle professioni nell'Unione europea*, in *Diritto Comunitario e degli Scambi Internazionali*, p. 383 ff.
- Lyon-Caen A., Sciarra S. (1998), *La Convenzione di Roma e i principi del diritto del lavoro*, in *Quaderni di Diritto del Lavoro e delle Relazioni Industriali*, vol. 20, *I contratti di lavoro internazionali*, p. 9 ff.
- Lyon-Caen, G. and A. (1993), *Droit social international et européen*, Dalloz, Paris.
- Mancini G. F. (1989), *The Making of a Constitution for Europe*, in *Common Market Law Review*, p. 595 ff. (now also in Id., *Democracy and Constitutionalism in the European Union. Collected Essays*, Hart Publishing, Oxford – Portland, 2000, p. 1 ff.).
- Marshall T. H. (1992), *Citizenship and Social Class*, in T. H. Marshall, T. Bottomore, *Citizenship and Social Class*, Pluto Press, London.
- Mather J. D. (2005), *The Court of Justice and Union Citizen*, in *European Law Journal*, p. 722 ff.
- Numhauser-Henning A. (2003), *Diritti pensionistici e norme comunitarie di coordinamento dei sistemi nazionali di sicurezza sociale alla luce degli sviluppi in materia di immigrazione e mercato del lavoro*, in *Rivista del Diritto della Sicurezza Sociale*, p. 471 ff.
- O'Leary S. (2005), *Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union*, in G. de Búrca (ed.), *EU Law and the Welfare State. In Search of Solidarity*, Oxford University Press, Oxford, p. 39 ff.
- Pennings F. (2003), *Introduction to European Social Security Law*, Intersentia, Antwerp – Oxford – New York.
- Pennings F. (2005), *Co-ordination of Social Security on the Basis of the State-of-Employment Principle: Time for an Alternative?*, in *Common Market Law Review*, p. 67 ff.
- Poiarés Maduro M. (2001), *Harmony and Dissonance in Free Movement*, in *Cambridge Yearbook of European Legal Studies*, vol. 4, p. 315 ff.
- Reich N. (2005), *The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union*, in *European Law Journal*, p. 675 ff.
- Roberts S. (2004), *"A Strong and Legitimate Link". The Habitual Residence Test in the United Kingdom*, in R. Langer, M. Sakslin (eds.), *Co-ordinating Work-Based and Residence-Based Social Security*, Forum Juris, Helsinki, p. 67 ff.
- Rossi L. S. (1994), *I beneficiari della libera circolazione delle persone nella giurisprudenza comunitaria*, in *Foro Italiano*, I, p. 97 ff.
- Sakslin M. (2000), *Social Security Co-ordination – Adapting to Change?*, in *European Journal of Social Security*, p. 169 ff.
- Sindbjerg Martinsen D. (2004), *European Institutionalisation of Social Security Rights: A Two-layered Process of Integration*, PhD Thesis, European University Institute, Florence, 2004.

Sindbjerg Martinsen D. (2005), *Social Security Regulation in the EU: The De-Territorialization of Welfare?*, in G. de Búrca (ed.), *EU Law and the Welfare State. In Search of Solidarity*, Oxford University Press, Oxford, p. 89 ff.

Spaventa E. (2004), *From Gebhard to Carpenter: Towards a (Non-)Economic European Constitution*, in *Common Market Law Review*, p. 743 ff.

Streeck W. (1996), *Neo-Voluntarism: A New European Social Policy Regime?*, in G. Marks et al., *Governance in the European Union*, Sage Publications, London, p. 64 ff.

Tomuschat C. (2000), in *Common Market Law Review*, p. 449 ss.

Toner H. (2004), *Non-Discriminatory Obstacles to the Exercise of Treaty Rights – Articles 39, 43, and 18 EC*, in *Yearbook of European Law*, vol. 23, p. 275 ff.

Van der Mei A. P. (2002), *Regulation 1408/71 and Co-ordination of Special Non-Contributory Benefit Schemes*, in *European Law Review*, p. 551 ff.

Van der Mei A. P. (2003), *Free Movement of Persons within the European Community. Cross-Border Access to Public Benefits*, Hart Publishing, Oxford – Portland.

Van der Mei A. P. (2005), *EU Law and Education: Promotion of Student Mobility versus Protection of Education Systems*, in M. Dougan, E. Spaventa (eds.), *Social Welfare and EU Law*, Hart Publishing, Oxford – Portland, p. 219 ff.

Walzer M. (1983), *Spheres of Justice – A Defense of Pluralism and Equality*, Basic Books, New York.

Watson Ph. (1980), *Social Security Law of the European Communities*, Mansell Publishing, London.

White R. (1998), *EC Social Security Law*, Longman, London.