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Regional Free Movement of People at the Global Level: The Case of the Eurasian Economic Union (EAU)

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Abstract: The paper research is on free movement of people at the Eurasian Economic Union (EAEU). It introduces the main components of the EAEU's free mobility regime, its promises and challenges. The author argues that the free movement of people regimes are not similar and respond to different needs and origins. Trying to answer, if free movement of people in the EAEU Treaty is the EU Model, the author discovers that in fact, the EAEU's scheme finds its roots in regional treaties signed and developed in the post-Soviet space in the 1990s. The paper has a discussion on the challenges of implementation and interpretation and situates them within a larger global panorama of regional free mobility schemes beyond the EU. Conclusions are made with some thoughts and suggestions for future research, also in light of the general closure of borders during the COVID-19 pandemic. This paper offers different insights on the free movement of workers at EAEU level. It has identified how the EU cannot really be considered as a model on several key aspects, notably the absence of the principle of non-discrimination enshrined in the Treaty and the lack of a secure residence status beyond the conclusion of an employment agreement. Researchers will need to continue to measure and investigate its implementation and the effects the free movement regime has in the inclusion of EAEU workers. More research will also be needed in light of the closure of borders during the pandemic and the effects that might have in the near future on the EAEU's free movement regime.

Keywords: Eurasian Economic Union (EAEU); free movement of people; Eurasian integration; migration law

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Contents

I. Introduction

This paper is situated within the burgeoning literature on global migration law and policy that does not concentrate on the EU, North America and Australia as the sole objects of study (see among many others Acosta, 2018; Kubal, 2019; Tsourapas, 2018). More specifically, it is located within the increasing number of works investigating the legal regulation of regional free movement of people at global level, outside the well-known example of the EU (see generally on this: Pécoud and de Guchteneire, 2007; Nita et al., 2017). In a world where intraregional

mobility exceeds interregional movement and where South-to-North migration is smaller than South-to-South flows (Ratha, Plaza, and Ozden, 2016, p. 2020), it is perhaps surprising that these two trends are only now being slowly investigated.

A powerful narrative insists on depicting migration as a widespread problem being tackled by the erection of borders — both physical and legal. This is well exemplified by classical texts on the subject, which present a 'crisis of immigration control' that major immigrant-receiving countries are facing (Hollifield, Martin and Orrenius, 2020). Such emphasis on the Global North leads others to affirm that migration regulation is characterised by a landscape where 'no new ideas are emerging', or where the only ones emerging point in the direction of further control and restriction (Dauvergne, 2016, p. 7).

These accounts only offer a partial picture and do not allow academic and policy debates to move forward. Regional migration agreements tell us a different story about the alleged global trend of border closures. Contradicting this accepted narrative, regional agreements ease the crossing of borders for at least those holding certain nationalities. Examples are abundant. Already in 2007, the editors of a first volume on the subject concluded that the world was "progressing towards more, not less, freedom of movement" of people (Pécoud and de Guchteneire, 2007, p. 2). The boom in the last 12 years is notable and more than 30 regional organisations have adopted policies and legal instruments (Nita et al., 2017, p. 5). Scholars are picking up on these developments and are also leaving aside simplistic accounts where the EU is presented as the only functioning regime and the rest as merely aspirational (Geddes et al., 2019; Chetail (2019) devotes an entire section to the right to free movement under regional treaty law in his latest work).

Against this background, the inclusion of a legal regime facilitating labour migration in the 2015 founding Treaty of the Eurasian Economic Union (EAEU)[1] can be understood not only as a continuation of free

[1] Treaty on the Eurasian Economic Union, Astana, 29 May 2014. The Treaty came into force on 1 January 2015. The three original Member States were Russia, Kazakhstan and Belarus. Armenia joined on 2 January 2015 whilst Kyrgyzstan obtained full membership on 12 August 2015. The Eurasian Economic Union has absorbed the previous Eurasian Economic Community (EURASEC), Eurasian Customs Union and the Single Economic Space (Art. 99 EAEU Treaty).

mobility in the region since the demise of the Soviet Union,[2] but also as part of an understanding whereby immigration control, or its management, is best achieved by, paradoxically, discontinuing the control of certain administrative requirements for those who are nationals of a group of regional states. This is not a minor issue for those interested in comparative migration law, since Russia is the second largest host of migrants in the world, only after the USA (Kubal, 2019, p. 2), and Kazakhstan hosts 3.7 million non-nationals representing 20 % of its population (United Nations, 2019).

This paper is divided as follows. The next section will briefly introduce the main components of the EAEU's free mobility regime, its promises and challenges. Some authors have argued that the EAEU is modelled on the EU. Whist this might be true with regards to some aspects of the EAEU's institutional structure, this paper argues that the free movement of people regimes are not similar and respond to different needs and origins. In fact, the EAEU's scheme finds its roots in regional treaties signed and developed in the post-Soviet space in the 1990s. Nonetheless, the EU's experience, as well as other regional free movement regimes, for example in South America, can be helpful in anticipating possible knotty issues in the construction of a regional mobility regime, suited to the idiosyncrasies in the EAEU, and reflect on adequate answers before they become truly problematic. In that regard, section three will discuss the challenges of implementation and interpretation and situate them within a larger global panorama of regional free mobility schemes beyond the EU. The paper will conclude with some thoughts and suggestions for future research, also in light of the general closure of borders during the COVID-19 pandemic (Madiyev, 2021).

II. Free Movement of People in the EAEU Treaty. Is the EU a Model?

Some scholars have presented the EAEU as being inspired by or modelled on the EU (Sagynbekova, 2017, p. 8; Golam and Monowar, 2018, p. 170). Whilst this might be true with regard to certain aspects,

[2] Among many other multilateral and bilateral treaties, the Agreement on visa-free movement of citizens of the states of the Commonwealth of Independent States on the territory of his participants, 9 October 1992, Bishkek, Kyrgyzstan; Agreement on visa-free movement of EURASEC citizens within the Community, 2000.

such as the EAEU's institutional structure (Petrov and Kalinichenko, 2016), this section assesses the validity of such a claim when it comes to labour migration. It does so by dissecting Section XXVI of the EAEU Treaty on Labour Migration (Articles 96–98). Attention is paid here to the three main elements in any migration trajectory (namely entry, rights during stay and exit/expulsion or permanent residence). The EAEU provisions will be contrasted with the EU's mobility regime and its development.

This comparison must be performed with some caveats in mind. To begin with, in the EAEU's case, no country argued against the inclusion of a Section on labour mobility during the negotiations of its Treaty. That was not the case among the six founding members of the European Economic Community (EEC); all of them opposed free movement of workers except for Italy, who had "millions of unemployed workers" and "needed remittances," and Belgium (Groenendijk, 2009, p. 12; Maas, 2007). Moreover, the post-Soviet space has a long history of free movement multilevel norms since 1992 (domestic, bilateral and regional) (Molodikova, 2017) and a fluid understanding of nationality and alienage. In Russia, for example, five million former Soviet Union citizens from other republics naturalised between 1992 and 2002) (Leonov and Korneev, 2019). Since 1999, Russia and Belarus have had in place a Union agreement through which "citizens of both countries have equal rights of travel, residence, work and welfare" and citizens of both countries are citizens of the Union State (Molodikova, 2017; Pirker and Entin, 2020).[3] With the exception of the Benelux Economic Union, this was not necessarily the case when the European Communities were established in the 1950s.[4] Finally, the present EU's regime is the result of more than 60 years of development, where free movement of workers has been partly transformed into free movement of citizens (Guild, 2009), as well as several setbacks, not least Brexit.

[3] Article 14 of the Treaty on the Establishment of the Union State of Belarus and Russia, signed on December 8, 1999. Citizens of the Union enjoy equal rights and bear equal duties on the territory of another member state, unless provided otherwise by the legislative acts of the member states or treaties between them.

[4] Treaty establishing the Benelux Economic Union, The Hague, 3 February 1958. *See* Article 2 establishing freedom of movement of people and equal treatment.

By contrast, the main interest in the post-Soviet space has been since the 1990s to create a visa-free travel area and to allow those who obtain an employment contract, and their family members, but not others, to reside and work for the duration of such a contract.[5] Given differing contexts, each region must develop its own narratives for regional mobility that make sense for the time and place.

Groenendijk (2009, p. 17) has identified four elements that, from the 1960s, were at the core of the inclusion of Community workers in the other Members States: "access to employment and education, equal treatment with national workers, secure residence rights and family reunification". Paramount among these elements was the abolition of discrimination based on nationality between workers of the Member States when it came to employment, remuneration and other conditions of work.[6] By contrast, the EAEU's more modest aspirations are limited to the coordination of labour law systems, free movement of labour, cooperation on labour migration, and basic labour and social rights — including medical insurance and the right of children to access education — for EAEU workers (Lyutov and Golovina, 2018, p. 95). All this considered, the following pages assess the EAEU free movement provisions and offer some comparative thoughts on the evolution of the EU's regime, by concentrating on entry, rights during stay and exit/ expulsion or permanent residence.

II.1. Who Can Move?

Free mobility schemes determine the conditions for the crossing of borders, residence and work in a second state in a named region. The EAEU Treaty calls upon the Union to adopt measures to ensure the functioning of an internal market guaranteeing free movement of labour (Art. 28 EAEU Treaty). However, Article 96 is less specific in its wording and merely demands that Member States agree on "common principles

[5] For example, the Commonwealth of Independent States (CIS) agreement on cooperation in the field of labour migration and social protection of migrant workers, Moscow, 15 April 1994.

[6] Council Regulation 15/1961/EEC [1961] OJ L 1073/6. Regulation relatif aux premieres mesures pour la réalisation de la libre circulation des travailleurs à l'intérieur de la Communauté, Preamble.

and approaches in the sphere of labour migration" and assist in the organised recruitment of workers (Art. 96 (1) and (3) EAEU). Workers are defined as those who, being nationals of a Member State, lawfully reside and lawfully engage in labour activities in the state of employment of which they are neither nationals nor permanent residents (Art. 96.5 EAEU). Employment refers to activities performed under an employment contract or in execution of works (services) 'under a civil law contract carried out on the territory of the state of employment in accordance with the legislation of that state' (Art. 96.5 EAEU). Employers are defined as natural or legal persons who provide a job based on an employment contract, in line with the legal requirements demanded in each state of employment (Art. 96.5 EAEU). The emphasis on the "employment contract" is palpable and determines the legality of residence of the individual. This "formalistic" approach (Pirker and Entin, 2020, p. 515) has always prevailed in the region since at least 1994.[7]

In a clear contrast with the EU's regime, the Treaty remains silent as to any right of entry. This might seem paradoxical in theory, but the entry is not the main issue in practice in the region due to visa-free travel among the Member States (Molodikova, 2017). In the particular Russian case, migrants who do not require a visa to enter need to obtain a 'patent' in order to work. In order to obtain it, they need to fulfil certain conditions (e.g., medical insurance and a civic and language knowledge certificate) and there is a limited timeframe of 30 days after the entry to obtain it (Kubal, 2019). However, EAEU workers are not required to obtain any employment permit, meaning that they do not need to pass any civic or language knowledge exam (Art. 97.1 EAEU). Employers can engage their services without any restrictions, except those related to national security and public order (97.2 EAEU). Both articles have direct effect and direct applicability (Pirker and Entin, 2019, p. 134).

In the EU's case, defining who is a worker has resulted in a long line of cases by the Court of Justice of the European Union (CJEU). A worker is an individual who "pursues an effective and genuine activity as an

[7] Art. 6, Commonwealth of Independent States (CIS) agreement on cooperation in the field of labour migration and social protection of migrant workers, Moscow, 15 April 1994.

employed person."[8] In order to determine if a person is employed, the individual has to provide services for a period of time, under the direction of another person for remuneration.[9] Thus, in contrast to the EAEU, where the employment and civil law contract is a necessary condition to obtain residence, the EU's regime is more flexible provided the work is genuine and effective. Southern Common Market (*Spanish* — Mercado Común del Sur (MERCOSUR)) also offers an interesting approach that takes into consideration the large percentage of informality in labour markets in South America (Acosta, 2018, ch. 7).

In countries with very high degrees of informality in the labour market, such as Russia (according to some authors as high as 48 percent of the GDP in Russia. Schenk, 2018, p. 64), this is a matter deserving further attention. In practice, some employers prefer to engage EAEU workers without signing a contract to avoid taxes and social insurance contributions (Schenk, 2015, p. 4; Sagynbekova, 2017, p. 18). As seen below, this has legal implications for the security of residence of EAEU workers and for the success of the free movement regime itself, and it is something deserving further research.

II.2. Rights during Stay

Access to the Labour Market and Quotas

Access to the labour market includes not only the right to work under the direction of others but also the right to self-employment and entrepreneurship. States often restrict both elements through various methods such as tying residence permits to one job or labour sector. Other restrictions comprise impeding self-employment activities, requiring companies to employ a minimum percentage of national workers, or establishing quotas.

In the EU's case, the only possible restriction refers to employment in the public administration,[10] a provision that has been interpreted as referring only to jobs where the individual "is entrusted with the

[8] Case 53/81, Levin, 23 March 1982, paragraph 21.

[9] Case 66/85, Lawrie-Blum, 3 July 1986, paragraph 17.

[10] Art. 45(4), Treaty on the Functioning of the European Union.

exercise of powers conferred by public law and with responsibility for safeguarding the general interests of the State."[11]

As mentioned, the EAEU Treaty prohibits quotas or any other labour market protective measures (Art. 97.1 EAEU)[12] and workers have the right "to engage in professional activities" (Art. 98(1) EAEU). Workers have the right to have their degree certificates obtained in other Member States recognised, except in the educational, legal, medical or pharmaceutical sectors, where a domestic recognition procedure might be set out by Member States (Art. 97.3 EAEU).

Nonetheless, the EAEU Treaty allows Member States to restrict access to employment based on national security considerations (e.g., in sectors of strategic importance) and public order ones (e.g., in certain geographical areas) (Art. 97.2 EAEU). Since these are exceptions to the general rule, they should be interpreted strictly. The precise contours of the terms *public security* and *public policy* has led to extensive, at times contradictory, jurisprudence where the CJEU has made use of the proportionality principle on a case by case basis (Thym, 2016; Koutrakos, 2016). In its first Advisory Opinion on the matter, the Eurasian Court of Justice referred to the CJEU's jurisprudence in *Bosman* and *Simutenkov* and also applied the proportionality principle to the case at hand, as will be seen below.[13]

Family Reunification

As mentioned earlier, family reunification was one of the original and key elements in the development of the EU's free movement of workers regime. Family reunification can be central to the migratory process for many individuals and there are certain categories of foreigners (e.g., seasonal workers) who are often excluded in domestic laws from any

[11] Case C-149/79, *Commission vs Belgium*.

[12] Quotas have been often used in the past two decades by Russia (Schenk, 2018). They are currently used in Russia with regard to work permits which are those required by migrants who need a visa to enter the country. They are however not applied to EAEU workers or to "patents" workers, which are those coming from countries who do not require a visa to enter Russia.

[13] Case CE-2-2/5-18-BK Eurasian Economic Commission, Advisory opinion of the Grand Chamber of the Court of 7 Dec. 2018, *Opinion on Professional Athletes*.

family reunion route. Whilst family life is intrinsically related to family reunification, no international instrument provides an indisputable right to family reunification and the consequent right of entry for family members. However, family reunification has become a standard clause in regional free movement regimes. In this regard, migrants have three questions in mind: does an individual right to family reunification exist? Which family members may join the sponsor? What are the conditions of residence and rights of family members?

In the EU's case, from the outset the first 1961 EEC's Regulation included the right to family reunification for workers with spouses and children under 21. Two conditions were set: the worker had to have regular employment and adequate housing. Family members were entitled to work under the same conditions as the sponsor.[14] These requirements have seen some modifications (e.g., the abolition of the requirement to prove adequate housing) and are now regulated in Directive 2004/38.

The EAEU's provisions differ in some respects. First, family members are either spouses or children who are dependent on them. The Treaty does allow Member States to expand this category 'in accordance' with their legislation.[15] Second, there seem to be no conditions to allow family reunion for those who are not workers under the Treaty. Third, the Treaty remains silent on whether family members have the right to work. It might be argued that family members also holding the nationality of a Member State will be able to do so in so far as being under the personal scope of the Treaty. They could thus sign an employment agreement under the same conditions as the sponsor. However, in the absence of any specific provisions, family members not holding the nationality of a Member State will depend upon national legislation in order to determine their right to employment.

Regarding other rights, family members enjoy equal treatment with citizens of the state of employment regarding social protection (except for pensions)[16] and free medical assistance in emergency

[14] Arts. 11–14, EEC Regulation 15/61.

[15] Art. 96 EAEU Treaty.

[16] Art. 98(3) EAEU Treaty.

situations.[17] Children of workers have the right to "attend pre-school institutions and receive education in accordance with the legislation of the state of employment" (Art. 98(8) EAEU). In the absence of any other provisions, other rights will depend on national law.

Civil and Socio-Economic Rights

Several civil and socio-economic rights are enshrined in the EAEU Treaty. The Treaty does not include any political rights. Whilst some of these rights may already be found in international agreements that all five Member States have ratified,[18] some others are similar to,[19] or go beyond, the UN Convention on the rights of migrant workers that only Kyrgyzstan has ratified — Armenia having signed it. This exemplifies how regional agreements might extend rights to a group of regional migrants, when the same rights are already enshrined in international treaties whose ratification is more cumbersome.

Civil rights include the right to use, possess and dispose of property, as well as its protection; the free transfer of funds (Art. 98(2) EAEU); and the right to join trade unions under the same conditions as nationals (Art. 98(5) EAEU). The free transfer of funds goes beyond the UN Convention on migrant workers[20] and it is particularly important for Armenian and Kyrgyz workers and the remittances they send to their home countries (Brownbridge and Canagarajah, 2020).

Considering socio-economic rights, the Treaty provides for equal treatment with nationals on social security, except for pensions which are

[17] Annex 30 to the Treaty on the Eurasian Economic Union, Protocol on The Provision of Medical Care to the Member States Employees and to their Family Members.

[18] Art. 17 Universal Declaration on Human Rights (right to own property); Art. 22 International Covenant on Civil and Political Rights (right to join trade unions).

[19] The right to information enshrined in Article 98.6 EAEU is enshrined in Art. 33 UN Migrant Workers Convention. The EAEU Treaty also provides migrant workers with the right to obtain, free of charge, a document from the employer certifying the work performed, the period and the wages (Art. 98(7) EAEU). Such a right does not exist in the UN Migrant Workers Convention.

[20] Art. 47(2) only refers to the obligation for states to "take appropriate measures to facilitate such transfers".

regulated by domestic law and the recently adopted Pension Agreement. Finally, workers and their family members have equal treatment with nationals regarding free emergency or urgent medical treatment.[21] However, the provision of other medical services is regulated by domestic law and by any bilateral, or international treaties, adopted by the Member States.[22]

II.3. Prospects for Permanent Residence

A secure residence status has been presented as being one of the key components facilitating social inclusion in a destination country (Groenendijk, 2009). Foreigners may generally have their residence permits withdrawn if the reason that motivated their entry has ended or if they commit a criminal offence. States often distinguish between temporary residents and permanent ones, who enjoy stronger protection from expulsion. In the EU's case, the requirements to exclude or expel migrant workers were already set in 1964 in a Directive.[23] Today, permanent residence is obtained after five years and permit-holders can then only be expelled on grounds of public policy, public security or public health.[24]

The EAEU's regime differs. Residence is intrinsically associated with employment. The Treaty refers to "temporary" stay as depending 'on the duration of' a contract (Art. 97.5 EAEU). The word "temporary" leaves no doubt as to the intention of the legislator. If a contract ends,

[21] Annex 30 to the Treaty, Protocol on Provision of Medical Treatment of Workers of the Member States and their Family Members, Art. 4.

[22] Annex 30 to the Treaty, Protocol on Provision of Medical Treatment of Workers of the Member States and their Family Members., Art. 3.

[23] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health OJ 56, 04.04.1964, pp. 850–857.

[24] Art. 27, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. OJ L 158, 30.04.2004, pp. 77–123.

workers may engage in another job within 15 days (Pirker and Entin, 2020, p. 517). EAEU nationals who do not have a contract have their stays limited to 90 days. This is not regulated by the EAEU Treaty, since it does not cover visa issues as such. This is rather regulated by the Commonwealth of Independent States framework and by bilateral agreements (Schenk, 2015, p. 2).

Finally, the unwillingness of some employers to sign contracts results in some migrants ending up with an entry-bar in Russia (the so-called blacklist) making them deportable and banning their return for three years (Schenk, 2015, p. 2). An entry bar might be imposed not only on those who work without a contract but also on those who commit two minor administrative offences in a three year period, including "speeding or parking tickets, or being caught crossing the street in the wrong place" (Kubal, 2019, p. 28). The EAEU Treaty does not address this issue (Leonov and Korneev, 2019, p. 215).

III. Implementation and Interpretation

Deficient implementation, gaps in application and the lack of strong supranational institutions of regional free movement regimes outside the EU might lead some to consider them as merely aspirational and lacking in accomplishment. These "intellectually dead-end explanations" run the risk of presenting the rest of the world as exotic while invoking "arguments about how law does not really work there" (Kubal (2019) highlights in the Russian case, p. 77). Moreover, these arguments unduly emphasise a fictitious dichotomy between an idealised domestic migration law, as well as EU citizenship law, that works and a superfluous idealistic non-European regional framework that does not. This offers those whose work solely concentrates on the Global North a quick exit to deny the importance of processes taking place in other regions. This section discusses the issues of implementation and interpretation and proposes some elements for discussion that can be useful in moving the debate forward beyond self-defeating explanations.

III.1. Implementation

A recurrent argument when discussing free movement regimes outside the EU in international academic fora is the issue of implementation. Some consider that without strong supranational institutions, similar to those the EU has, implementation is significantly impaired and doubtful. While implementation has to be taken seriously, this dismissive approach is problematic on various grounds.

First, it has been abundantly proven that "immigration law in practice differs drastically from immigration law in theory [leading to a situation where] law in action is filled by countless government decisions that reflect the exercise of discretion, which responds to political and economic pressures that fluctuate over time" (Motomura, 2014, p. 4).[25] Second, as the work of scholars such as Groenendijk (2009) shows, the application of European law on free movement of workers in the 1960s and 1970s was deficient. Indeed, lawyers, rather than using EU law, which State authorities were not prepared to implement, needed to often resort to other informal channels to help their clients (Groenendijk, 2009). Third, even today, several authors have convincingly explained how certain EU nationals, such as the Roma, find it difficult to assert their rights in the face of ongoing discrimination (Parker, 2021; Aradau et al., 2013, Carrera and Atger, 2010). Finally, immigration law in practice sometimes hits those who are nationals, but cannot prove it, even in States where the rule of law is taken for granted, as exemplified by the recent Windrush scandal in the UK (Wardle and Obermuller, 2018).

Lack of compliance is not always the result of bad faith on the part of state authorities but may be due to shortcomings in administrative capacity or information for all relevant actors including potential beneficiaries, bureaucracies, and courts (Sagynbekova, 2017). There is a process of sedimentation before any rule is understood and applied consistently by all relevant actors. Rather than concentrating on each instance of misapplication and portraying it as an insurmountable failure, it might be more fruitful to approach the matter with a fresh

[25] His book discusses the case of the United States but can be applicable to any other Western democracy when it comes to migration law.

perspective to identify tools facilitating the progressive realisation of rights. As Evans has explained with respect to the work of the Committee against Torture, the focus must be "on practical steps that might be taken to improve the enjoyment of the right… [and] the pursuit of bettering the immediate situation as a stepping stone toward an end which might either be as yet unachievable in full, or is not yet an agreed outcome" (Evans, 2015, p. 46). Three such steps might be mentioned.

First, the incorporation of new migration categories into domestic laws to reflect a new reality where certain non-nationals, e.g., regional migrants, cannot be considered as normal foreigners any longer, is an important step. This has taken place in all EU Member States who were obliged to implement EU law on the subject,[26] but its importance can also be seen in other regions (see, for example, for the Ecuadorian case and its introduction at domestic level of a South American citizen migration category (Ramírez et al., 2019)). Second, the role of regional courts but, also importantly, the dialogue they establish with domestic courts is of utmost importance to interpret concepts and provisions in the founding treaties or secondary regional law. The Court of Justice of the EU is often mentioned in this respect, but other regional courts (e.g., in the Andean Community, in CARICOM or in the East African Community) have already produced important rulings on regional migrants that can be taken into account by the EAEU Court (Acosta, 2019, pp. 14–15). Finally, training and information campaigns are essential both in informing potential users, but also bureaucracies, national lawyers and judges. The integration of regional law into law schools' curricula also enhances this process.

III.2. Interpretation

The interpretation of the EAEU legal corpus, including not only the Treaty and its Protocols but also decisions of the bodies of the Union, falls upon the shoulders of the Court of the Eurasian Economic Union, whose main task is to ensure uniform application of the law.[27]

[26] For example, EU Directive 2004/38 on the rights of EU citizens.

[27] Annex 2 to the Treaty, Statute of the Court of the Eurasian Economic Union.

Standing is limited in that only Member States and economic entities may submit a dispute to the Court. Economic entities can only challenge decisions and actions, including the failure to act, of the Eurasian Economic Commission when those decisions directly affect their "rights and legitimate interests" and when there has been a "violation of any rights and legitimate interests of the economic entity granted by the Treaty or international treaties within the Union".[28] Economic entities are referred to as either legal persons or natural persons who are registered as individual entrepreneurs. Member States and bodies of the Union, including the Commission, may request the Court for an Advisory Opinion.[29] Since Advisory Opinions are not binding, this mechanism has been presented as being 'weak' and the lack of preliminary references as a "dis-integration" of the judiciary between the regional court and the domestic counterparts (Karliuk, 2019, p. 434).

Whilst some scholars have presented the Court of Justice of the EU (CJEU) and its case law as a "useful benchmark" (Pirker and Entin, 2019, p. 130), there are crucial differences in the functioning of both courts. The CJEU receives most of its cases via the preliminary reference procedure through which national courts request the CJEU to give a ruling — when such a ruling is necessary to allow the national court to decide on the particular case at hand — on the interpretation or validity of EU law.[30] The CJEU also receives an important number of cases from the European Commission through the infringement procedure when a Member State has failed to fulfil its obligations under EU law.[31] The combination of both procedures has led to an enormous amount of case law, not always consistent or coherent, dealing with EU citizens and their free movement rights (Kochenov, 2017).

[28] Annex 2 to the Treaty, Statute of the Court of the Eurasian Economic Union, chapter IV.

[29] Annex 2 to the Treaty, Statute of the Court of the Eurasian Economic Union, Arts. 46–47.

[30] Art. 267 Treaty on the Functioning of the European Union.

[31] Art. 258 Treaty on the Functioning of the European Union.

To date, the EAEU Court has only produced one Advisory Opinion on free movement of workers.[32] This resulted from a request from the Commission in a case where Russia imposed quotas on the maximum number of foreign players, including EAEU workers that could participate in sport competitions. Even though the Commission had already produced a Decision in 2017,[33] exhorting the Russian Federation to ensure the adequate application of the Treaty, no steps had been taken.[34]

In its Advisory Opinion, the Court found that since Articles 97.1 and 97.2 were capable of direct effect and direct applicability; any quantitative restrictions to professional sportsmen were forbidden. Professional sportsmen were indeed workers who had clear and precise rights deriving from the Treaty. Whilst Member States may limit free movement of workers based on national security (including in economic sectors of strategic importance) and public order, they must do so in line with the principle of proportionality.[35]

As Pirker and Entin have rightly argued, the Advisory Opinion is important in several respects. By referring to EU law cases such as *Bosman* or *Simutenkov* and using them by analogy, the EAEU Court establishes some parallelism with the CJEU in its reasoning. This facilitated certain conclusions such as the fact that Member States are obliged to implement Commission Decisions (Pirker and Entin, 2019, p. 136) and that in cases of conflict between domestic and EAEU law, the latter would prevail (Pirker and Entin, 2019, p. 137). However, as mentioned, the Commission does not have the capacity to launch an infringement action against a Member State and it instead uses the Advisory Opinion "to fill this lacuna" whilst the EAEU Court tries to make all the "judicial remedies at its disposal as effective as possible" (Pirker and Entin, 2019, p. 145).

[32] Case CE-2-2/5-18-BK Eurasian Economic Commission, Advisory opinion of the Grand Chamber of the Court of 7 Dec. 2018, *Opinion on Professional Athletes*.

[33] Decision number 47, 11 May 2017.

[34] Decisions of the Commission form part of the Union law and are directly applicable on the territories of the Member States. Paragraph 14, Annex 1 to the Treaty, Regulation on the Eurasian Economic Commission.

[35] Case summary on the clarification on the application filed by the Eurasian Economic Commission, No.CE-2-2/5-18-БК, Available at: http://courteurasian.org/page-26481 [Accessed 15.07.2021].

Considering these limitations, it could be argued that as important as the EAEU Court's role will be, domestic actors — namely national administrations and domestic courts — emerge as crucial to implement and interpret EAEU norms. This is not the place to engage in a complex analysis of dualism and monism theories and their application to the five EAEU Member States (other authors have already conducted this exercise: Karliuk, 2017; Kalinichenko et al., 2019).

Nevertheless, there needs to be a serious debate on how to make access to rights deriving from regional mobility agreements as effective as possible. One possible option would be to have the Commission working in conjunction with national independent mechanisms focusing on prevention. Prevention mechanisms could also facilitate the role of domestic courts. Again, the training of judges on regional law is essential, as is the sharing of relevant domestic rulings among the participant states.

IV. Conclusion

With the adoption of mobility agreements, nationals of the countries involved obtain a new status that eliminates, in theory, the possibility of being undocumented while also expanding their labour, family reunification and socio-economic rights. The gradual opening of borders at the regional level, coupled with increasing entitlements in certain areas, approximates foreigners' status to a privileged category closer to nationals. Through that process, states partially forfeit their capacity to control who is entitled to reside and work in their territory.

Following the demise of the Soviet Union, the resulting states have adopted numerous domestic, bilateral and multilateral regulations facilitating mobility and residence, with a strong focus on access to the labour market. Russia, as the second largest recipient of migrants globally and the main destination for regional migrants, has been at the centre of such debates. This historical legacy and the Russian need for millions of migrant workers are essential to understand the idiosyncrasy and peculiarities of the EAEU's free movement regime (Schenk, 2018, pp. 11 and 17).

The EAEU recognises a reality of mobility on the ground that has been ongoing for almost three decades (Leonov and Korneev, 2019,

p. 211). This is not different from other regions that have opened borders just to see that mobility did not dramatically increase, such as in the case of MERCOSUR (Acosta, 2018, ch. 7). As explained by Groenendijk (2009, p. 14), when referring to the EU's case, mobility often happens before the adoption of any agreement regulating it. Thus, for example, Romanians in Spain (Acosta and Martire, 2014, pp. 368–369), Paraguayans in Argentina or Kyrgyz in Russia will in many cases simply see their previous residence regularised and facilitated. In a world where "amnesties" for undocumented migrants seem to be controversial, there is no more powerful regularisation than the adoption of a new free movement regional scheme. Whilst multilateral mobility regimes might seem a novelty to some, they have been a normal occurrence in international law since at least the 19th century (for the South American Case, Acosta, 2018, ch. 3) and they are nothing but a replication of the dozens of bilateral agreements already taking place on a global scale. Bilateral agreements on labour migrants have been used extensively in the Post-soviet space since the 1990s (Molodikova, 2017, p. 319).

Discontinuing control through the opening of borders has important implications for the lives of individuals. In the EU's case, the gradual demise of immigration authorities and employer's discretion in the 1960s led to an "extension of the rule of law in a field that was dominated by police power, bureaucratic arbitrariness and interests of the state" (Groenendijk, 2009, p. 16). It is not surprising the Kyrgyz workers in Russia refer to simplified employment procedures leading to savings in bureaucratic processes, coupled with less abusive interference by the police, as some of the major changes the EAEU has brought in practice (Sagynbekova, 2017, p. 18; Leonov and Korneev, 2019, p. 216).

This paper has offered two different insights on the free movement of workers at EAEU level. First, it has identified how the EU cannot really be considered as a model on several key aspects, notably the absence of the principle of non-discrimination enshrined in the Treaty and the lack of a secure residence status beyond the conclusion of an employment agreement. This presents a distinctive regime that will evolve in a divergent manner from the EU due to the specific needs of the

region. Second, the paper has enunciated two major challenges for any free movement regime at global level, namely gaps in implementation and the interpretative role of courts. These are aspects that demand further research from various angles and disciplines in the coming years.

Despite the challenges, the EAEU can be rightly located among the increasingly large number of regional agreements at global level outside the EU facilitating mobility, residence and work. These agreements are already making a difference in the lives of millions of individuals whether in South America (International Organization for Migration, 2018), the Caribbean (Ama, 2019) or Africa (Okunade and Ogunnubi, 2019). It is urgent in that regard to establish a dialogue between the different regions which facilitate mobility outside the EU, with a view to explore shared challenges and solutions.

Free movement of workers in the EAEU's case is a structural element that will continue with peaks and valleys depending on economic performance, mainly by Russia. Uzbekistan and Tajikistan might also join the EAEU in the coming years in order to facilitate the mobility of their own nationals to Russia, but also to Kazakhstan (Madiyev, 2021). Russia has indeed a declining working age population and a severe demographic problem where population growth results only from immigration (Schenk 2018, pp. 11, 17). Russian, as a *lingua franca*, will also make mobility easier than, for example, in the EU (Groenendijk, 2009, p. 14). The extent to which the agreement is known by authorities, lawyers, migrants and employers will also determine its future success. With only six years of application it is still very early to make an accurate judgement on this aspect. Researchers will need to continue to measure and investigate its implementation and the effects the free movement regime has in the inclusion of EAEU workers. More research will also be needed in light of the closure of borders during the pandemic and the effects that might have in the near future on the EAEU's free movement regime.

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