

Unwanted People and Desired Citizens

Contemporary Attitudes, Challenges and Perceptions
of Migration and Integration



Edited by

**Cezary Smuniewski, Andrea Zanini,
Cyprian Aleksander Kozera, Błażej Bado**

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Contents

Introduction	7
<i>Agostino Massa</i>	
International Migration and Transnational Social Protection: Theory and Practice	9
<i>Ilona Urych</i>	
Migrations and Their Meaning for State (In)security. Outline of the Problem	19
<i>Cyprian Aleksander Kozera, Paweł Bernat, Cüneyt Gürer, Błażej Popławski</i>	
Immigrants <i>Ante Portas</i> and Desirability of People on the Move: Selective Perceptions of Forced Displacement and Voluntary Migration from Africa, Asia, and Eastern Europe	35
<i>Izabela Stańczuk</i>	
Legal Status of Foreigners in Light of the Constitution of the Republic of Poland	51
<i>Małgorzata Czerwińska</i>	
Freedom of Movement at the Regional Level	69
<i>Sławomir Chomonicik</i>	
Taking up Employment by Ukrainians in Poland. Polish Legal Status Before and After the Outbreak of Russia's War Against Ukraine	83
<i>Przemysław Wywiat</i>	
Reliable Aid. Support of the Polish Armed Forces for Ukrainian War Refugees after 24 February 2022	95

<i>Ewa Maria Marciniak</i>	
Ukrainians in Poland After the Outbreak of War. Possible Types of Social Presence	107
<i>Alina Betlej, Krzysztof Jurek, Iwona Niewiadomska</i>	
Integration of Ukrainian Immigrants in Poland. Analysis of Selected Problems	119
<i>Andrea Tomaso Torre</i>	
Between Perception and Reality. Migration to Italy in the Last 20 Years	135
<i>Maria Stella Rollandi, Andrea Zanini</i>	
Economic Interest and Good Government: Foreigners and Social Control in Early Modern Genoa	151
<i>Luisa Piccinno</i>	
Foreign Labor in the Port of Genoa: Privileges, Integration and Conflicts (15 th –19 th Centuries)	169
<i>Daniela Tarantino</i>	
“Migrating or Staying.” The Church’s Magisterium on the Migration Phenomenon in the Post-Covid Era for an “Inclusive” Citizenship	187
<i>Błażej Bado, Cezary Smuniewski</i>	
In Search of Freedom? Migrations of Pacifists According to Peter Brock	207

Freedom of Movement at the Regional Level

Abstract

The free movement of an individual may be understood as the freedom of movement and choice of one's whereabouts, the freedom to leave any country (including one's own), and the right to return to one's own country. The exercise of these rights may vary depending on the human rights protection system we are dealing with. As regards the universal system, these rights are most often recognized in a general, vague and superficial way. However, it is different in the case of regional systems, which take into account the specificity of a given region and migration policies. The text presented below analyzes the regulations associated with the freedom of movement under regional human rights protection systems, taking into account their characteristics.

Keywords: freedom of movement, regional human rights protection system

1. Introduction

Although most frequently the key role in ensuring the implementation of fundamental rights and freedoms for citizens and persons residing in the territory of a given country is attributed to national law, international law plays a very important role in shaping a human rights protection system. As part of the universal or regional human rights protection systems, legal norms are established, sets of values and mechanisms of supranational extent are developed to ensure that human rights are respected by the international community. Thanks to these instruments, minimum standards are created to ensure the identical understanding of certain rights and freedoms and their universal observance. Universal protection is implemented within the United Nations system with the Universal Declaration of Human Rights (*Universal Declaration* 1948) as its foundation. This document was adopted under a resolution of the United Nations General Assembly on 10 December 1948. It lays down the basic catalogue

of personal and political rights as well as economic, social, and cultural rights. However, its serious drawback is the lack of international control measures to ensure its observance. Adoption of the Universal Declaration of Human Rights initiated the creation of a universal human rights protection system, which has continued to evolve over the last decades. An extremely important step towards the development of a universal protection system was the adoption in 1966 of the International Covenant on Civil and Political Rights (International Covenant 167/1977) and the International Covenant on Economic, Social and Cultural Rights (International Covenant 169/1977). As opposed to the Universal Declaration of Human Rights, the Covenants provide for control mechanisms (periodic reports submitted to the UN Secretary-General, institutions for individual complaints or inter-state complaints). Together with the Universal Declaration of Human Rights the Covenants are treated as “a specific international bill of rights, i.e. a code human rights.” (Banaszak, et al. 2003: 58; Lijewski, Myślińska 2014: 108) Without belittling their importance, it should be noted, however, that the universalism of the solutions adopted affects their effectiveness, and the universal human rights protection system itself provides a lower standard of protection than regional systems, which take greater account of the specificity of a given region (it is easier to communicate and develop common standards for countries with similar cultures and value systems). It is appraised that the most effective is the European system, which is copied by both the inter-American and African systems. The European human rights protection system is institutionalized and high assessment of its effectiveness is possible thanks to the activities of the Council of Europe, the European Union, and the Organization for Security and Cooperation in Europe. The standards developed by these institutions are subject to control mechanisms of varying degrees of intensity.

In both the universal and regional systems, freedom of movement is understood as the right to change and choose the place of stay, the freedom to leave any country (including one’s own), and the right to return to one’s own country, is considered to be one of the elementary and fundamental human rights. The movement of people itself may have an international (movement between countries) or national (movement between territorial units of a given country, e.g. provinces, cantons, voivodships, counties, municipalities, etc.) dimension, which is why the standards regarding this right adopted by states and international institutions are crucially important. The right to free movement and choice of residence, as regulated in Art. 13(1) and 13(2) of the Universal Declaration of Human Rights is included in the

group of personal and political rights (1st generation of human rights). According to that provision “Everyone has the right to freedom of movement and residence within the borders of each State,” (*Universal Declaration 1948: Article 13(1)*) as well as “Everyone has the right to leave any country, including his own, and to return to his country.” (*Universal Declaration 1948: Article 13(2)*) These regulations do not provide for any exceptions or restrictions in the exercise of the rights specified therein. However, this issue is regulated differently in the aforementioned International Covenant (167/1977). Insofar as Art. 12 sections 1, 2, and 4 specify what constitutes the right to free movement, section 3 of the said provision allows restrictions in its exercise. It also needs to be emphasized that the entity authorized to move freely under Art. 12(1) is “Everyone lawfully within the territory of a State (...).” (*International Covenant 167/1977: Article 12(1)*) The circle of authorized entities was therefore narrowed down by the criterion of legality of stay. As already mentioned, the right to free movement is not absolute and may be restricted in indicated cases. In accordance with Art. 12(3), this right may be restricted only by law, when it is necessary to protect state security, public order, public health or morals, and the rights and freedoms of others, and is consistent with the other rights recognized in the Covenant (*International Covenant 167/1977: Article 12*). The requirement that restrictions should be introduced by law is intended to limit the arbitrariness of decisions of state authorities, while the need for at least one of the premises indicated in the Covenant is to provide substantive justification for the decision taken. The introduced solutions give countries freedom in creating a migration policy tailored to the needs and geopolitical situation within reasonable limits. However, as it has already mentioned, regional systems have a more tangible impact on ensuring that states guarantee the exercise of an individual’s rights and freedoms.

2. Inter-American human rights protection system

2.1. Foundations for the functioning

The Inter-American human rights protection system is associated with the functioning of the Organization of American States (hereinafter: OAS), i.e. the oldest regional organization in the world, which was founded in 1948 with the signing in Bogota (Colombia) of the OAS Charter, also known as the Charter of Bogota (*Charter of The Organization 1948*). In

its current form (after the adoption of the protocols in 1967, 1985, 1992, and 1993), the OAS Charter consists of a preamble and 3 parts divided into chapters (Part 1 – Chapters I–VII, Part 2 – Chapters VIII–XVIII and Part 3 – Chapters XIX–XXII). In accordance with Art. 1, this organization was established “to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence” among the American States (*Charter of The Organization* 1948: Article 1). OPA members are all (35) independent states of the Americas, and its main goals are based on four pillars, i.e. democracy, human rights, security, and development (OAS 2023). The structure of OAS also includes the Inter-American Commission on Human Rights (since 1960) and the Inter-American Court of Human Rights (since 1978).

Legal acts on which the basic assumptions of the inter-American human rights protection system are based include the American Declaration of the Rights and Duties of Man, which was adopted in 1948, and the American Convention on Human Rights, adopted in 1969. The American Declaration of the Rights and Duties of Man assumes that all people are free and equal in dignity and rights. The preamble to this document states that the fulfilment of duty by each individual is a prerequisite to the rights of all (*American Declaration* 1948: Preamble). The rights of an individual are enumerated in Chapter One (comprising 28 articles), while the duties are in Chapter Two (comprising 9 articles). Chapter One lays down both personal and political rights and freedoms (*inter alia* right to life, liberty, and security, right to equality before the law, right to religious freedom and worship, right to the protection of honor, personal reputation, and private and family life, right to a family and protection thereof, right to protection for mothers and children), as well as economic, social and cultural rights (*inter alia* right to work and to fair remuneration, right to leisure time and to the use thereof, right to social security, right to the benefits of culture). As regards duties, the American Declaration of the Rights and Duties of Man provides for the following: duties to society, duties toward children and parents, duty to receive instruction, duty to vote, duty to obey the law, duty to serve the community and the nation, duty to pay taxes, duty to work. In 1969, the American Convention on Human Rights was adopted, which came into force in 1978 (*American Convention* 1969). It consists of a preamble and 3 parts. Part I, which consists of five chapters (Art. 1–32), identifies the obligations of states and the rights protected by the Convention; in Part II, composed of four chapters (Art. 34–73), the

focus is on means of protection, indicating, among others, the principles of functioning of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights; while Part III, consisting of two chapters (Art. 74–82), lays down general and transitory provisions (*American Convention* 1969). Also important for the functioning of the inter-American system of human rights protection were the additional protocols to the American Convention on Human Rights, concerning *inter alia* economic, social, and cultural rights, and the death penalty. However, their discussion would go beyond the scope of this study. The American Convention on Human Rights itself, although largely modelled on the European Convention for the Protection of Human Rights and Fundamental Freedoms, does not contain the same control mechanisms, and as a result, the bodies functioning on the basis thereof operate less effectively.

2.2. Freedom of movement in the Inter-American human rights protection system

One of the documents in which the freedom of movement is recognized as a human right is the aforementioned American Declaration of the Rights and Duties of Man. According to it Art. VIII: “Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will.” (*American Declaration* 1948: Article VIII) Thus, the American Declaration of the Rights and Duties of Man, unlike the *Universal Declaration of Human Rights* (1948), has substantively limited the right to free movement to citizens of a given country. Issues related to the freedom of movement have been regulated differently in the American Convention on Human Rights. Under Art. 22(1), this right shall be vested in every person lawfully in the territory of a State Party (*American Convention* 1969: Article 22). As in the case of the International Covenant (167/1977), the entity entitled to free movement and/or residence in a given territory is a person legally residing therein. The Convention (*American Convention* 1969) also allows the possibility of restricting the exercise of this right by statute, insofar as it is necessary in a democratic society for the prevention of crime or the protection of national security, public security, public order, public morals, public health, or the rights or freedoms of others. It is also allowed to introduce restrictions in designated zones for reasons of public interest. Although the American Convention on Human Rights

contains a catalogue of rights and freedoms similar to the one set out in the International Covenant (167/1977), they do not have identical scopes.

It should be remembered that although basic legal acts within the inter-American system of human rights protection ensure the exercise of the right to free movement and residence, owing to the social, economic, political, and cultural and economic impact of migration on the countries of origin, transit, and destination, the issues related thereto are a matter of debate of the various bodies and entities operating within the OAS. Also worth mentioning are various types of programs that contribute to the development of migration policy, e.g. the Migration and Development Program of 2008.

3. African human rights protection system

3.1. Foundations for the functioning

The African human rights system is associated with the functioning of the Organization of African Unity, which was the first African continental institution after independence operating in the years 1963–1999. It has been replaced by the African Union affiliating 55 states. The African Union aims to realize the vision of “an Integrated, Prosperous and Peaceful Africa, driven by its citizens and representing a dynamic force in the global arena.” (*About the African Union* 2023) The basic objectives of the African Union include: achieving greater unity and solidarity among the African countries and African nations; defending the sovereignty, territorial integrity, and independence of Member States; integrating the continent; encouraging international cooperation; promoting and protecting human rights by the African Charter on Human and Peoples’ Rights and other relevant human rights instruments; to promote sustainable development; to coordinate and harmonize regional policies. The bodies that deal with human rights issues include the African Commission on Human and Peoples’ Rights, the African Court on Human and Peoples’ Rights, the International Law Commission of the African Union, and the African Charter on the Rights and Welfare of the Child. It should be stressed, however, that given the ongoing independence processes of the peoples of Africa and the resulting consequences, the African system of human rights protection should properly be seen as a promotion rather than real protection of these rights (Liżewski 2016: 551).

The basic legal act regulating human rights is the African Charter on Human and Peoples' Rights, which was adopted in 1981 and entered into force in 1986 (*African Charter* 1981). It consists of a preamble and three parts (Part I – Rights and Duties, Part II – Safeguards, and Part III – General Provisions). The rights protected by the Charter include the rights of an individual, among others equality before the law, the right to life, the right to respect for human dignity, the prohibition of slavery, the prohibition of torture, cruel, inhuman or degrading treatment, and, the right to freedom and personal security, the right to freedom of conscience, religion and worship, the right to information, freedom of association, participation in government, the right to property, the right to education, the right to protection of the family. The Charter also indicates the rights of peoples, including equality, the right to existence, the freedom to dispose of wealth and natural resources, the right to economic, and, social and cultural development with respect for one's freedom and identity, and in equal enjoyment of the common heritage of mankind, the right to national and international peace and security, the right to a satisfactory natural environment. The duties include respect and consideration for others, protection of harmonious family development, service to the national community, maintenance and strengthening of social and national solidarity, work, paying taxes, or preserving and strengthening positive African cultural values. When making a comparative analysis of the acts discussed so far, it should be noted that in the case of the African Charter on Human and Peoples' Rights, its structure is different, because the rights of individuals and peoples are consistently compared with each other, although the latter are constructed vaguely, while at the same time, the rights and freedoms of an individual are related to his duties towards the family, society, state or nation (Liżewski 2016: 552).

3.2. Freedom of movement in the Inter-African human rights protection system

Freedom of movement and choice of residence is guaranteed in Art. 12 of the African Charter on Human and Peoples' Rights. According to section 1 of the abovementioned article "Every individual shall have the right to freedom of movement and residence within the border of a State provided he abides by the law." (*African Charter* 1981: Article 12(1)) Section 2 authorizes each person to leave any country (including his own) and to return to his country. It is also possible to subject the indicated rights to

restrictions, provided for by law for the protection of national security, law and order, public health, or morality. In contrast to the International Covenant (167/1977) or the American Convention on Human Rights (1969), there is no requirement that restrictions be introduced by law. This may raise concerns about the arbitrariness of the decisions of the authorities to restrict the rights of an individual in such an important matter as the freedom of movement and residence.

The African Union's migration policy framework sets out priorities and guidelines for key areas related to migration, including border management, migration management, migrations for work and education, irregular migrations, forced resettlement, or internal migrations. It is also worth emphasizing that work is underway on the implementation by the Member States of the Protocol of the African Union on the free movement of persons and the right of residence (*Migration, Labour & Employment* 2023).

4. European human rights protection system

4.1. Foundations for the functioning

As regards the European system of human rights protection, distinguished should be the system operating within the Council of Europe, the main basis of which is the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention 284/1993) and the system operating within the European Union, for which the Charter of Fundamental Rights of the European Union (EU Charter of Fundamental Rights 2007), the Treaty on European Union (Treaty 2004/864/30) and the Treaty on the Functioning of the European Union (Treaty 2004/864/2) are most important.

The Convention (284/1993), called the European Convention on Human Rights, was signed on 4 November 1950 and entered into force in 1953. Its provisions relate to fundamental human rights and freedoms (their contents and possible restrictions, Art. 2–18), the activities of the enforcement authorities (i.e. the European Court of Human Rights and the Committee of Ministers), as well as the procedural regulations. The fundamental rights and freedoms provided for in the Convention (284/1993) include the right to life, the prohibition of torture, the prohibition of slavery and forced labor, the right to freedom and personal security, the right to a fair trial, and, prohibition of a punishment without a legal basis, right to respect for private and family life, freedom of thought, conscience, and religion,

freedom of expression, freedom of assembly and association, right to marry, the right to an effective remedy or the prohibition of discrimination. Later on, additional protocols were added to the Convention (284/1993), regulating new rights and freedoms and amending the control mechanism. The Convention (284/1993) itself is an extremely important instrument of the European human rights protection system. However, it is emphasized that the guarantees established by the Convention (284/1993) are subsidiary (ancillary) in relation to national human rights protection mechanisms, and the content of its provisions is subject to dynamic interpretation (performed by the European Court of Human Rights, adjusting the content to the changing reality).

The Charter of Fundamental Rights of the European Union (2007), adopted in Nice on 7 December 2000, was not initially of a binding nature. Its provisions concerning the guaranteed rights and freedoms are diverse. It was granted a binding force on 13 December 2007 under the Treaty of Lisbon, which entered into force on 1 December 2009. It is noted that it is one of the most important tools for the protection of fundamental rights at the regional level as it defines the non-negotiable values (Grzelak, Jędrzejczyk 2019, 2021). The Charter of Fundamental Rights of the European Union (2007) contains provisions concerning dignity, freedom, equality, solidarity, civil rights, and justice. Its provisions are addressed to all bodies and institutions of the European Union. As for the assessment of the implementation of the rights provided for in the Charter, it is worth acquainting oneself with the annual reports published since 2010 by the European Commission. It is also worth emphasizing that the Strasbourg system has been adopted as part of the system functioning in the European Union. According to Art. 6(2) Treaty on European Union: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties." (Treaty 2004/864/30: Article 6)

4.2. Freedom of movement in the European human rights protection system

The Convention (284/1993) itself, in its original version, does not regulate the issue of the freedom of movement. This matter is regulated by Protocol No. 4 (Protocol 175/1995). In accordance with Art. 2(1) "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

(Protocol 175/1995: Article 2) Section two of the aforementioned provision authorizes everyone to leave any country, including his own. As in the case of other human rights protection systems, the system operating within the Council of Europe also allows for the possibility of restricting the rights laid down in Art. 2(1) and 2(2) of the Protocol (175/1995). No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or the protection of the rights and freedoms of others. When assessing whether the interference of a particular state has been “as envisaged by the law,” the European Court of Human Rights not only requires that the contested measure has any legal grounds in national law, but it also refers to the quality of the law in question, expecting it to be available to the person concerned and its effects to be predictable (*Battista v. Italy* 43978/09/2014). An example of such justified interference is the prohibition on leaving a country imposed in criminal proceedings, which, insofar as a fair balance is maintained between the requirements of the general interest and the rights of the complainant (this balance may be upset by the duration of the preventive measure (*Miażdżyk v. Poland* 23592/07/2012)).

The free movement of persons is (along with the free movement of capital, services, and goods) one of the fundamental freedoms guaranteed to the citizens of the European Union. It is identified with the quintessence of the European Union and its basic purpose. Freedom of movement and residence is laid down in Art. 45 of the Charter of Fundamental Rights of the European Union (2007). However, the first provisions concerning this matter were already contained in the Treaty (2004/864/2) and concerned the free movement of workers or service providers. Alongside the development of EC law and subsequently EU law, the striving to establish an internal market providing for the free movement of persons has been reflected in the Schengen agreements, under which internal border controls have been removed, measures have been put in place to support external border control, and a common visa policy has been introduced for short-term stays of persons from the signatory countries. Currently, the principles for the free movement of persons are regulated in Directive 38/2004/EC. This act aims to encourage EU citizens to exercise their freedom of movement and residence in the territory of Member States. In accordance with its content, the fundamental and individual right of an individual to move and reside freely within the territory of a Member State of the

European Union arises from EU citizenship. Although the solutions set out in this Directive are criticized, among others, because they are abused by European Union citizens engaging in so-called social tourism, the European Parliament strongly opposes any restrictions on the right to free movement. It is worth noting, however, that the situation related to the COVID-19 pandemic resulted in the actual restriction of the exercise of the rights laid down in Directive 38/2004/EC (most Member States closed their borders, restored internal controls, and introduced temporary restrictions for travelers from other Member States). Apart from the issues related to intra-Union migrations, attention should also be paid to measures related to immigration of third-country nationals to Member States, aimed at a balanced management of legal immigration and combating illegal one. Interesting solutions have been included e.g. in Directive 50/2009/EC, which provides for a fast-track procedure of issuing special residence and work permits on more attractive terms.

5. Conclusions

Nowadays, the right to change one's place of residence with the possibility of leaving a country (including one's own) is lastingly considered one of the basic human rights. When creating a migration policy, states are obliged to ensure the implementation of fundamental human rights, including the freedom of movement. However, both universal and regional human rights protection systems provide for the possibility of introducing restrictions on the exercise of the rights arising from the freedom of movement. In most cases, these restrictions must result from the law and have a rational, substantive justification (protection of public security, maintenance of public order, protection of health, morality, or the rights and freedoms of others). The control mechanisms provided for in regional human rights protection systems allow, to a greater or lesser extent, to influence the attitude of states and enable more effective exercise of the rights of an individual. The European system seems to be the most effective as regards exercising the right to free movement and residence, providing many solutions and opportunities, both for European Union citizens and for people from outside it.

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