Individual Legal Status

A tool for developing European law?

Proceedings of the Conference on European Dimensions of Individual Status (Malta: 3rd July 2017)

Antonio Bartolini, Valentina Colcelli & David E. Zammit

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FOREWORD

The present work is one of the outcomes of the Jean Monnet Project "Status within European Union Law"- EuroStatus, funded by the EACEA (Education, Audiovisual and Culture Executive Agency) in the context of the Jean Monnet — Life Long Learning Programme of the European Union.

The idea of the Project comes from the scientific cooperation between the Università degli Studi di Perugia, University of Regensburg, Tecnológico de Monterrey, De Montfort University, Alma Mater Studiorum – Università di Bologna, Universidad de Alcalá de Henares, Consiglio Nazionale delle Ricerche, Faculty of Law Osijek, Universidad de Valencia, Università degli Studi di Torino and University of Malta.

The aim of the project is to investigate, how the individual status of European citizens is being profoundly conditioned by contemporary EU law. The concept of individual legal status finds its origins in Roman law, and remains an important feature of modern legal systems. EU law is providing new criteria which may be employed for defining the significance and contours of individual legal status. The process of EU integration has been accompanied by structural and economic changes, which have influenced the individual's legal status in distinct and varying ways. In order to enhance the functioning of its internal market, certain legal statuses (such as those of worker, producer, consumer etc.), have been foregrounded by the EU, while at the same time EU law has greatly modified them. EU recognition of particular individual rights is contributing to define and re-define the legal status of the person in light of the process of European integration. The attention paid to individual status and to the relations between private actors within the EU legal order is crucial for understanding the development of EU law.

The book summarized scientific results held in Malta during the Conference titled "European dimensions of Individual Economic Status. Market Economies, Fundamental Rights, and Private Law".

In the first chapter, key aspects of EU statuses are introduced. Valentina Colcelli underlines how European Union has introduced or amended laws on the status of individuals as defined by their activities and relationships with other individuals. EU law has a clear impact on an individual's traditional familial status (e.g., parent/child, workers' family members,

etc.), but it also has created new types of status connected with economic rules, market organisation, and free circulation (e.g., status of consumers). The EU also gives new dignity to non-traditional status (i.e., same-sex partners, common law spouses); individuals with non-traditional status are regarded as legal family members in some member states, such as Italy. Yet the EU legal system currently does not incorporate a composite reflection on how its laws affect individuals with regard to changing traditional categories of status. This paper analyses the relations between EU institutional settings and individuals in view of the EU law integration process. It provides answers to these research questions: Has the process of EU integration changed the juridical traditional definition of individual status? Is there a new function for the legal status concept? What role has EU law played in such a function? Under EU law, is it possible to build a unified definition of the status of individuals over and above the legal systems of member states?

Calogero Pizzolo, in the second chapter, describes the fundamental right for EU citizens status related to people's free movement. The chapter deals with some developments in the scope of people's free movement and residence within the EU related to third-country nationals. It also examines the case law of the Court of Justice and its broad interpretation, in particular, of Article 20 (TFEU), whereby it guarantees an effective protection of EU citizens towards their home countries. In this context, the link between a non-EU parent and a child holder of the right in question is of primary importance. According to the case law of the Court, in the evaluation of the aforesaid link, the best interests of the child must be considered as a criterion of interpretation. A summary analysis of Directive 2004/38/CE is carried out in order to contextualise the considerations of the Court of Luxembourg. The second part of the book is devoted to analyse some specific individual situations qualified as statutes in the EU legal framework and how E.U. legislation protects human rights and individual rights.

Joaquín Sarrión Esteve considers the configuration of a constitutional procedural status for consumers in European Court of Justice case law. Although we can see consumer protection primarily as an instrument with which to develop the EU internal market, it is also a relevant instrument for defining the individual economic status of EU citizens and residents as equal players in the EU market. Firstly, we will explain our motivation and objectives of the paper. We will then explain our methodology, and we will study the EU regulation bases and the concept of consume. Finally, the chapter will analyse the relevant case law which developed the EU constitutional procedural status for EU consumers.

Lena Seglitz-Baierl studies the status of parents under the National and European Union law. EU law in particular regulates a considerable number of issues which are connected with the transnational dimension (families with parents of different EU member state nationalities or of a EU citizen and a third State national). This is of importance for the rights the resulting from EU citizenship or, in the professional field, for the exercise of the fundamental freedoms. Furthermore, profession-related issues of concern for parents come under the jurisdiction of EU law.

The aim of Tunjica Petrašević and Paula Poretti's paper is to discuss the non-contractual liability of the EU in damages for delayed EU court proceedings, with special reference to antitrust cases. First of all we will discuss the possibility of the EU incurring liability for breaches made by the EU judiciary. In the second part, we will focus on delayed EU court proceedings in antitrust cases. We will analyse relevant case law in order to draw certain conclusions. An earlier prevalent understanding of the Court of Justice (CJ) was that it was possible to ask for a reparation of damages in appellate procedure before the CJ against the judgment of a lower court – the General Court (GC). The current position adopted by the CJ is that such a request involves an independent action and it is necessary to initiate an independent "fresh" action in damages. According to Art. 256, TFEU the competent court for the actions of individuals is the GC. An unusual situation in which the GC decides in favour of an action against itself can certainly trigger suspicion regarding whether the requirements of impartiality and independence are met in such cases. In the concluding remarks we will therefore try to critically evaluate the newly established approach of the CJ.

David Edward Zammit underlines just like E.U. legislation, the European framework for protecting human rights via the European Convention on Human Rights and the European Court of Human Rights in Strasbourg is meant to accommodate diversity while promoting convergence between the legal systems of ratifying states. Yet, as regards proceedings alleging a breach of Article 6 rights due to excessive delays in legal proceedings, it seems that the decisions of the Strasbourg Court are failing to achieve any meaningful convergence between national remedial practices for such grievances. Over 5,331 violations based on the length of proceedings, out of a total of 17,754 rulings finding a violation, have been handed down since 1959, and there is no other area of human rights law where the Strasbourg Court has given such unequivocal and clear direction to national courts. Yet, the stream of complaints being filed directly before the Court continues to flow unabated, and this notwithstanding that it is meant to operate no more than a subsidiary mechanism to redress new points of law which exceptionally arise, and in regard to which its multinational

expertise is required. In this paper we seek to investigate why the response of certain national systems, primarily Malta and Italy, to the direction of the Court appears to be so conservative and ineffectual. To what extent can the response of the Maltese legal system be attributed to inadequate positive legislation and to what extent does it reflect a compartmentalised legal culture rooted in its hybrid legal tradition? What parallels can be drawn to the legal system of Italy, which faces the same problems, and what approaches might break the vicious circle which inhibits effective harmonisation of remedies?

LEGAL STATUS OF THE INDIVIDUAL IN THE PROCESS OF EUROPEAN INTEGRATION

Valentina Colcelli*

1. Aim of the Paper

Why a study on institute like status? There are two empirical reasons. First, although the expression of individual legal status, starting from Roman law, still survives in the law and within juridical domains, its meaning is still vague. It would be difficult to investigate whether the status concept predates modern societies or whether it only reflects a simplification of reality, prepared by jurists and legal scholars. In any case, although the concept survives, it has changed over time, reflected by references in the law and the social identification of groups[1]. The EU legal system now offers new ways to regard individual legal status. Regardless of changes over time and in the context of different legal traditions, several concepts of individual legal status have elements in common, such as the description of people's group in relationship with the National Institutions and other private and public persons.

Second, the EU Court of Justice has used the phrase "fundamental status" in regard to citizens and others. (See ECJ 20.09.2011, C-184/99, Grzelczk; ECJ 17.09.2002, C-413/99, Baumbast and R, Racc., I-7091, p. 82.) And the Court of Justice has used the phrase "individual legal status". (See C-256/11, 15.11.2011; C-162/09, 7.10.2010; C-34/09, 8.03.2011; C-371/102, 9.11.2011;, C-329/11,6.12.2011; C-277/10, 9.02.2012; C-149/10,16.09.2010; C-325/09, 21.07.2011; C-177/10,8.09.2011; C-296/09, 9.12.2010; C-104/09,30.09.2010: C-516/09, 10.03. 2011.)

Selection of an individual's status by the EU legal system is not the same as the categorization of persons in Europe's historical past, but it does have its roots there (see § 6).

The EU Court of Justice has identified the existence of the community legal system, through the direct recognition of individual rights by the European Community Treaties. Primarily concerned with economic actors

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1 A. CICU,(1965),'Il concetto di status'. Scritti minori di Antonio Cicu, vol. 1, I, Milano, 181.

and the free market, this recognition now extends to many other aspects of citizens' lives; legal provisions regulate matters that have an impact on work, circulation, markets, family law, the status of children, and the status of individuals overall.

2. Process of European Integration and Individual Legal Status

The process of European integration has been accompanied by structural and economic changes that have influenced individuals' legal status in different ways. This paper aims to analyse how the individual status of European citizens—and of third-country nationals within the EU—are affected by current EU law. Traditional legal status, embedded in member states' laws, (e.g., status of workers, citizens, immigrants, etc.) has been altered with the establishment of new definitions of status, for example regarding family members different from the traditional notions of mononuclear and heterosexual families.

The EU Court of Justice has established a legal system that directly recognizes individual rights. Primarily concerned with economic actors and the free market, it now extends into many aspects of citizens' lives, having enacted provisions that regulate legal matters regarding families, children, and individuals generally. Protection of individual rights both nationally and within the EU courts is the best means of EU integration. To guarantee the existence of the EU legal system, the court does not rely on member states but attributes subjectivity to individuals instead. Thus, within the law and the market system, the EU has postulated some aspects of legal status (including for workers and producers) and at the same time has widely modified them.

In light of the European process of integration, the recognition of individual rights under the EU is redrawing the legal status of individuals.

Some scholars note that individual rights have often been situational and temporal in character,[2] identified selectively by juridical legal systems[3]. However, individuals' legal status should in fact be a permanent condition. It is able to organize individual rights and duties like a parameter (or better justification) for multiplex events regarding the individual's life and private and public individual activities. Thus, attention to the individual's status and the network of private actors within the EU legal order

[2] P. Rescigno, (1973) Situazione e status nell'esperienza del diritto. Riv. Di dir. Civ., L, 209.

[3] A. Palazzo, (2003) 'Interesse legittimi e tutela dei diritti del privato'. Aa. Vv., Nuove forme di tutela delle situazioni giuridiche soggettive, Atti della Tavola rotonda in memoria di Lorenzo Migliorini (Perugia, 7 dicembre 2001), Torino, 23.

that governs their relations is crucial to understanding the development of the EU legal system.

EU rules take into account the typology of the persons addressed and classify them by specific rules[4] according to economic affairs. Under EU law individuals are defined by virtue of their activities or status, and they are regarded as being of direct interest to EU law in two ways:

a) without reference to any other connection, they may regarded with any other specific individual (as concerns the requirement of a certain activity or status, their activities might have involved, for example, exercising a right of free movement as a worker, or as a student or freedom to provide, or (indeed receive) a service or freedom of establishment). Or they may have the status of being retired or otherwise enjoying rights under community law by the fact that they have sufficient resources to avoid becoming a burden on the social assistance system[5].

b) They may benefit in some measure from EU law because of the relationship they enjoy with another person, e.g., a family member. Such persons may be said to enjoy "derived" rights, not necessarily because the rights they enjoy are conferred any less directly by the EU legal system, but rather because the interest that EU law has in conferring rights upon them derives from the relationship that these individuals enjoy with another person, whose benefit is the main interest of EU law.

Thus, EU law affects individuals' "traditional" legal status (i.e., as a parent or child, worker's family member, partner, or wife/husband), and it also creates a new individual legal status connected with economic rules, market organisation, and free circulation (e.g., as a consumer, producer, family member, etc.). Also, beginning with the European Community, and continuing today with the EU, new dignity is given to individuals' "secret" status (as defined by Alpa[6]), such as individuals who are gay, common law husbands or wives, or common law mothers. EU law promotes their dignity by removing the "secret" status and recognizing them as family members.

The EU legislator introduces or amends laws ordering them on the Individual's Legal Status of whom the law's addressed to, even though.

4 M. A. Livi, F. Macario,(1996) 'Profili generali'. I soggetti. Diritto privato europeo, (Edit by) N. Lipari, Padova, 113.

5 G. Barrett, (2003), Family matters: European community law and third-country family members, Common Market Law Review, 40, 369–421.

6 G. Alpa (1993),' Status e capacità', La terza, Roma_Bari, 37.

However, it is very common to think about the EU law in an economic manner[7], but on the contrary the person is the centre of the EU action, on the contrary. And in any case, individuals are the first addressee of EU rules.

But at the moment the European legal system does not have a composite reflection on how EU law affects individuals and how it is able to change the traditional categories of individual status. And in any case, for member states' legal systems it is now impossible to analyse and regulate the status of individuals and citizens without taking into consideration the EU rules that have direct or indirect effects on the legal status of the person.

Thus, this paper implements an analysis of the relations between EU institutional settings and individuals, in view of the European law integration process. In particular, it provides answers to the following questions: Has the process of European integration changed the juridical traditional definition of individual status? Is there a new function for the legal status concept? What role has EU law played in such a function? Under EU law, is it possible to build a unified definition of the status of individuals over and above the legal systems of member states? And also, is the identification of the individual's status under the EU legal system, and the increased numbers of these individuals, synonymous with new privileges? Or do these things reflect only formal equality? Is the selection of the individual's status by the EU legal system and their increased numbers going back to the past?

The answer is "no", because the selection of the individual's status by the EU legal system is not the same as the categorization of persons in Europe's historical past, but it does have its roots there. What is *not* conferred by the selection of the individual's status by the EU legal system? As explained below, it does not confer formal equality, nor is it synonymous with new privileges, nor is it an instrument only for formal equality (as in the legal systems built after the French Revolution) and synonymous with new privileges.

3. Fundamental Status in EU, Citizenship

According to the freedom of circulation, the identification of individuals' legal status is regarded as being of direct interest to European Union law. There is a direct relationship between the right of free movement and individuals' legal status. Free movement of citizens means the possibil-

[7] A. Blair (2005), 'European Union since 1945', Longman Pearson, Harlow.

ity of seeking a job in another country, working in that country without special work permission, living there not only for that purpose, and remaining even after the end of employment. Furthermore, such workers enjoy treatment equal to national workers in access to employment, in working conditions, and in all other social and tax advantages that may help with integration in the host country.

But the free movement of workers as now guaranteed also to EU citizens also means the right of residence, social advantages, the right to stipulate contracts (not only work contracts), and the extension of certain rights to workers' family members.

For these reasons, free movement—not only of workers but now citizens—has a direct and indirect effect on the legal status of individuals, on national family law, on contracts law (including discrimination on contracts different from employment contracts, such as sales, rent contracts, etc.), and on respect for fundamental social rights. Thus, the regulation of rights usually connected with the status of a person typically engraves deeply on the social position of that person.

Within the domain of EU law, citizenship seems to have the same elements for a jointly fundamental status.

The general condition of being a worker or self-employed grants some EU rights under treaty articles. These depend on certain situations being fulfilled. Freedoms under treaties, as well as under secondary legislation, include specific provisions against discrimination. These appear as a focused structure of EU rights, distinct from the fundamental individual legal status of citizenship. In addition, and as mentioned above, workers or self-employed persons who are lawful residents in other member states may still retain their basic status as EU citizens. Of significant relevance to this status is the concept of "fundamental status" as introduced by the EU Court of the Justice. (See C-413/99 - Baumbast and R. v Secretary of State for the Home Department, Case C-413/99, Reports of Cases 2002 I-07091; Case C 503/09, Lucy Stewart v. Secretary of State for Work and Pensions, 21 July 2011.)

Of course, EU citizenship is undoubtedly connected with all the conditions characterizing status of citizenship under national law, and citizenship of the Union, established by Article 17 EC, is not intended to extend the scope of "*ratione materiae*" (also known as subject-matter jurisdiction) to include internal situations that have no link with community law[8]. Thus,

[8] Case C-148/02 Carlos Garcia Avello v Etat belge[2003] ECR I-1 1613; Joined Cases

"fundamental status" cannot signify some usurpation of member states' citizenship, but the national citizenship could represent a limitation on the freedoms established by the treaties incorporated in the notion of EU citizenship.

This paper does not take into consideration the problem of the "duties" of EU citizenship as referenced by 20 TFEU ex art. 17 TEC. Many believe that duties should not be at the essence of EU citizenship, because EU citizenship is commonly associated with the EU rights immediately based on the treaties. The topic is controversial, and in any case the approach of this paper is more connected with the counterpoint to the rights that the ECJ has held regarding Articles 17 and 18[9].

In any case, EU citizenship is explicitly not meant to replace member states' citizenship, but is in accumulation thereto[10]. In the case of Baumbast, which established EU citizenship as a fundamental status, the status is "enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality". The case also notes that Article 21(1) TFEU (formerly 18(1) TEC) is directly effective, that is, it confers on individuals' rights that are enforceable before national courts.

ECJ has consistently held that EU citizenship is of no relevance in just internal situations[11], but remarking the above reflection on the non-discrimination as main aims of the EU as an instrument right to building a "European Union welfare state" ex art. 2 and 3 TFEU.

Discrimination founded on member states' citizenship is what EU law (beginning with the European Community) intends to prohibit. If national citizenship becomes grounds for discrimination, such a circumstance diverges from the aims of the EU and the treaties. As such, national citizenship must fall away, in favour of the more egalitarian EU citizenship. Union citizenship is fundamental in the sense that it is a safety net, should national citizenship lead to erroneous results. See for instance the ECJ approach.

As mentioned above, the EU Court of Justice has in many instances referenced "status." We propose that in these examples of case law the ECJ expressions of status mean eliminating discrimination. In 200/02 Chen (2004), the ECJ threw out as unmeritorious the UK's argument that a baby

C-64/96 and C-65/96 Uecker and Jacquet [1997] ECR I-3171, paragraph 23.

9 Case C-413/99 Baumbast and R, [2002] ECR I-7091

10 Article 17(1) TEC

11 Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 31, Baumbast e R, cited.

could not avail herself of EU citizenship because the resources that would satisfy the requirements of Article 7(1) (b) of the Directive belonged to her mother. The court in this case took into account a realistic appreciation of a factual situation in order to eliminate discrimination.

This type of reconsideration, although high, does not spill over into internal situations. The consideration above could be extended to the question of the surname of the child (Case C-148/02, Carlos Garcia Avello v. Etat Belge)[12], because according to EU law regarding the free circulation of citizens, the status of the person circulates with the person himself/herself. For instance, it could happen that if a member state's legal system permits the legal recognition of a child by a same-sex couple, that legal recognition must be realised in a member state that does not have the same permissive legislation. Thus, this paper shows that EU law and EU legal systems have an indirect influence on the "pedocentric"[13] relationship between parents and children; even though this area of rules is not part of the EU harmonization process, it extends the analysis to the relevance or irrelevance of the sexual orientation of the parent and in consideration of the children's rights.

By "fundamental status", the EJC has revealed itself to be concerned with discrimination as a general principle of EU law. It has, consequently, engaged an expansive approach to the direct applicability of Articles 12, 20 TFEU and 21TFEU. Recourse to EU nationality as a fundamental state, thus, is not a different way of saying that EU citizenship has enriched internal citizenship in an anti-discriminatory manner.

The opinion of Advocate General La Pergola, delivered on 1 July 1997 (Maria Martinez Sala v Freistaat Bayern), is worth citing at length:

> *(20) The prohibition of discrimination on grounds of nationality is laid down in the Treaty and interpreted by the Court as a general principle. It is a principle which, potentially, applies throughout the area of application of the Treaty, although it applies "without prejudice to" and therefore through particular provisions laid down for putting it into effect in one or another sector of the Community legal order: for example, the free movement of workers and the freedom to provide services or the right of establishment. The creation of Union citizenship unquestionably affects the scope of the Treaty, and it does so in two*

12 Case C-148/02 Carlos Garcia Avello v Etat Belge, cited.

13 R. Cippitani (2013), 'Riforma dello status e fonti comunitarie', R. Cippiatni, S.Stefanelli (Edit by) La Parificazione degli status di filiazione, Iseg srl. Roma–Perigia_Mexico, 119.

ways. First of all, a new status has been conferred on the individual, a new individual legal standing in addition to that already provided for, so that nationality as a discriminatory factor ceases to be relevant or, more accurately, is prohibited. Secondly, Article 8a of the Treaty attaches to the legal status of Union citizen the right to move to and reside in any Member State. If we were to follow the reasoning adopted by the Governments represented at the hearing, then despite its explicit wording, Article 8a would not afford Union citizens any new right of movement or residence. In the present case, however, it is not necessary to examine the foundation of that view. If - as in this case - a Community citizen is in any event granted the right to reside in a Member State other than his Member State of origin, his right not to be discriminated against in relation to nationals of the host State continues to exist for as long as he is resident there: even if the person concerned is unable to rely on the directive on the right of residence, that right derives directly and autonomously from the primary rule of Article 8, which in the application of the Treaty is relevant in conferring on the person concerned the status of Union citizen. That individual status will always and in any circumstances be retained by the nationals of any Member State: consequently, in this case, it does not matter whether leaving to reside in the host State was derived from the directive or from the domestic law of the Member State concerned.[14]

Many EJC judgments take this direction. In this sense also, Lucy Stewart v. Secretary of State for Work and Pensions[15] clearly explicated similar thoughts:

(80) The status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to receive, as regards the material scope of the Treaty, the same treatment in law irrespective of their nationality, subject to such exceptions as are provided for in that regard[16].

(81) Situations falling within the material scope of EU law include those involving the exercise of the fundamental freedoms guaranteed by the Treaties, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article

[14] Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 31; D'Hoop, paragraph 28; and Case C-544/07 Rüffler[2009] ECR I-3389, paragraph 62

[15] Case C-503/09, Lucy Stewart v. Secretary of State for Work and Pensions, 21 July 2011

[16] Case Grzelczyk cited, paragraph 33; Case D'Hoop cited, paragraph 29; and Rüffler, cited paragraph 63.

21TFEU[17].

(82) In the case of the main proceedings, it is common ground that Ms Stewart has, in her capacity as a citizen of the Union, exercised her freedom to move and to stay in a Member State other than her Member State of origin.

(83) In as much as a citizen of the Union must be granted, in all Member States, the same treatment in law as that accorded to nationals of those Member States who find themselves in the same situation, it would be incompatible with the right to freedom of movement were citizens to receive, in the Member State of which they are nationals, treatment less favourable than that which they would enjoy if they had not availed themselves of the opportunities offered by the Treaty in relation to freedom of movement[18].

The novelty of this approach, starting with the reflection over the notion of "citizen as fundamental status", is that it extends not only to workers and job seekers and the other classifications of people created by the other substantive treaty rights. The corpus of European Union law actually incorporates a general principle of anti-discrimination within EU law.

The nature of the court's reasoning in cases like Martinez Sala and Trojani shows the way EU citizenship has been used to further buttress protection in community law against discrimination based on nationality.

This is also reflected in the way the court has policed the restrictions that might legitimately be placed on the exercise of citizenship rights. Directive 2004/38 codified much of the court's case law and earlier residency directives.

Starting from the analysis of the reality of domestic laws—thinking of Spanish, Portuguese, Belgian, Dutch, Swedish, Norwegian, and Icelandic examples—and from the respect of the fundamental rights of the person, EU law affects the traditional status of parents, children, workers' family members, partners, wives, and husbands. Decisions of the ECJ also reflect the fact that the protection of rights of family members is not based on the formal unity of the family, but on the protection of vulnerable people in need of solidarity, bearing duties and responsibilities of the holders of family status.

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17 See *Grzelczyk*, paragraph 33; *D'Hoop*, paragraph 29; and *Rüffler*, paragraph 63 and the case-law cited.

18 Case D'Hoop cited, paragraph 30, and C-224/02 Pusa [2004] ECR I-5763, paragraphs 18; in this direction also C-184/99, Grzelczk, cited.

The right of free circulation of citizens also has effects in relation to parental responsibility, the presumption of paternity, and declaratory actions and disownment of paternity. Many aspects of children's lives are, however, not properly within the competence of the EU, but the free market has generated unwanted side effects for children. In 2000, the European Community adopted a regulation on jurisdiction, recognition, and enforcement in matrimonial matters and in matters of parental responsibility for children of both spouses (Brussels II). The regulation adopted by the EU in 2003 (Brussels II bis) extended the scope of Brussels II to all decisions on parental responsibility (which was an improvement on Brussels II) and included provisions on jurisdiction and the return of the child in cases of child abduction. These regulations have had not only procedural effects but also substantial effects, for example the notion of parental responsibility.

4. EU Citizenship as Fundamental Status: New Way for a EU Social Model?

According to the above consideration, freedom of movement and individual status can be separated from the condition that accompanies one's pre-border crossing status and his/her settlement in another member state. The analysis will be done taking EU jurisprudence strongly into account:

> *(32) According to settled case-law, a benefit may be regarded as a social security benefit as long as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71*[19].
>
> *(35) With regard to determining the precise nature of the benefit at issue in the main proceedings, it follows from the Court's settled case-law that the required EU law be applied uniformly implies that the concepts to which that law refers should not vary according to the particular features of each system of national law but rest upon objective criteria defined in a context specific to EU law. In accordance with that principle, the concepts of sickness and invalidity benefits in Article 4(1) (a) and (b) of Regulation No 1408/71 are to be determined, for the purpose of applying the regulation, not according to the type of national legislation containing the provisions giving those benefits, but in accordance with*

[19] Case C-286/03 Hosse [2006] ECR I-1771, paragraph 37; Joined Cases C-396/05, C-419/05 and C-450/05 Habelt and Others [2007] ECR I-11895, paragraph 63; and Case C-228/07 Petersen [2008] ECR I-6989, paragraph 19.

EU rules which define what those benefits shall consist of[20].

(36) In that regard, in order to distinguish between different categories of social security benefit, the risk covered by each benefit must also be taken into consideration[21] *(Case C 503/09, Lucy Stewart v. Secretary of State for Work and Pensions, 21 July 2011)*

Taking into account legislation at the secondary level, the preamble to Council Regulation 1612/68 (now Directive 2004/38) explicitly refers to "the fundamental right of workers to improve their standard of living which must be exercised in freedom and dignity"[22].

"Social" regulation of private law[23] is correlated with distributive justice and to the insufficient resources of people who are excluded from acceding to essential services, the greater bargaining power of the service provider, or the inadequate financial and educational endowment of consumers to best measure their preferences. In the same area of the market, public ownership models based on tax-financed subsidies have usually been superseded by privatized models[24], in which the contractor may be contractually bound by a universal service obligation or at the least an obligation to ensure that vulnerable groups may enjoy the service at a lower tariff[25].

Instruments of European private law may change the regulatory approach to the markets (both the product market and the labour market)[26]. For instance, in the case of the labour market, EU countries differ to a considerable degree in the way they regulate these markets (e.g., OECD, 1994, 2004). While common law countries depend more on markets and contracts, civil law countries depend more on regulation.

This area of analysis has a strong relationship with workers' right of

20 Case 69/79 Jordens-Vosters [1980] ECR 75, paragraph 6.

21 Case C-406/04 De Cuyper [2006] ECR I-6947, paragraph 27.

22 Dora Kostakopoulou, (2014), 'European Union Citizenship Rights and Duties: Civil, Political and Social', Forthcoming in E. Isin and P. Neyers (eds.), Global Handbook of Citizenship Studies (London: Routledge, Forthcoming, 2014)

23 C. JOERGES, E.U. PETERSMANN and Edited, (2006). 'Constitutionalism, Multilevel Trade Governance and Social Regulation' (Studies in International Trade Edited by Law, 9), Oxford.

24 R. LA PORTA, F. LOPEZ-DE-SILANES and R. VISHNY, (1998), Law and finance. J. Political Economy, 106: 1113-1155.

25 F. Cafaggi, , H.M. Watt, (2009). 'The Regulatory Function of European Private Law', Elgar, Cheltenham, Northampton

26 V. Colcelli, (2013), 'Private law instruments as way of EU regional integration', Mario i. Álvarez Ledesma y Roberto Cippitani (Coord.), Derechos Individuales e IntegracIón regIonal (antología), Roma – Perugia – México, 2013,575-597.

free movement, typical of EU individual rights. This right has existed since the foundation of the European Community in 1957. Today it is part of the more general right to free movement of persons, one of the fundamental freedoms guaranteed by European law to EU citizens.

For the countries that joined the EU on 1 May 2004 (the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia) and on 1 January 2007 (Bulgaria and Romania), the right of free movement of workers may be restricted during a transitional period, with a maximum of seven years after accession. For the first two years following accession, access to labour markets of the EU incumbent member states depends on the countries' national laws and policies (in particular Denmark, Italy, France, the United Kingdom, the Netherlands, Spain, Portugal, and Ireland). Three member states—Germany, Austria, and the United Kingdom—continued to apply national measures on labour market access. These national measures were irrevocably ended on 30 April 2011 at the latest. Free movement of workers, as guaranteed to EU citizens, means the possibility of job searching in another country, of working there without any need of a work permit, of living there for that purpose, of remaining there even after the employment has finished, and of enjoying treatment equal to national workers in the access to employment, in working conditions, and in all other social and tax advantages that may help integration in the host country.

But the free movement of workers also means "right of residence", social advantages, the right to stipulate contracts (not only work contracts), and the extension of certain rights also to workers' family members[27]. Thus, the free movement right of workers has direct and indirect effects—on the status of persons and respect for fundamental and social rights, and also on national family law, contracts law, and discrimination on contracts other than employment contracts (i.e., sales, rent contracts, etc.).

Therefore, the regulation of the rights usually connected with the status of person typically engraves deeply on the social position of that person[28].

The Court sought to shelter the various aspects of workers' lives from discrimination on the grounds of nationality and to promote their integration into the fabric of the host society by upholding family reunifi-

[27] "Free movement of workers – achieving the full benefits and potential" (COM (2002)694.

[28] The Free Movement of Workers in the Countries of the European Economic Community, Bull. EC 6/61, pp. 5-10, p. 6; European Council (1968) Regulation 1612/68 on Free Movement of Workers OJ Special Edition 475, OJ L257/2.

cation rights, granting them the same tax and social advantages that nationals of the host Member State enjoy and protecting them from differential conditions of employment and from dismissal. It also ensured that their children and their spouses had access to educational opportunities, housing and trade union participation. In other words, both secondary legislation and case law sought to shelter their whole life, that is, both its economic and social dimensions, from the disadvantages that accompanied, and continue to accompany, 'alienage'. True, one might argue here that this protective layer of legislation had one objective only, namely, to eliminate restrictions in the exercise of free movement rights in order to promote the single market ideal and guarantee economic productivity. Yet, this argument fails to capture the complexity of free movement in the European Union since it essentially disentangles it from its context and its socio-political aspects[29].

For the period of three months[30], and for five years of residence, the presence of individuals within other member states produces conflict for a number of claims: a) states' right to maintain the integrity of their welfare systems; b) the right to shelter states from the claims of "outsider insiders"; c) claims to equal treatment under EU citizenship law; and d) situations that have exceeded the liberalising trend of free market ideology. It is easy to see that judicial entities may not necessarily guaranty these individuals' rights. Within a particular EU country of destination, EU citizenship alone is inadequate for complete social progress in regard to rights and citizenship.

Possible social citizenship duties that might find their way into the TFEU's provisions on EU citizenship in the future are: a) a duty addressed to both the Member States and the Union to promote the equal standing of all citizens in the EU by taking all possible measures to promote labour market participation and to fight poverty, homelessness and social exclusion; b) a duty on the part of the Member States and the Union to promote inclusive access to the resources, rights and opportunities needed for participation in the democratic life of the Union; c) an institutional equality duty applying to all levels of policy making and a horizontal (i.e., citizen) duty of non-discrimination on any of the prohibited grounds (Articles 18 and 19 TFEU) and d) a solidarity duty[31].

[29] D. KOSTAKOPOULOU, 'European Union Citizenship Rights and Duties: Civil, Political and Social', Forthcoming, E. Isin and P. Neyers (eds.), Global Handbook of Citizenship Studies (London: Routledge, Forthcoming, 2014)

[30] The residence of Member states citizen is unqualified during the first three months.

[31] D. KOSTAKOPOULOU, (2014) 'European Union Citizenship Rights and Duties: Civil,

In any case, the EU law, as interpreted by the Court of Justice, recognises the relevance—in the field of social security, for example—of international agreements that confer on citizens of a member state more extensive rights than those deriving from community provisions, such as those contained, for example, in Regulation (EEC) No 1408/71. The individual concerned may not be denied the rights provided for by the more favourable provisions of such international agreements[32]. The same applies in this case to the European Convention on Social and Medical Assistance, signed in Paris on 11 December 1953, of which Germany is a signatory. The right not to be expelled, as laid down therein, of necessity entails the right to reside in the host state. This therefore constitutes a legal ground justifying the presence of the plaintiff in Germany, even for community law purposes. The considerations above lead to a number of questions: What are the consequences of the freedom of movement on the levels of well-being of individuals and on the sustainability of national welfare states in the scenario of full implementation of the EU citizenship status? To what extent would regional migration flows be driven by fiscal competition? Would more generous welfare state contexts attract low-income immigrants in search of stronger protection? How will this reverberate on inequality and growth of the origin and destination regions? These questions are difficult to answer without an economic formation. The problem is that when the EU Court of Justice or EU secondary legislation takes into account some effect of the word "status", these cases do not reflect neutrality or indifference.

5. What the Selection of the Individual's Status by the EU Legal System Is Not

The topic of individual legal status has a long history, beginning with ancient Rome and revisited in the Middle Ages and again at the time of the French Revolution[33]. The traditional relationship among individual legal status, privileges and discrimination could strengthen a common populist approach to the European Union politics through.

The legal status of individuals in the EU legal system could be defined as a public and personal condition from which comes rights and duties;

Political and Social', citd.

32 Case C-227/89 Ludwig Rönfeldt v Bundesanstalt für Angestellte [1991] ECR I-323 and Case C-475/93 Jean-Louis Thévenon and Stadt Speyer-Sozialamt v Landesversicherungsanstalt Rheinland-Pfalz [1995] ECR I-3813)

33 L. Viola,(1999) 'Lo stato giuridico della persona in prospettiva storica.' G. Lauriola (Edit by) Scienza e filosofia della persona in Duns Scoto, Alberobello, AGA, 25-45.

it also justifies many activities and facts regarding the individual's life[34]. But in the EU, the status is not an instrument for formal equality (as in the legal systems built after the French Revolution), nor is it synonymous with new privileges.

The EU concept of individual legal status does not conform to the academic conception of "organic", a theory born in Italy in the second half of the nineteenth century and starting from Hegel's organic theory of the state. For this theory the individual legal status exits only in reason the affiliation of the main social and collective groups: family and citizens[35].

In the EU legal system, it is relevant the concept of family and citizens. This evidence could help to explain what the individual legal status is in the European legal system. It is not for three reasons: first of all for theory the individual connected with market regulation are not individual legal status. To explain these conditions the theory above mentioned does not fit. It is possible to say these are not preliminary conditions for the EU law application, and we do not care about them.

The organic theory of individual legal status has to be related to the supranational dimension, not to a national approach. According to the European Union legal system is way to go over the above mentioned theory, that is not able to explain the multilevel complexity of the EU reality. First of all, the main concept used by the organic theory of individual legal status is the family as a collective group of which one is a member. The family collective group is of large relevance in the EU legal system also. However, this system poses the problem of identifying what is considered to be the genotypic form of family we have to refer to[36]. The EU legal system relates to member state legal systems, and the concept of the family and family members is one preliminary condition that applies to free movement (see Dir. n.34/1998). To assign this condition, the EU legal system compares the traditional notion of family and familial relationships grounded in heterosexual marriage to new formulations of marriage not common to every member state. Thus, a new modelling of family and family members in the EU legal system is increasing. Meanwhile, in internal legal systems the family as a centre of interest—different and expanded compared to the traditional family—is much more vague[37].

34 P. Rescigno, (1973) Situazione e status nell'esperienza del diritto. Riv. Di dir. Civ., L, 209.

35 A. Cicu, (1965) 'Il concetto di status. Scritti minori di Antonio Cicu', vol. 1, I, Milano, Giuffrè, 181.

36 R. Sacco, 'Introduzione al diritto comparato', Utet, Torino, 1980, 39-40.

37 L. Lemmi,(1994) 'Una nota sul concetto di status'. P. Cendon (edit by), Scritti in onore di Rodolfo Sacco, La comparazione giuridica alle soglie del 3°millennio, II, Milano,

The other individual legal status present in the "Organic theory" is that of the citizen. If the reference to the family as a collective group affiliation is no longer possible for lack of a unified definition.

And about the citizen as used in the "Organic theory" a problems exist: The concept of EU citizenship was born only after 1992. Before 1992, the main preliminary condition for applying community law and the right to free movement was the status of the worker, not the citizen. The status of worker was derived from a formal or informal contract, as discussed by Henry Maine[38], underlining that this condition could be limited during human life.

To describe individual legal status in today's world, and especially in the EU legal system, by reference to the contract alone is insufficient. Nevertheless, it is important to attempt an explanation of this status, because it is not possible to extend the concept used by jurists, courts, and national or EU legislators to every personal situation. Doing so could be dangerous for individual freedom and for democracy. In the next section, I will try to explain how an expansion of individual legal status can become so high that its meaning disappears and it loses relevance without any consequence. In fact, such an expansion will generate a new underhanded form of discrimination and privileges under the veil of this irrelevance.

6. Individual Legal Status in the EU: Linking Voluntary Adhesion and "Functionalization to the EU Goal"

To answer what individual legal status is in the EU legal system and in the ECJ (EU citizenship is the fundamental status of the EU individual, by Articles 17-18 of the TEU), it is important to remember that in the EU legal system, the selection of relevant interests in horizontal legal relationships arises for the same reason and in the same way as the qualification of rights in vertical legal relationships, that is, to consolidate the EU legal system.

EU vertical legal relationships qualifies the network of private actors and the relations among them within the EU legal order. Familiar private law instruments such as tort or contract now appear as only a small part of many possible tools harnessed with the aim of obtaining allocative

663, for the author if the status worth to designate what we now refer to as a person's ability (and that of the juridical act), then it is a concept that has lost its reason for being in the right now, unless you keep .... life this conceptual category is only one source of uncertainty and confusion, misunderstanding and duplication.

38 H.S. MAINE, (1861), 'Ancient Law. Its Connection with the Early History of Society and its Relations to Modern Ideas, 163-165, from P. Stein, Legal Evolution. The Story of an Idea, Cambridge - New York, 1980, 85.

efficiency or distributive justice and are synthetically described as the correction of market failures.

All European Union laws regulate relationships—whether vertical or horizontal—but not generic relations. These relationships aim to pursue the *primauté* of the EU and conserve its legal system and internal market and, in horizontal relationships, to consolidate the EU legal system—initially structured by the regulation of vertical relationships.

The EU legal system also has typical civil law principles, such as the recovery of funds and contract liability, but it also the concept of individual legal status, which aims to guarantee that the economic order sought by the union is maintained.

Therefore, horizontal relationships in the EU legal system, in view of the functions assigned to legal protection, are selected and adjusted to ensure the existence and survival of the EU legal system. Relationships are aimed at conserving the legal system that was established by the treaties and which, even within the interstices of the rules, the ECJ originally encoded and continues to interpret.

The selection of the individual's status by the EU legal system is critical to its functioning and underlines the trend toward a new form of welfare state. Thus the individual's status is not synonymous with privilege in a historical manner, nor is it an instrument of formal equality as in the legal systems built after the French Revolution. *«Il principio di eguaglianza è nato (...) dalle ceneri politiche e filosofiche degli status personali di stampo feudale dell'epoca medievale e moderna, e in un rapporto di piena ed aperta contrapposizione con essi»*.

The arrival of the welfare state meant that social rules were created to protect the weak; this required recognizing and demarcating diversity and special cases, but not in a way that is discriminatory.

The evolution of society and of legal systems brings to light the need to acknowledge the individual's status, because the legal system bears responsibility for removing obstacles and applying principles of equality in a manner that is not only substantial but also based in the real world, rather than that of abstract theory.

In the EU legal system, the reference to an individual's status as an operative condition of EU law and EU individual rights confirms the public interest in overseeing this identification.

The new meaning of public interest chanced also the personal condition

for the identification of individual's status. This is the actual difficulty in formulating its real definition. In the EU legal system, the public interest is the clear priority. In Articles 2 and 3 of the TFEU, the identification of obstacles to equality is functionalized to the construction of the legal system itself. In this the definition of an individual's status is not open-ended, but delimited to preconditions regarding the operationalisation of EU law. It also is not discordant with the centrality of the person in member states' legal systems and in the EU welfare state.

As a matter of fact, the reference to the EU legal system reinforces the idea of the status as a gathering and synthesis between private law and public law, where according to the different areas there is a greater or lesser degree of self-determination of the individual within these relevant areas, as determined by the public interest. Tracing the presence of these differences is crucial in understanding the function of individual status in contemporary reality and not letting it be open to subjectivity; it tends to expand beyond the function that was intended. This understanding reinforces the idea that the concept of status is an ever-changing balance between freedom of will and freedom of movement, on the one hand, which are essentially a matter of private law, and the social objectives of the welfare state, which are expressed in terms of public law.

To realize the aim mentioned above and to avoid new privileges or discrimination, it is important to not forget Maine's reflection. According to personal conditions and the private relationship that impact on them, it does not seem existing connection between status and contract, but it is.

The distinction that Maine proposed is that persons are free to make contracts and form associations with whomever they choose, but by this self-organizing of one's own affairs, there is a shaping of free will in one's own interests. As a matter of fact, the interests that rule in such contracts and associations are not those of the parties alone. Consideration for the stability of society, or the general convenience of everyone in society, takes priority over the autonomy that might otherwise be granted to individuals in the conduct of their own affairs.

But Maine's contract has been declared to contain some generalizations. The movement from status to agreement is more in line with EU goals.

The protection of non-dominant groups within society—minorities, consumers, immigrants, non-heterosexual couples, et al., or other collective groups for which the EU has selected goals—is only possible if the collective groups agree with their selection. Individual legal status

in the EU legal system must be grounded not only in the capacity for operationalisation of public protection but also in individual awareness that this is to guarantee that the economic order sought by the Union is maintained in the light of building an EU welfare state (ex art. 2 and 3 TFEU).

Also, not part of the agreement and not within the range of relevance for ECJ jurisprudence and EU legislation are personal relationships—contractual or non-contractual partnerships among citizens and non-citizens. For instance, a limitation on the effective exercise of the right to free movement will many consequences for EU citizens' status because of their deep connections. At the moment, the exercise of free circulation is a voluntary choice, self-adhering to the preliminary conditions applicable to EU law regarding traditional and non-traditional status (i.e., status of parents/children, workers' family members, same-sex partners, common law husbands/mothers, etc.), and with new status definitions connected with economic rules, market organisation, and free circulation (for example the status of consumers).

For private persons, the other choice at the moment is voluntarily bringing a direct action, where appropriate, before the EU Court of Justice or national courts. In the EU Commission's notice of 13 February 1993 on cooperation between national courts and the commission, which concerns applying the old articles 85 and 86 EC[39], the commission explains that natural persons and enterprises are entitled access to all legal remedies provided by member states, under the same conditions that member states apply in the case of violation of domestic rules. Thus, individual legal status within the EU is strengthened when the judges apply rules that concretely conform to the objectives pursued by the European Union. The effective protection of individual rights under the EU legal system derives from the possibility of using them in actions before national courts[40]. It is for "the legal system of each Member State to determine which court has jurisdiction to hear disputes involving individual rights derived from Community law, but at the same time the Member States are responsible for ensuring that those rights are effectively protected in each case[41]."

7. Looking for a Unified Definition of EU Individuals' Legal Status

In accordance with the relevance of the concept of individual legal status under EU law, it may be possible to think about the existence of a "unified" definition of an individual's legal status above and beyond the

39 OJ C39/6, 1993.

40 C-208/90,Theresa Emmont v Minister for Social Welfare, ECR, 1991, p. I-4269.

41 C-179/84, Bozzetti v Invernizzi, , ECR, 1985, p.2317.

legal systems of member states.

The EU status is open cluster for positive or negative indifferent positions, where a person is as part of social relationships[42] relevant for EU law. Due to the free movement throughout the EU boundaries, the individual's status is postulated by the EU law for performance of itself.

Thus, reflection over the singular individual's status (worker, consumer, family member, etc.) could introduce another consequence: a new call for a joint reconstruction of individuals' status under the EU. At this time, in fact, there is an increasing demand for this (see the conclusion of general advocate Pergola[43]).

Indeed, due to the fact that the legal status of a person (i.e., wife, brother, son, daughter), whether as a citizen of the EU or a third-country national present in the EU, is a personal condition postulated on EU law and enjoying the same EU rights, it could not be considered in a different manner in the legal system of any member state.

For the member states' legal systems, it is now impossible to analyse and regulate the status of these states' persons and citizens without taking into consideration the EU rules that directly or indirectly have an effect on or address the legal status of the person.

At the moment, the European legal system does not have a composite formulation on how EU law affects the person and how it is able to change the traditional categories of individual status according to time and place, or how to examine the evidence of what EU law has actually been at a particular time.

Such a formulation could be an establishment of principles of the European law of persons. It would be able to provide coherence to the various EU legislative and case law solutions. F.i public documents shall not to be an formal obstacle to the free circulation, according to Regulation (EU) 2016/1191 of the European Parliament And Of The Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

The EU has the legal basis to define individual status (see Articles 21(2) and 114(1) TFEU), but the real problem stems from administrative

42 W. G. Friedmann, (1962) ?Some reflections on status and freedom', Essays in honour of Roscoe Pound, Indianapolis,222.

43 C-336/94 Dafeki, Racc., I_6761

obstacles. This is acknowledged in the draft regulation mentioned above: "Certain formalities for the legalisation of documents also represent an obstacle or an excessive burden. Given the possibilities offered by the use of new technologies, including digital signatures, the Union should consider abolishing all formalities for the legalisation of documents between Member States. Where appropriate, thought should be given to the possibility of creating, in the long term, authentic European documents."

A civil registry and its documentation do not have secondary importance, but keep in mind that the principle of oneness of status has to be applicable to the Act of Civil Status and not an obstacle to free circulation. As one relevant example, it is impossible in the Italia Civil Registry to register new filiation, paternity or a mother forms that is not grounded on Italian traditional legal principles.

EU law has an impact on the "traditional" legal status of individuals (i.e., parents, children, workers' family members, partners, wives/husbands), and it also creates a new individual legal status, taking into account a notion of the family and its members that is relevant for the application of Dir. 2004/38/CE. That directive defines "family member" as "(a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a [EU/EEA] Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)".

EU law and its jurisprudent relationships enter into the issues of family member care and in regard to free movement effectively govern them. But in Italy, for example, the status of registered partnerships as equivalent to marriage, in accordance with the conditions laid down in the relevant legislation of the host member state, has no relevance. The historic facts of birth, death, marriage, divorce, etc. precede their bureaucratic registration. And the bureaucratic registration cannot affect the respect of family life, and the right to marry and have a family as EU Fundamental rights. The notion of family member has particular relevance in connection with the right of asylum, expulsion of immigrants, family reunification, and other aspects, because the lives of individuals are connected with the mission of the EU legal system.

If the status is set up as a prerequisite for the enjoyment of a right of an

individual within the Union, it cannot take recourse to a principle of unique status within the EU, because the "pre-conditions" for the enjoyment of EU rights cannot change depending on where the subject is. This mixes up the principle of equality for European citizens. The notion of unified status is that which is already operational in secondary legislation and is directly related to EU officials. In this context, the application is represented, for example, by the independent concept of the family and especially parent-child relationships. On this subject, under the EU statute, for example, employees are eligible for a family allowance for dependent children as well as a pension for orphans (see Articles 1 and 2 of Annex VII to the Staff Regulations, art. 80 of the statute).

Recall that according to the Court of First Instance, the criterion for determining the condition of a dependent child is "the emotional commitment to satisfy in whole or in part the essential needs of the child, in particular with regard to housing, food, clothing, education, care and medical expenses". A divorce or custody of a child to a spouse who is not officially the child's parent does not negate the condition of the dependent child.

The principle of uniqueness would apply, therefore, to civil statutes, as well as to the status of a person as defined in the member state of origin. This is because such a status and the pre-conditions for this determination depend on the existence and enjoyment of the benefits and rights established in the EU, whether for admission and residence or for other benefits, such as pay and pensions. In Dafeki, in fact, the subject of the judgment of equivalence is an act of civil status. García Avello is likewise noteworthy: García Avello, the obligation to object recognition seems to be the status of the person (linked to the right to a name) purchase in your country of origin (paragraphs 31 and 45). "The judgments Dafeki and Garcia Avello and conclusions Niebüll delineate an obligation for the State of destination—that is, for the State of the Forum—to meet in a particular case, the clarification of status in the state of origin, without checking whether the law applied then set up status that is competent according to the conflicting rules of the State of destination."

It should be recalled how the Court of Justice established matters in the judgment in Dafeki. As stated in that judgment, in the absence of legislation to harmonize the matter, with reference to the value of the extraterritorial certificate of civil status of a country, the administration and the courts of the member state of destination or residence of citizens have an obligation to abide by the documents of civil status issued by the country of origin, even when compared to the mere recognition of the probative value of that document, as submitted, or as recognition of the

validity of the act. It is inherent to the concept of European citizenship and close to the principle freedom of movement and the freedom to acquire personal and family status in each Member State.

At the same time, non-registration does not give a formal/documental existence to the individual legal status that could be influenced, used, or presupposed for the operationalisation of EU Law or *"c'est a dire"* (clarification) of its aims.

This fact has relevant consequence for the costs of the EU and member states:

> *6.17 Its accompanying Impact Assessment (ADD 1) seeks to illustrate the scale of the problem encountered by citizens and businesses moving within the EU. Whilst acknowledging the difficulty of quantifying the number of public documents circulating between Member States and subject to some form of legalisation or equivalent administrative formality, the Commission estimates that, each year, approximately 1.4 million apostilles are issued at a cost of more than €25 million. It suggests that the costs to EU citizens and businesses of legalisation other than by apostille are likely to be in the range of €2.3 million to €4.6 million and that the production of certified copies of public documents and certified translations amounts to €75-€100 million and €100-€200 million respectively each year*[44].

The unification of individual legal status within the EU is not only a relevant problem for respecting individual rights and fundamental rights, but also for economic concerns[45].

[44] Draft Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012

[45] R. Arnold, (2013) 'Protección de los derechos fundamentales (en Europa)', Mario I. Álvarez Ledesma y Roberto Cippitani (Coord) Diccionario analíticode derechos humanose integración jurídica, Iseg, Roma-Perugia-México, 563.

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FUNDAMENTAL RIGHT FOR EU CITIZENS *STATUS*. SOME DEVELOPMENTS IN THE SCOPE OF PEOPLE'S FREE MOVEMENT AND RESIDENCE RELATED TO THIRD-COUNTRY NATIONALS

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1. From a basic economic freedom of the common market to a fundamental right of the EU citizen

The Treaty of Rome (1957), from which the European Economic Community[1] later arose, provided for the free movement of economically active people (workers) aimed at the development of the Common Market [2]. Therefore, this right has developed as an *essential axis* of an integration process based on the implementation of a Common Market within which economic actors should enjoy the freedom of movement to access and carry out (permanence) salaried or self-employment activity, provide or receive services, permanently exercise a profession, etc.

Pursuant to this aspect, *residing* in a Member State in order to carry out the aforementioned economic activities, regardless of nationality, has existed since the mid-seventies of the last century without any discretionary power in the Member States [3].

The prohibition of discrimination based on nationality, in this context and thanks to the contribution of EU case law, has become extraordinarily significant. However, the freedom we are analysing, together with the other fundamental freedoms, has primarily been considered as an *economic freedom*. This criterion, and the European integration process[4], will be left aside[5] in order to ultimately give rise to a wider and more inclusive one: a

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1 See Article 3.

2 This can be explained by the fact that the initial and distinctive objective of the current EU was purely economic: the creation of a Common Market where the free movement of workers developed into an economic freedom more closely related to that of capital, goods and services.

3 PIZZOLO, Calogero, Derecho e Integración regional, EDIAR, Buenos Aires, 2010, pp. 696-697.

4 The limiting original rules of the aforesaid Treaty of Rome relevant to non-discriminatory economic movement were reduced by the Single European Act through the notion of the internal market as a space without internal borders within which people's free movement is guaranteed, together with a subsequent right of residence.

5 Although its earliest antecedents can also be found in the formulation of certain proposals

criterion that links people's free movement, *beyond* its economic content, to the rights arising from the status of EU citizenship [6].

This *qualitative leap* arose from the Treaty on European Union (hereinafter TEU) signed in Maastricht on 7 February 1992. The free movement and residence included a wide social field (family), starting with the economic actor. Therefore, it previously was not a complete scope, that is, before 1992, it did not concern "the whole society" [7].

The Maastricht Treaty added a new second part to the former Treaty of the European Community (hereinafter TCE) under the title "Citizenship of the Union". In the words of the current Article 20.1 (Treaty on the Functioning of the European Union, hereinafter TFEU, former Article 17 TCE):

> *"Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship".*

Based on these premises, EU citizens are beneficiaries of a series of civil and political rights whereby the *right to move and reside freely* in the territory of the Member States – regardless of any work or professional grounds – has the most significant legal and practical impact. Article 21.1 (TFEU, previous Article 18.1 TCE) states:

– in the framework of the EU project that emerged during the Paris Summit of 1972 – aimed at extending the right of free movement to all nationals of the Member States, the first window in the regulation plan linked to the consideration of the aforesaid freedom as a right that was not strictly economic and was not exclusively limited to workers or to people looking for a job emerged almost twenty years later. The first inflection point occurred thanks to the three following rules: Directive 90/364/CEE of 28 June, relevant to the right of residence; Directive 90/365/CEE of 28 June, relevant to the right of residence of employee or self – employee who gave up carrying out their professional activity; and Directive 90/366/CEE of 28 June, relevant to the right of residence of students (later replaced by Directive 93/96/CEE of 29 October). The importance of these three Directives – now repealed by Directive 2004/38/CE – as decisive for the process we are following.

6 In July 2009, the Commission stated that more than 8 million EU citizens have taken advantage of their right of free movement and residence, and currently live in another Member State. The free movement of citizens "the freedom of movement of persons is one of the foundations of the EU. Consequently derogations from that principle must be interpreted strictly" (see the Communication of the Commission to the European Parliament and the Council: "On guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ", Brussels, 2 July 2009, COM(2009) 313 final, p. 3).

7 See the commentary on Article 45 in MANGAS MARTÍN, Araceli (director), Carta de los derechos fundamentales de la Unión Europea. Comentario artículo por artículo, Fundación BBVA, 1998, p. 719.

"Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".

In turn, the EU Charter of Fundamental Rights (hereinafter the Charter), which currently has "the same legal value as the Treaties" (see. Art. 6.1, TEU), states in its Article 45.1:

"Every citizen of the Union has the right to move and reside freely within the territory of the Member States".

We find ourselves, as Mangas Martín argues, approaching a *«derecho universal de todo ciudadano»* [universal right of all citizens] of the Union. The free movement and residence, *«libertad fundamental vinculada a un hecho económico y prevista en los tratados fundacionales, se transformó en una libertad política fundada en un derecho de la ciudadanía de la Unión y vinculada a este estatuto a partir de 1992»* [the fundamental freedom related to economic fact and provided for by all the foundational treaties, grew into a political freedom based on a right of EU citizenship that has been linked to this status since 1992], i.e. a right *«no solo de agentes económicos (trabajadores, prestación de servicios, establecimiento), sino de todos los nacionales de los Estados miembros»* [not only of economic actors (workers, provision of services, establishment), but of all nationals of the Member States[8]. It is a fundamental right related to the political category of EU citizenship. It emerges, as the aforementioned author also affirms, as an *«obligación de resultado»* [obligation of result]. Furthermore, it is a rule of *«aplicación directa cuyo disfrute en sí mismo no está condicionado por medidas de ejecución del Consejo o de los Estados miembros»* [direct application, whose enjoyment in itself is not dependent on a means of implementation by the Coucil or the Member States]. All conditions for its enjoyment and their eventual limits *«deben estar previstos en el Tratado de funcionamiento y en las normas de desarrollo»* [must be established by the Treaty on the Functioning of European Union][9].

The direct effect of the previous Article 18.1 (TCE) – current Article 21.1 TFEU – has been directly assumed by EU case law[10]. In the words of the Court of Justice, EU citizenship status operates *«es convertirse en el estatuto fundamental de los nacionales de los Estados miembros»*

8 *Idem*, p. 721.
9 *Idem*, p. 721.
10 Judgement of 17 September 2002, *Baumbast*, C-413/99, EU:C:2002:493, paragraph 84.

[to convert itself into a fundamental status of nationals of the Member States][11]. It is stated that the TEU does not imply that EU citizens must carry out salaried or self-employment professional activity to enjoy the rights related to citizenship. Furthermore, the Court concluded that nothing in the text of the Treaty permits EU citizens who have settled in another Member State to carry out a salaried activity to be considered as being deprived of the rights granted on the basis of EU citizenship when this activity ceases [12]. People's free movement is one of the grounds of the European Union. Therefore, all exceptions to this principle must be interpreted in written form[13].

We are dealing with a "communitisation" of the Schengen heritage[14], whose *raison d'être* is precisely addressed to the *«creación de un espacio de libre circulación entre los Estados signatarios, mediante la eliminación de los controles a las personas en sus fronteras interiores y el reforzamiento de éstos en sus fronteras exteriores»* [creation of an area of free movement between the signatory states through the removal of checks on persons at internal borders and strengthening them at its external borders][15]. What was conceived at the beginning as a freedom with essentially economic implications, exclusively recognised for the nationals of the Member States who wished to carry out work or professional activity in the territory of another Member State, has now assumed an unquestionable social dimension, as demonstrated by the fact that this freedom has been extended to the whole community of EU citizens, regardless of the reasons for their move. In any case, we should clarify that this social dimension which is now included in the free movement — and has been definitively established by the implementation of EU citizenship —coexists with the economic one[16].

The creation of EU citizenship, along with its corollary, i.e. the free movement of all its holders in the territory of all the Member States, implies a significant qualitative step forward, since it *makes this freedom*

11 Judgement of 20 September 2001, *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31.

12 Judgement of 17 September 2002, *Baumbast*, C-413/99, EU:C:2002:493, paragraph 83.

13 Judgement of 3 June 1986, i, C-139/85, EU:C:1986:223, paragraph 13, and *Jipa*, judgement of 10 July 2008, C-33/07, EU:C:2008:396, paragraph 23.

14 The countries which apply the whole Schengen Agreement represent a territory named the "Schengen area". Therefore, the Agreement allows the abolishment of checks at the internal borders between signatory States and the creation of a single external border where entry controls are carried out within the aforesaid area according to the same procedures.

15 DE SOTOMAYOR, Lucía Dans Álvarez, "La libre circulación de personas tras el Tratado de Lisboa", in *Revista del Ministerio de Trabajo e Inmigración*, Ministerio de Trabajo e Inmigración, Madrid, No. 92, 2011, p. 263.

16 *Idem*.

independent of its functional and instrumental elements (the connection with economic activity or with the implementation of the internal market) *and raises it to the category of an autonomous and own right*, which is relevant to the political status of EU citizens[17].

People's free movement, as Molina del Pozo states, has three aspects[18]: a) the free movement of non-active persons, in close connection with EU citizenship, b) the free movement of workers, both salaried or self-employed, and c) the free movement not only of the nationals of the EU Member States, but also of the nationals of third countries who intend to live or reside inside the territory of the Member States.

For its part, the TFEU devotes its Title IV to the "Free movement of persons, services and capitals". En su artículo 45.1 concretamente se dice:

"Freedom of movement for workers shall be secured within the Union". (see art 45)

The rule later states that such freedom of movement shall entail the abolition of any discrimination based on the nationality of workers of the Member States as regards employment, remuneration and other conditions of work and employment (art. 45.2). Without any prejudice to limitations based on grounds of public policy, security and public health, the free movement of workers shall include the right: a) to accept offers of employment actually made; b) to move freely within the territory of the Member States for this purpose; c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; and d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission (Art. 45.3). The rule concludes that the aforesaid provisions "shall not apply to employment in the public service" (Art. 45.4).

Article 15 of the Charter consistently states that every citizen of the Union "has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State". All nationals of third countries who are authorised to work in the territory of the Member States have the right to benefit from work conditions

17 See the conclusions of the General Advocate Dámaso Ruiz-Jarabo Colomer submitted on 20 March 2007, C 11/06 and C 12/06, EU:C:2007:174, paragraph 82.

18 See MOLINA DEL POZO, Carlos Francisco, *Derecho de la Unión Europea*, Editorial Reus S. A., Madrid, 2011, p. 328 ff.

equivalent to those of EU citizens. Article 49 expresses itself in a similar sense (TFEU).

As observed, the EU has been evolving towards a space of regional integration which has many points of convergence with the protection of human rights. The Charter, together with its interpretation by the Court of Justice, has allowed the development of the case law in the field of EU citizenship for the purpose of guaranteeing its *useful effect*. The latter has been highlighted when this has been necessary to protect the freedom of movement and residence of minors, whose right to remain on EU territory has been threatened by the fact that their parents are citizens of third countries. Therefore, the Court of Luxembourg's case law has created, under certain circumstances that we will analyse, a *link* between non-EU parents and their EU citizen children, whose condition also allows their parents to benefit from free movement and residence. In order to identify the achievements of this EU case law, it is first necessary to understand how, according to the Court of Justice, it impacts the cross-border element.

2. The Cross-Border Element

In the definition of the field of people's free movement and residence, *the cross-border element*[19] plays a very important role. The invocation of this freedom – like the other fundamental freedoms – *requires some kind of movement between the Member States*. EU law *«no se aplica a las cuestiones meramente internas. No existe pues aplicación del estatuto del ciudadano sino se ejerce el derecho a la libertad de circulación, es decir, sin movimiento transfronterizo»*[20]. [does not apply to merely internal issues. Therefore, there is no application of the status of citizenship when the right of free movement is not exercised, that is, in the absence of any

[19] We can infer from Article 21 (TFEU) that both movement and residence have an *intra-community character* because, in each Member State, its nationals have, based on its own home regulations, those of residence and movement, which are in no way subject to the limitations and conditions provided for by the Treaties. The same occurs for the prohibition of discrimination on the grounds of nationality (Article 18, TFEU) applicable in the field of application of the Treaties.

This is equally true in the field of application of the EU Charter of Fundamental Rights, whose beneficiaries are institutions and entities of both the Union and of the Member States *solely when they apply EU law* and which compels institutions to respect them in all the Community's fields of competence (Article 51 of the cited Charter). This makes it clear that the Charter creates neither new competences nor any new mission charged to the Community and the Union. Also the Charter, as EU law, will be applied only to *intra-community situations*].

[20] See ABARCA JUNCO, Ana Paloma and GÓMEZ-URRUTIA, Marina Vargas, "El Estatuto de Ciudadano de la Unión y su posible incidencia en el ámbito de aplicación del Derecho comunitario (STJUE Ruiz Zambrano)", in *Revista Electrónica de Estudios Internacionales*, No. 23, 2012, p. 11.

cross-border movement].

So, in the view of EU case law, this situation seems to absolutely *exclude* any other one which does not appear to be closely connected to the *previous crossing* of a border. As highlighted by the General Advocate in the *Ruiz Zambrano* judgement[21]:

> *«no creo que el ejercicio de derechos derivados de la ciudadanía de la Unión esté siempre inextricable y necesariamente unido a la circulación física. Actualmente, existen además situaciones de ciudadanía en los cuales el elemento de circulación real o apenas se distingue o sinceramente no existe».*

The same Advocate cited three decisions of the Court of Justice to support its statement. In the *García Avelló* case, the parents were Spanish nationals who moved to Belgium, but their children, Esmeralda and Diego (with dual Spanish and Belgian nationality and whose controversial surnames were the subject matter of the procedure), were born in Belgium and, as inferred from the report for the hearing, had never left the aforesaid State[22]. In the *Zhu y Chen* case, Catherine Zhu was born in part of the United Kingdom (Northern Ireland) and simply moved inside the territory of the United Kingdom (to England). The rules which guarantee, in such cases, Irish nationality to people who were born on the isle of Ireland (including Northern Ireland), together with good legal advice, allowed her to base a right of residence in the United Kingdom for herself and her mother, who was a Chinese national, on EU citizenship; otherwise, it would have been impossible for her, as a child, to effectively exercise her rights as an EU citizen[23]. In the *Rottmann* case, the crucial nationality (German for naturalisation, rather than his previous Austrian nationality) was acquired by Dr. Rottmann after he moved from Austria to Germany. However, the judgement does not take into account the prior movement and analyses only the effects *pro futuro* arising from the loss of his German nationality, based on which Dr. Rottmann would have become stateless [24].

In the same sense, another General Advocate had previously stated that *«no se debe circunscribir esta doctrina a las hipótesis en las que se ha circulado, pues también comprende aquellas en las que se impide o se disuade de circular, cuando los auxilios se destinan a formarse en otros Estados miembros, evidenciándose así la imprescindible conexión*

21 Conclusions of the General Advocate Eleanor Sharpston submitted on 30 September 2010, EU:C:2010:560, paragraph 77.

22 Judgement 2 October 2003, *García Avelló*, C-148/02, EU:C:2003:539.

23 Judgement 19 October 2004, *Zhu y Chen*, C-200/02, EU:C:2004:639.

24 Judgement 2 March 2010, *Rottmann*, C-135/08, EU:C:2010:104.

comunitaria para invocar el artículo 18 (TCE)»[25]. EU law *«permanece al margen de la política de los Estados sobre las ayudas para estudiar en el extranjero, pero, si deciden otorgarlas, vigila que las condiciones impuestas para disfrutarlas no limiten indebidamente la libre circulación»*[26]. In this sense, the Court of Justice stated that the aforesaid Articles 17 (TCE) and 18 (TCE),

> *«se oponen, en circunstancias como las de los litigios principales, a un requisito según el cual, para poder obtener una beca para cursar estudios en un Estado miembro que no sea el de la nacionalidad de los estudiantes que la solicitan, dichos estudios han de ser continuación de los realizados durante al menos un año en el territorio del Estado miembro de origen de los estudiantes»*[27].

In the *Ruiz Zambrano* case, the preliminary question was whether a non-EU foreign progenitor of a child who was the national of a Member State and who did not exercise the freedom of movement can invoke, for his/her benefit, EU regulations relevant to the freedom of movement[28]. The Court of Justice recognised that Directive 2004/38/CE is not an implementing one based on two considerations: on the one side, in Article 3, paragraph 1, it stated that it will apply to *«cualquier ciudadano de la Unión que se traslade a, o resida en, un Estado miembro distinto del Estado del que tenga la nacionalidad»*; on the other side, "dependent" forefathers are included within its field of material application, but not vice versa, and therefore, it would not also be applicable to this hypothesis. Therefore, the ground of the judgement can be found in his/her status as an EU citizen, which functions, as we have seen, to convert itself into a *fundamental status* of the nationals of the Member States.

The judgement recalled that Article 20 (TFEU) prohibits national means which have the effect of depriving citizens of such rights, and in this sense, it stated that decisions relevant to the denial of a residence or work permit

> *«privarían a los menores ciudadanos de la Unión del disfrute efectivo de la esencia de los derechos vinculados al estatuto de ciudadano de la Unión»*[29].

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25 See the conclusions of the General Advocate Dámaso Ruiz-Jarabo Colomer submitted on 20 March 2007, C 11/06 and C 12/06, EU:C:2007:174, paragraph 87.

26 *Idem*, paragraph 88.

27 Decision of 23 October 2007, *Rhiannon Morgan c. Bezirksregierung Köln y Iris Bucher c. Landrat des Kreises Düren*, C-11/06 y C-12/06, EU:C:2007:626.

28 Decision of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124.

29 *Idem*, paragraph 44.

In fact, the denial of a residence or a work permit in Belgium for Messrs. Ruiz Zambrano has the consequence, as pointed out by the Court, that minors would be obliged to leave the EU territory in which they are citizens. According to this orientation, as a logical consequence, the aforesaid rights linked to the status of EU citizenship were granted to both of them *without any further conditions*.

In light of the above, we have highlighted the *de facto* existence of "two kinds of citizens". One type has all the rights related to citizenship (due to the fact that he/she "moved"), and the other is only potentially a citizen ("as long as he/she does not move"). The situation is confused as, since the Treaty of Maastricht, citizenship has not in fact required any conditions other than being a national of a Member State (Art. 20, TFEU). According to the Court of Justice, in a situation such as the one in the *Ruiz Zambrano* judgement, *«no es una mera situación que quede desprotegida automáticamente del Derecho de la Unión y, en este sentido, es el estatuto de ciudadanía el que va a darle cobertura, activando además la protección comunitaria de los derechos fundamentales»*[30].

The basic problem with the aforesaid decision, as we have seen, is the application of EU law to a subject such as people's free movement, and especially, its preminence within the internal field of the Member States. The *extensive* criterion of that judgement was later accepted by the subsequent case law. In the *Shirley McCarthy* decision, relevant to a similar case (due to the fact that the right of free movement was not taken into consideration), the Court of Justice stated that Artcle 21 (TFEU):

> *"is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States"*[31].

In both cases, the Court of Justice implemented the protection granted by the *status* of EU citizenship, without marginalising them to mere

[30] ABARCA JUNCO, Ana Paloma and GÓMEZ-URRUTIA, Marina Vargas, "El Estatuto de Ciudadano de la Unión y su posible incidencia en el ámbito de aplicación del Derecho comunitario (STJUE Ruiz Zambrano)", referred to above, p. 14.

[31] Decision of 5 May 2011, *Shirley McCarthy*, C-434/09, EU:C:2011:277, paragraph 56.

internal situations. The difference is that the protective mantle of *Ruiz Zambrano* was tempered in *McCarthy*. This is due to the fact that in *Ruiz Zambrano*, it was argued that national means have perverse and opposite effects to the rights granted by the *status* of EU citizenship, while this did not occur in the second case, given that Mrs. *McCarthy* was not obliged to leave EU territory[32].

In the recent *Chávez-Vílchez y otros* judgement[33], the Court of Justice returned to this matter in order to resolve the preliminary question within a series of actions between, on the one side, Mrs. H.C. Chávez-Vílchez and seven other nationals of third countries who were mothers of one or more minor children with Dutch nationality for whom they carried the responsibility for daily and effective care, and on the other side, the competent public authorities, *with reference to the rejection of their demands for social assistance and family benefits due to they fact they did not have the right of residence in the Netherlands*.

3. Protection of the best interests of the child and the residence of citizens of third countries

The eight main actions the *Chávez-Vílchez y otros* judgement addressed are related to the demands for social assistance (*bijstandsuitkering*) and family benefits (*kinderbijslag*) submitted to the Dutch competent authorities on the basis, respectively, of the law on social assistance and the law on familiar benefits for the nationals of third countries[34]. They were made by the mothers of one or more minors with Dutch nationality whose fathers shared the aforesaid nationality. All these minors were recognised by their fathers, but they mainly lived with their mothers.

In all the aforementioned actions, the demands for social assistance and family benefits submitted by the interested people were rejected by the competent authorities on the basis that, *in the absence of a residence permit, they did not have the right, in accordance with the national regulations, to benefit from such services*.

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32 See MARÍN CONSARNAU, Diana, "TJUE – decision of 05 May 2011, s. *McCarthy / Secretary of State for the home department*, C-434/09 – «artículo 21 TFUE — libre circulación de personas — nacional que siempre ha residido en el estado miembro de su nacionalidad». nuevos matices a la protección que ofrece el estatuto de ciudadano de la Unión", en *Revista de Derecho Comunitario Europeo*, Centro de Estudios Políticos y Constitucionales, Madrid, Nr. 41, Enero-abril 2012, p. 229.

33 Decision of 10 May 2017, *Chávez-Vílchez y otros*, C-133/15, EU:C:2017:354.

34 In practice, it concerns two mothers of Venezuelan nationality, two Latin Americans, one from the former Yugoslavia, one from Nicaragua, one from Rwanda and one from Cameroon.

In this context, the referring court (*Centrale Raad van Beroep* or "Tribunal Central de Apelación") wondered if the applicants in the main actions, who were nationals of third countries, *were entitled, as mothers of minor citizens of the Union, to the benefit of the right of residence* based on Article 20 (TFEU) in the circumstances specified in each of them. It considered that, in this case, the applicants could invoke the rules of the law on social assistance and of the law on familiar benefits which allow foreign people legally residing in the Netherlands to be considered as Dutch nationals and to eventually take advantage of social assistance or familiar benefits in accordance with these rules, without the need, for this purpose, for any resolution by the Dutch Immigration and Naturalisation Services awarding a residence permit.

In order to reach this conclusion, the referring court invoked the aforementioned decisions in *Ruiz Zambrano y Dereci y otros* in support. In accordance with these legal precedents, it was stated that *«se desprende que las demandantes en el litigio principal tienen un derecho de residencia basado en el artículo 20 [TFUE] que se deriva del derecho de residencia de sus hijos, que son ciudadanos de la Unión, siempre que se hallen en una situación como la recogida en dichas sentencias»*. Therefore, it was necessary to determine, in each of the main proceedings, *«si se dan circunstancias que obliguen efectivamente a esos menores a abandonar el territorio de la Unión si se deniega el derecho de residencia a sus madres»*[35]. As a consequence, the Court of Luxembourg was asked to determine the importance, in light of the Court of Justice's case law, *of the fact that the father, an EU citizen, resided in the Netherlands or in the Union, considered as a whole.*

The previous question was based on the fact that, in practice, different Dutch administrative entities had restrictively interpreted the aforesaid *Ruiz Zambrano y Dereci y otros* judgements and had considered that the relevant case law was applicable only to situations where the father, in accordance with objective criteria, for example, is imprisoned, hospitalised or admitted to a specialised institution that has gone bankrupt. Outside these situations, the progenitor who is a national of a third country shall prove convincingly that the father is no longer in a condition to be responsible for the child, not even with the support, eventually, of third parties. According to the referring Court, these rules arise from the Circular on Immigration.

In addition to what was stated above, we should mention that in all

[35] Decision of 10 May 2017, *Chávez-Vílchez y otros*, C-133/15, EU:C:2017:354, paragraph 33.

the main actions cited, the involved Dutch authorities did not consider pertinent either the fact that the daily and effective care of the minor was charged to the mother, a national of a third country, and not to the father, an EU citizen, or the nature of the contacts between the minor and his/her father, the means by which the latter contributed to his/her maintenance and education, or even if the father was willing to take on the responsibility of the minor. Furthermore, the fact that the father did not have guardianship and custody of the child had also been assessed as not being pertinent, because it had been convincingly demonstrated that he could not be charged with them. Ultimately, the referring court wondered if the EU case law cited above should be interpreted "so restrictively"[36].

The Court of Justice, in turn, recalled its case law in the sense that

«los menores afectados por los litigios principales pueden, en su condición de nacionales de un Estado miembro, invocar, también frente al Estado miembro cuya nacionalidad poseen, los derechos correspondientes a su estatuto de ciudadanos de la Unión, que les confiere el artículo 20 TFUE». [the minors affected by main actions can invoke, in their condition as nationals of a Member State, the rights related to their status as EU citizens, granted by Article 20 TFEU, as well as towards the Member State whose nationality they have][37].

Furthermore, it was reaffirmed that the cited Article 20 (TFEU) prohibits national means, including decisions denying the right of residence to the family members of an EU citizen, which have the effect of depriving EU citizens of the "actual enjoyment of the essence of rights granted by his/her status"[38].

However, the Court of Justice highlighted that it had already affirmed

[36] In these circumstances, the Centrale Raad van Beroep (Central Court of Appeal) decided to suspend the proceedings and to raise the following preliminary questions before the Court of Justice:" whether Article 20 TFEU must be interpreted as precluding a Member State from refusing a right of residence in its territory to a parent, a third-country national, who is responsible for the primary day-to–day care of a child who is a national of that Member State, when it cannot be excluded that the other parent, who is also a national of that Member State, might be able to take charge of the primary day-to–day care of the child. The referring court seeks to ascertain whether the fact that the child is not entirely dependent, legally, financially or emotionally, on the third-country national is relevant to that issue."

[37] See, in this sense, the decisions of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277 paragraph 48; 15 November 2011, *Dereci y otros*, C-256/11, EU:C:2011:734, paragraph 63 and of 6 December 2012, O. y otros, C-356/11 y C-357/11, EU:C:2012:776, paragraphs 43 and 44.

[38] See decisions of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraph 42 and 6 December 2012, *O. y otros*, C-356/11 y C-357/11, EU:C:2012:776, paragraph 45.

that there are "very specific situations" where, despite secondary legislation relevant to the right of residence of third countries' nationals and although the interested EU citizen has not exercised his/her right of free movement,

> *«debe reconocerse sin embargo un derecho de residencia a un nacional de un tercer país, miembro de la familia de dicho ciudadano, pues de lo contrario se vulneraría el efecto útil de la ciudadanía de la Unión, si, a consecuencia de la denegación de ese derecho, dicho ciudadano se viera obligado de hecho a abandonar el territorio de la Unión en su conjunto, lo que le privaría del disfrute efectivo del contenido esencial de los derechos conferidos por ese estatuto».[we should recognise, however, a right of residence for a national of a third country, a family member of the aforementioned citizen, because otherwise, the useful effect of EU citizenship would be affected if, as a consequence of the denial of such a right, this citizen would be actually obliged to leave the EU territory as a whole, which would deprive him/her of the effective enjoyment of the essential content of rights granted by this status]*[39].

The situations analysed in the previous paragraph are always characterised, according to the Court of Luxembourg, even if they are regulated by rules which fall *a priori* within the competence of the Member States. That is to say, the regulations relevant to the right of entry and residence of third countries' nationals should be a field of application for the rules of EU secondary legislation, which provide for, under certain conditions, the granting of this right. However, these situations are intrinsically related to the freedom of movement and residence of an EU citizen, which prevents the denial of the right of entry and residence of the aforesaid nationals in the Member State where he/she resides in order to prevent this freedom from being undermined[40].

In the *Chávez-Vílchez y otros* judgement, the Court of Justice argued that if the nationals of third countries involved in the main proceedings were denied residence, they would be obliged to leave EU territory (it is the responsibility of the referring Court to verify this circumstance). This could imply a restriction on the rights awarded to their minor children by the *status* of EU citizenship, particularly on the right of residence, because

[39] See, in this sense, of decisions 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraphs 43 and 44; 15 November 2011, *Dereci y otros*, C-256/11, EU:C:2011:734, paragraphs 66 and 67; 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 74, and of 13 September 2016, CS, C-304/14, EU:C:2016:674, paragraph 29.

[40] See the decision of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 75, and 13 September 2016, CS, C-304/14, EU:C:2016:674, paragraph 30.

the aforesaid minor children could be obliged to accompany their mother, and therefore, to leave EU territory with her. In this way,

> *«la eventual obligación de sus madres de abandonar el territorio de la Unión privaría a sus hijos menores del disfrute efectivo del contenido esencial de los derechos que, sin embargo, les confiere su estatuto de ciudadano de la Unión»*[41].

In this *relationship of dependency* between the EU citizenship of young people and a national of a third country to whom the right of residence is denied, the Court of Justice affirmed that it could undermine the *«efecto útil de la ciudadanía de la Unión»*, provided that this dependency would result in the obligation of the EU citizen to leave the territory not only of the Member State in which he/she is a citizen, but also of the Union as a whole, as a consequence of the aforesaid denial[42].

In this *Rendón Marín* judgement, the Court of Luxembourg had already referred to the necessity to protect the *link* between a non-EU progenitor and a child who is a citizen of the Union. The refusal to allow the progenitor, a national of a third country – as affirmed by the Court of Justice – who is responsible for the effective care of a minor, an EU citizen, residing with him/her in the host Member State *«privaría de todo efecto útil al derecho de residencia del menor, dado que el disfrute de un derecho de residencia por un menor implica necesariamente que éste tenga derecho a ser acompañado por la persona que se encarga de su cuidado efectivo y, por tanto, que esta persona pueda residir con él en el Estado miembro de acogida durante su estancia en éste»*[43]. Thus, Article 21 (TFEU) and Directive 2004/38, according to the Court of Justice, must be interpreted in the sense that they prohibit national regulations requiring an *automatic denial* of a residence authorisation for the progenitor of a minor dependent child who is a citizen of the Union, residing with him/her in the host Member State, solely due to the fact that the aforesaid national of the third country has a criminal record[44].

Returning to the *Chávez-Vílchez y otros* judgement, as mentioned by

41 Decision 10 May 2017, *Chávez-Vílchez y otros*, C-133/15, EU:C:2017:354, paragraph 65.

42 See, in this sense, the decisions of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraphs 43 and 45; 15 November 2011, *Dereci y otros*, C-256/11, EU:C:2011:734, paragraphs 65 to 67, and 6 December 2012, *O. y otros*, C-356/11 y C-357/11, EU:C:2012:776, paragraph 56.

43 Decision of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 51.

44 *Idem*, paragraph 51.

the Court of Justice, in order to assess the risk that the interested minor, an EU citizen, would be obliged to leave the territory of the Union and would, in this way, be deprived of the *actual enjoyment* of the essential content of the rights awarded by Art. 20 (TFEU) if a right of residence is denied to his/her progenitor (a national of a third country), it was necessary to identify, in each of the main actions, which progenitor was responsible for the minor's effective care and if there was a relationship of dependency between the latter and the progenitor, a national of a third country. By examining these points, as argued by the Court of Justice, the competent authorities

> *«deben tener en cuenta el derecho al respeto de la vida familiar, tal como se reconoce en el artículo 7 de la Carta de los Derechos Fundamentales de la Unión Europea, que debe interpretarse en relación con la obligación de tomar en consideración el interés superior del niño, reconocido en el artículo 24, apartado 2, de la referida Carta»*[45].

In this way, a fundamental criterion of interpretation was introduced for the application by the national authorities of the *status* of EU citizenship. This criterion had already been provided for by the Convention on the Rights of the Child (ONU), which tends to extend protection rather than limit it through restrictive interpretations.

As a consequence of the aforesaid assessment, the sole fact of being able to assume the daily and actual care of the minor and being prepared to fulfill this commitment

> *«constituye un elemento pertinente, pero no suficiente por sí mismo para poder declarar que no existe entre el progenitor de un país tercero y el menor una relación de dependencia tal que diese lugar a que este último se viese obligado a abandonar el territorio de la Unión si a ese nacional de un país tercero se le denegase el derecho de residencia»*[46].

Actually, such a declaration must be based on the consideration, with respect to the main interest of the child, of all the circumstances of the specific case, and in particular, of his/her age, his/her physical and emotional development, the intensity of his/her affective relationship with the parent citizen of the Union and with the other, who is a national of a third country,

[45] Decision of 10 May 2017, *Chávez-Vílchez y otros*, C-133/15, EU:C:2017:354, paragraph 70.

[46] *Idem*, paragraph 71.

and of the risk of affecting the minor's balance if he/she is separated from them[47].

With reference to the third preliminary question, the Court of Justice answered that Article 20 (TFEU) must be interpreted in the sense that it does not prevent a Member State from subjecting the right of residence in its territory of a third country national who is a parent of a minor who is a national of the aforesaid Member State, and who is responsible for his/her daily and effective care, to an obligation for this national to provide data allowing an assessment of whether a denial of the right of residence to the parent from a third country would deprive the minor of the actual enjoyment of the essential content of the rights arising from his/her status as an EU citizen by forcing him/her to leave the EU territory as a whole. Nevertheless, it is the responsibility of the competent authorities of the interested Member State to carry out, on the basis of the data provided by the third country national, *the necessary investigations to be able to evaluate, in light of the whole circumstances of the specific case, whether a denial would imply these consequences*[48].

In order to place the role of the examined case law into context, we should restrict our analysis to Directive 2004/38/CE, which is relevant to the right of EU citizens and of their family members to freely move and reside in the territory of the Member States.

4. Directive 2004/38/CE, 29 April, on the right of EU citizens and of members of their families to freely move and reside in the territory of the Member States

As suggested by the title itself, this rule merges the prior multitude of provisions relevant to the right of free circulation and residence into one legal tool[49]. In its wording, it follows many of the most important decisions of the Court of Justice on this matter.

Since its initial consideration, Directive 2004/38/CE starts from the base that EU citizenship awards

> *"a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect"*[50].

47 *Idem*.

48 *Idem*, paragraph 78.

49 It modifies Regulation (CEE) Nº 1612/68, and Directives 64/221/CEE, 68/360/CEE, 72/194/CEE, 73/148/CEE, 75/34/CEE, 75/35/CEE, 90/364/CEE, 90/365/CEE y 93/96/CEE are waived.

50 The Directive 2004/38/CE, recital 1. Coincidentally, in its recital 11 it is stated that:

It is also defined as one of the fundamental freedoms of the internal market, which implies an *«espacio sin fronteras interiores»* [area without internal borders] within which people's free circulation will be guaranteed through the reorganisation of the rules of the Treaty[51]. It is stated that the right of all EU citizens to freely move and reside in the territory of the Member States, so that it can be exercised in *«condiciones objetivas de libertad y dignidad»*[objective conditions of freedom and dignity], must be recognised for the members of his/her family, "irrespective of nationality" [regardless of his/her nationality][52]. The enjoyment of permanent residence for all EU citizens who have decided to settle on a long-term basis in a host Member State "strengthen[s] the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union"[53].

Directive 2004/38/CE emphasises the *cross-border element*. It is applied to all EU citizens who se *«traslade a, o resida en, un Estado miembro distinto del Estado del que tenga la nacionalidad, así como a los miembros de su familia»*, who accompany or are reunified with him/her[54]. As a consequence, the *«derecho a salir del territorio de un Estado miembro para trasladarse a otro Estado miembro»* is guaranteed by providing that *«no se les podrá imponer ningún visado de salida ni obligación equivalente»* to the people who exercise this right[55]. As a consequence, without any prejudice to the provisions regulating travel documents at national border checks, *«los Estados miembros admitirán en su territorio a todo ciudadano de la Unión en posesión de un documento de identidad o un pasaporte válidos y a los miembros de su familia que no sean nacionales de un Estado miembro y que estén en posesión de un pasaporte válido»*. In this way, *«no se les podrá imponer ningún visado de entrada ni obligación equivalente»* to EU citizens[56].

With reference to the *right of residence*, Directive 2004/38/CE regulates it in accordance with the time of residence in the host country. If the residence lasts for a period of *up to three months*, EU citizens can remain in the territory of another State *«sin estar sometidos a otra condición o formalidad que la de estar en posesión de un documento de identidad o*

"The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures".

51 Directive 2004/38/CE, recital 2.

52 Directive 2004/38/CE, recital 5.

53 Directive 2004/38/CE, recital 17.

54 Article 3 "Beneficiaries".

55 Article 4 "Right of exit".

56 Article 5 "Right of entry".

pasaporte válidos». The same occurs for family members with a valid passport who are not nationals of a Member State who accompany the EU citizen or are reunified with him/her[57]. But we should not forget that EU citizens and their family members will enjoy the aforesaid right of residence *«mientras no se conviertan en una carga excesiva para la asistencia social del Estado miembro de acogida»*[58]. Also, in such circumstances, without any prejudice to limitations on the right of entry and residence on the grounds of public order, public security or public health, *«en ningún caso»* a means of expulsion against EU citizens or their family members can be adopted if a) the EU citizens are salaried or self-employed workers, or b) the EU citizens entered the territory of the host Member State to find a job. In this case, EU citizens and their family members will not be expelled if they are able to demonstrate that they are continuing to look for a job and have an actual possibility of being recruited[59].

Unlike the previous case, any EU citizen has the right of residence in the territory of another Member State for a period *longer than three months* if: a) he/she is a salaried or self-employed worker, or b) he/she has at his/her disposal, for his/her family members, *«recursos suficientes para no convertirse en una carga para la asistencia social del Estado miembro de acogida durante su período de residencia, así como de un seguro de enfermedad que cubra todos los riesgos en el Estado miembro de acogida»*, or c) he/she is enrolled in a public or private institute recognised or financed by the host Member State in accordance with its legislation or its administrative practice, with the main purpose of attending courses, including vocational training, and he/she is covered by *«seguro de enfermedad que cubre todos los riesgos en el Estado miembro de acogida y garantiza a la autoridad nacional competente, mediante una declaración o por cualquier otro medio equivalente de su elección, que posee recursos suficientes para sí y los miembros de su familia para no convertirse en una carga para la asistencia social del Estado miembro de acogida durante su período de residencia»*, or d) he/she is a member of the family which accompanies the EU citizen or is reunified with him/her, or fulfils the conditions provided for by letters a), b) or c)[60].

Therefore, the right of residence, as explained by the doctrine[61], is not exercised irrespective of the economic situation or of the social and health

57 Article 6 "Right of residence for up to three months".

58 See Article 14.1 "Retention of the right of residence".

59 See Article 14.4 "Retention of the right of residence".

60 Article 7 "Right of residence for more than three months".

61 MANGAS MARTÍN, Araceli y LIÑAN NOGUERAS, Diego J., *Instituciones y Derecho de la Unión Europea*, Tecnos, Madrid, 2010, p. 148.

cover, and thus, two categories should be left out of the right of residence: first, EU citizens who do not have enough economic resources, and second, people excluded for reasons of public policy, security or public health.

The Member States should not establish a *«importe fijo»* corresponding to what they consider *«recursos suficientes»*, but they should consider the personal situation of the interested person. In any case, according to Directive 2004/38/CE, the aforesaid amount will not overcome the level of resources below which the host Member State can guarantee social care to its nationals or, when this criterion is not applicable, the level of the minimum social security pension paid by the host Member State[62]. On the other side, the use of the host Member State's social care by an EU citizen or a member of his/her family *«no tendrá por consecuencia automática una medida de expulsión»*[63]. On this point, the Court of Justice stated that resources coming from third parties shall also be accepted[64].

In the Commission's opinion, EU citizens have the right to reside in the host Member State if they carry out an economic activity there. EU students and citizens who do not carry out such an activity *«deberán tener suficientes recursos para que ellos mismos y los miembros de su familia no se conviertan en una carga excesiva para la asistencia social del Estado miembro de acogida durante el período de su residencia, y tener cobertura sanitaria total»*[65].

EU citizens who have legally resided in the host Member State *for a*

62 See Article 8.4 "Administrative formalities for Union citizens".

63 See Article 14.3 "Retention of the right of residence".

64 Decision 23 March 2006, Comisión c. Bélgica, issue C-408/03, EU:C:2006:192. The Court states that "according to the very terms of the first subparagraph of Article 1(1) of Directive 90/364, it is sufficient for the nationals of Member States to 'have' the necessary resources, and that provision lays down no requirement whatsoever as to their origin. The correctness of that interpretation is reinforced by the fact that provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly" (paragraph 40). "he Court therefore held that an interpretation of the condition concerning the sufficiency of resources within the meaning of Directive 90/364 to mean that the person concerned must himself have such resources and may not rely on the resources of a member of the family accompanying him would add to that condition, as formulated in that directive, a requirement as to the origin of the resources which, not being necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States, would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 18 EC" (paragraph 41). In the same sense, decision of 19 October 2004, *Zhu y Chen*, C-200/02, EU:C:2004:639, paragraph 30 ff.

65 See paragraph 2.3 in the Communication of the Commission to the European Parliament and the Council: "On guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ", cited above, p. 8.

continuous period of five years will have the right of permanent residence in it. The aforementioned right is not subject to the conditions provided for in the prior cases. The same is applicable for his/her family members who do not have the nationality of a Member State and have been legally residing for a continuous period of five years with the EU citizen in the host Member State. The continuity of residence is not affected by *«ausencias temporales no superiores a un total de seis meses al año, ni por ausencias de mayor duración para el cumplimiento de obligaciones militares, ni por ausencias no superiores a doce meses consecutivos por motivos importantes como el embarazo y el parto, una enfermedad grave, la realización de estudios o una formación profesional, o el traslado por razones de trabajo a otro Estado miembro o a un tercer país»*. After the right of permanent residence is acquired, it will be lost only due to the absence from the Member State for a continuous period of two years[66].

Directive 2004/38/CE also provides that the Member States will adopt the necessary means for *«denegar, extinguir o retirar cualquier derecho conferido por la presente Directiva en caso de abuso de derecho o fraude, como los matrimonios de conveniencia»*[67]. *Fraud* can be defined as a deliberate deception or contrivance aimed at obtaining the right of free movement and residence according to the aforesaid Directive. Within this regulation, the deception or contrivance is limited to the falsification of documents or to the misrepresentation of such material referring to conditions linked to the right of residence. Consequently, pursuant to Directive 2004/38/CE, rights can be denied, extinguished or withdrawn from people to whom a residence document has been issued as a consequence of fraudulent conduct regarding those who have been convicted[68]. While the assessment concerning an *abusive* practice, in the words of the Court of Luxembourg,

> *«por un lado, que concurran una serie de circunstancias objetivas de las que resulte que, a pesar de que se han respetado formalmente las condiciones previstas por la normativa comunitaria, no se ha alcanzado el objetivo perseguido por dicha normativa. Requiere, por otro lado, un elemento subjetivo que consiste en la voluntad de obtener un beneficio resultante de la normativa comunitaria, creando artificialmente las condiciones exigidas para su obtención»*[69].

66 Article 16 "General rule for Union citizens and their family members". Nevertheless, in the following article, exceptions for workers giving up their activity in the host Member State and for his/her family are established.

67 Article 35 "Abuse of rights".

68 See decision of 5 June 1997, *Kol*, C-285/95, EU:C:1997:280, paragraph 29.

69 See decision de 14 de diciembre de 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraphs 52-53.

A *marriage of convenience* is defined by Directive 2004/38/CE as a relationship established for the exclusive purpose of enjoying the right of free movement and residence[70].

Subject to specific rules expressely established by the Original Law and the Derivative Law, all EU citizens residing in the host Member State based on Directive 2004/38/CE shall enjoy *equal treatment* with respect to the nationals of the aforesaid State within the field of application of EU law. The benefit of this right will be extended to family members who do not have the nationality of a Member State, who shall take advantage of the right of residence and of permanent residence[71].

The principle of equal treatment, as argued by the Court of Justice, represents a particular expression,

> *«prohíbe las discriminaciones manifiestas, basadas en la nacionalidad, pero también cualquier forma de discriminación encubierta que, aplicando otros criterios de diferenciación, conduzca de hecho al mismo resultado»*[72].

However, this is not an absolute principle; in the same judgement, the Court had to decide if the Union had the right to prohibit municipal rules, such as the one which was the subject of the main action, which prohibit the admission of persons not residing in the Netherlands into *coffee shops* located in the municipality of Maastricht. That is, it had to determine whether the aforesaid municipal rule represents a restriction on the exercise of the fundamental freedoms, such as the freedom of movement. In this case, it had to decide whether this means can be grounded on the basis of fighting against the *«turismo de la droga»* and the troubles it involves. Lastly, it had to ascertain whether it is proportional in light of the aforesaid objective. The Court of Justice concluded that the cited objectives undoubtly represent a legitimate interest which can justify, in principle, a restriction on the obligations imposed by EU law. It affirmed that it is undeniable that the prohibition on admitting a non-resident into the *coffee shops* is a means which substantially limits drug tourism, and as a consequence, reduces the problems arising from it[73]. Therefore, the Court found that the restriction was justified by the objective of the fight against drug tourism and the troubles it involves.

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70 See Directive 2004/38/CE, issue 28.

71 See Article 24 "Igualdad de trato".

72 Decision of 16 December 2010, *Josemans*, issue C-137/09, EU:C:2010:774, paragraph 58.

73 *Idem*, paragraph 75.

5. Final considerations

The European Union is the sole regional integration process, at least to date, where the dynamic of economic integration is converging with a humanitarian one, with the latter being instrumentalised through the free movement of persons. In other words, it is expressed both within a Common Market that is free of economic barriers – non-tariff, paraarancelarias, etc. –, and as a social common space that is free of border controls. Despite all the *intra-block* conflicts arising from the latter, we have seen progress of unimaginable proportions over only a few decades.

The European integration has managed to overcome, as we can observe, an economic approach to people's free movement by anchoring its foundation not in a basic freedom of the Common Market, but in the status of EU citizenship.

The institutional design of the regional integration process is not separate from its success or failure if we observe the different integration experiences over time. The assignment of competencies to international entities – which allows their joint exercise – has been demonstrated to be crucial to strengthening people's free movement within the European Union, for example, through the implementation of the Schengen area.

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THE CONFIGURATION OF EU CONSTITUTIONAL PROCEDURAL STATUS FOR CONSUMER PROTECTION

Joaquín Sarrión Esteve*

1. Motivation

Consumer protection was used primarily under European Communities legislation as an instrument to drive economic integration[1], but with the creation of the internal market[2] it has developed as a "driving force" in the EU integration process"[3]".

In fact, consumer protection is - as we will see in this paper - not only a key instrument with which to develop the internal market[4] but also to

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1 Economic integration which was seen as a step towards political and social integration. See D. CHALMERS, G. DAVIES, G., MONTI (2014) European Union Law, 3rd edition, Cambridge University Press, Cambridge, 669.

2 Or, before, the common or single market. See K. MORTELMANS (1998) The Common Market, the Internal Market and the Single Market: What's in a Market? Common Market Law Review, 35.

3 I. BENÖHR (2013) EU Consumer Law and Human Rights, Oxford University Press, Oxford, 9. In fact the EU market success depends on cross-border consumer activity, see S. DE VRIES (2012). Consumer protection and the EU single market rules – The search for the 'paradigm consumer', Journal of European Consumer and Market Law, 5(4), 228-242

It is also important to note that the first reference to Consumer regulation in European Community is in the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy OJ 1975 C92/1, in which the Member States outlined the relevance of consumers to the success of the single market. See C. TWIGG-FLESNER (2016), 'Introduction: EU consumer and contract law at a crossroads?', in the book Research Handbook on EU Consumer and Contract Law, Research Handbooks in European Law series, edited by C. TWIGG-FLESNER, School of Law, University of Warwick, 2.

4 Because consumer rights are a way of achieving the goals of article 26 TFEU. See D.

reinforce economic, legal and constitutional status, particularly of EU citizens and residents as equal players in the market. After all, there is a duality in the images of the consumer, as an (actual) person who is in the mind of EU lawmaker and as the (projected, and finally real) person who will emerge due to the EU regulation"[5]".

European Court of Justice (ECJ) case law in the development of EU consumer protection is very important. As we will see, in fact, the ECJ developed a constitutional procedural status for consumers which must be applied by national courts. To address this, we need to use multi-level methodology because we live immersed in the European legal space, comprised of legal systems with different levels which are increasingly interconnected[6]. We therefore need a theoretical basis by which to approach it and try to study any element or reality included in these related legal systems, and must also deal with the new constitutional horizon opened in the EU after the Lisbon Treaty[7].

In this paper we will describe our methodology, and consider the bases for EU regulation and the concept of consumers[8]. Finally we will analyse

CHALMERS, D., G. DAVIES, G., MONTI (2014) European Union Law, 3rd edition, cit., 671. Nevertheless, it is true that we cannot disentangle the fundamental four economic freedoms from consumer (and also health, social and environmental policies) as article 3(3) of the Treaty of the European Union identifies as one of the aims of the EU the establishment of a highly competitive "social market economy". See C. BARNARD, (2010) The Substantive Law of the EU, 3rd edition, Oxford University Press, Oxford, 27 and 30.

5 S. LECZYKIEWICZ, D., and S. WEATHERILL, (2016) 'The Images of the Consumer in EU Law', in the book The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law, edited by D. LECZYKIEWICZ and S. WEATHERILL, Hart Publishing Oxford, Oxford, Available as Oxford Legal Studies Research Paper No. 9/2016 at SSRN. Retrieved from https://ssrn.com/abstract=2743283.

Furthermore, some authors argue for a modern code for the civil and social rights of consumers, and also of workers, as a way to protect the weak part -consumer- against the market. See C. MOLINA NAVARRETE (2017) La cuestión prejudicial y ¿el fin de los tribunales de "última palabra": Experiencias de tutela del contratante débil, Diario La Ley, 9008, 3.

6 Y. GÓMEZ SÁNCHEZ (2011) Constitucionalismo multinivel: Derechos Fundamentales, Sanz y Torres, Madrid, 20.

7 J. SARRIÓN ESTEVE (2011) El nuevo horizonte constitucional para la Unión Europea: a propósito de la entrada en vigor del Tratado de Lisboa y la Carta de Derechos Fundamentales, CEF Legal: Revista Práctica del Derecho, 162; and J. SARRIÓN ESTEVE (2014) Effective judicial protection in consumer protection in the ECJ's Case Law. Retrieved from https://ssrn.com/abstract=2526709.

8 The notion of a 'consumer' is a negative concept in contrast to that of a professional person (who acts within the scope of an economic activity), i.e. they are a natural person (in EU Law), and act outside the scope of an economic activity. It implies the application of EU consumer regulations, and therefore, special guarantees for protect consumers. We follow our previous work on consumer concept, see J. SARRIÓN

the relevant case law through which the EU consumer constitutional procedural status developed and the actual developments in this issue in the EU.

2. The multilevel methodology approach

It is typical – from a legal perspective[9] – to describe the relationship between EU law and national laws in terms of a multilevel legal system: constitutional pluralism[10] or multilevel constitutionalism[11]. In both cases we speak about theoretical constructions - perhaps we can call them metatheories[12] - which try to explain the EU's multilevel fundamental rights protection architecture,[13] and therefore the relationship and inter-

ESTEVE (2019)'Consumer', in Dictionary of Statuses within EU Law, , edited by A. BARTOLINI, R. CIPPITANI, V. COLCELLI, Springer, Cham, 95-106.

9 There are other approaches in political science, economics and sociology. Regarding the interdisciplinary status of EU studies and a comparison between them and the legal approach, see D. MILCZAREK (2012) 'Theoretical Aspects of European Studies' in the book Introduction to European Studies: A New Approach to Uniting Europe, Centre for Europe, University of Warsaw, Warsaw, 13-32.

10 See for example N. MACCORMICK, (1999) Questioning Sovereignty. Law, State and Nation in the European commonwealth, Oxford University Press, Oxford. It is a way to approach EU integration that differs from the traditional sovereigntist one, as pointed out by Fabbrini (See F. FABBRINI (2015) Fundamental Rights in Europe, Oxford University Press, Oxford, 19). However, some authors outline differences between Legal Pluralism and Plural Constitutionalism, see D. CHALMERS, G. DAVIES, and G., MONTI (2014) European Union Law, 3rd edition, cit. 219-222.

11 I. PERNICE (1999) Multilevel constitutionalism and the Treaty of Amsterdam: European Constitution-making revisited? Common Market Law Review, 36; I. PERNICE (2002) Multilevel constitutionalism in the European Union. European Law Review, 27; F.BALAGUER CALLEJÓN (2008) 'Constitucionalismo multinivel y derechos fundamentales en la Unión Europea' in the book Estudios en homenaje al Profesor Gregorio Peces Barba, 2; T. FREIXES SAN JUAN (2011) 'Constitucionalismo multinivel e integración europea' in the book Constitucionalismo Multinivel y relaciones entre Parlamentos: Parlamento europeo, Parlamentos nacionales, Parlamentos regionales con competencias legislativas, CEPC, Madrid; Y. GÓMEZ SÁNCHEZ (2014) Constitucionalismo multinivel. Derechos Fundamentales, 2nd edition, Sanz y Torres, Madrid.

Nevertheless, it is important to note that although multilevel constitutionalism and constitutional pluralism have different origins and developments in the European integration studies debate, both 'display significant similarities in terms of theoretical foundations'. See F. C. MAYER & M. WENDER (2012) 'Multilevel Constitutionalism and Constitutional Pluralism' in the book Constitutional Pluralism in the European Union and Beyond, Hart Publishing, 151.

12 J. BIELAUSKAITÊ, and V. SLAPKAUSKAS (2016) European Constitutionalism as the Metatheory of the Construction of Legal and Political Reality and the Challenges for its Development, Danube: Law and Economics Review, 7(1), 41-52.

13 Although it is difficult to affirm the existence of a Human Rights or Fundamental Rights protection system in a strict sense, we are facing a system in construction (J. SARRIÓN ESTEVE (2013) El Tribunal de Justicia de Luxemburgo como garante de los derechos fundamentales, Dykinson, Madrid) rationalised by scholars (P. TENORIO SÁNCHEZ (2013) Diálogo entre Tribunales y Protección de los Derechos Fundamentales en el

action of different legal systems or levels, particularly those of EU and individual countries. These are becoming progressively more interconnected. and we need to approach this complex 'legal reality'[14], with the logic of relationships and integration[15].

Certainly, one of the questions that challenges consumer protection is whether we are dealing with a "fundamental right". consumer protection is recognised in the EU Charter of Fundamental Rights[16], in the title "*IV, Solidarity*", under article 38:

Union policies shall ensure a high level of consumer protection.

However, we can understand that "not all rights are granted equal status", and we can see several differences[17]. In fact, we can distinguish several typologies of legal positions: fundamental rights, ordinary rights and policy clauses. Consumer protection is a policy clause"[18]".

So, the recognition of consumer protection under the EU Charter is

ámbito europeo", Revista General de Derecho Europeo, 31, 2-4).

14 Y. GÓMEZ SÁNCHEZ, Y. (2014) Constitucionalismo multinivel. Derechos Fundamentales, 2nd edition, cit. p. 55.

15 P. BILANCIA (2012), The Dynamics of the EU integration and the impact on the National Constitutional Law, Giuffrè, Milano, 84.

16 Charter of Fundamental Rights of the European Union, better known as the EU Charter, elaborated in 2000, Niza. The Charter was then adapted in Strasbourg in 2007 and entered into force with the Lisbon Treaty on 1 Dec. 2009. The last version of 26.10.2012 was published in the OJEU C 326/391 and is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN

17 J. SARRIÓN ESTEVE (2010) Social rights protection problems in conflicting situations with market freedoms in European Union Law, Revista Universitaria Europea, 13, p. 88-89.

18 See MENÉNDEZ, who clearly established the differences between the three types:

1) The distinction is based on an attractive interpretation of article 51 of the Charter: Fundamental rights are claims that could be used against the action of the ordinary legislator. Of course the ordinary legislator can regulate them, but must respect their essence. Fundamental rights: right to work (article 15), collective bargaining and action (article 28); working conditions respecting health and safety at work, and limited working hours and paid holidays (article 31.1 and 2).

2) Ordinary rights (clauses that refer to national legislation to determine the substantive contained of the right): worker's right to information and consultation within the undertaken (article 27); protection in the event of unjustified dismissal (article 30).

3) Policy clauses are norms that require public institutions to achieve a certain objective. Policy clauses: protection of the family (article 33.1); consumer protection (article 38). J. A. MENENDEZ (2003) 'Rights to Solidarity' balancing Solidarity and Economic Freedoms' in the book The Chartering of Europe, the European Charter of Fundamental Rights and its Constitutional Implications, edited by E. ERIKSEN, J. FOSSUM, J. MENÉNDEZ, Nomos, Baden-Baden, 183-187

limited to a mandate, as a policy clause, to the EU institutions -and of course for EU member state authorities in the implementation - to ensure "a high level of consumer protection" in their policies, and therefore it is more like a principle and depends on the regulation of consumer protection in the treaties, and the legal development of consumer protection policy in the EU.

Consumer protection is part of the social dimension of the EU, however, and as the ECJ has pointed out in Viking case regarding social rights, the European Community doesn't have a unique economic aim and therefore there is a need for balance between the economic and social dimensions[19].

Nevertheless, the EU Charter has provisions regarding scope and interpretation (article 52) and this legal configuration is confirmed in article 52(5) of the EU Charter, which establishes that "the provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union Law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality"; and in article 51(1) of the EU Charter which explains that the EU Charter provisions are addressed not only to EU institutions but also to the EU Member States when they are implementing EU law. The European Court of Justice's (ECJ) interpretation of this provision is very extensive, in the sense that it is linked to the concept of the scope of EU law[20]; and the *Explanations of the EU Charter* which indicates that the principles set out have been based on article 169 TFEU.

3. EU consumer concept and EU consumer protection legal framework

My aim in this part of the paper is to firstly overview the EU consumer concept, and secondly the legal framework regarding consumer protection in the EU[21], which is the basis of the development of EU case law on the constitutional procedural status for consumers.

19 See C-438/05, *Viking Line*, 79.

20 Not only when they implement EU law but in any case within the scope of EU law. See C-617/10, *Åkerberg Fransson*.

21 On the EU consumer concept, I follow my previous work, see J. SARRIÓN ESTEVE (2018) Consumer, cit.

3.1. EU Consumer Concept

As we know well, the notion of the consumer is a negative concept in contrast to that of a professional person: it is a natural person – in EU Law – who acts outside the scope of an economic, professional, trade, or business activity. In this way, the consumer establishes a contractual relationship with a professional or a trader, who is also a natural and a legal/juristic person. There is a concrete contractual relation between a business and a consumer (a business to consumer [B2C] contract), in contrast to a business to business (B2B) contract[22]. The consumer is the weaker party due to their non-professionalism and therefore their lower degree of knowledge about the contract and its conditions, in contrast to the professional who is supposed to be an expert in the field[23].

Although the approach of EU legislation to the notion of consumers can be seen as partial (there is not a common definition), the differences are minor and a consumer is considered a natural person who, in contracts covered by the respective directives, is acting for purposes which are not related to or which are outside their trade, business, craft, or profession. The ECJ is helpful, with a restrictive and standard interpretation of the consumer concept as a natural person (personal criterion) not connected through their professional activity (functional criterion), meaning that any judicial interpretation regarding the adjudication of the consumer position needs to consider the nature and aim of the specific contract.

Of course there are always complex cases within this concept, including mixed-purpose contract situations such as that of Gruber (a person living in a building in which one part was used as a family home and the rest for the farm) where the ECJ clarified that the existence of private elements was irrelevant, and denied the notion of a consumer, stating that a person who concludes a contract concerning goods intended for purposes which are in part within and in part outside their profession may not rely on the notion of a consumer unless the professional or trade aim is so limited as to be ineligible in the context. In the case of Costa the ECJ stated that a lawyer who concluded a credit agreement with a bank, in which the purpose of the credit was not specified, may be regarded as a consumer if the agreement was not linked to that lawyer's profession.

[22] S. HEDEGAARD & S. WRBKA (2016) -The notion of consumer under EU legislation and EU case law: Between the poles of legal certainty and flexibility - in the book. Legal certainty in a contemporary context: Private and criminal law perspectives edited by M. FENWICK and S. WRBKA, Springer International Publishing AG.71, Cham, Switzerland, 69–88

[23] J. LAZÍKOVÁ & L. RUMANOVSKÁ (2016) The Notion of Consumer in the EU Law, EU Agrarian Law, 5(2), 2.

This strong restrictive approach to defining consumers has been criticised. There is a lack of protection for a person who may be the weaker party – which is supposed to be the aim of consumer protection – and there is also overprotection for well-informed persons (for example, a lawyer) in private contractual relationships.

Perhaps criteria based on the person rather than functional criteria would be better, as suggested by Lazíková and Rumanovská, *de lege ferenda*[24].

Being a consumer implies having the status of consumer (the Consumer EuroStatus) in a legal sense, and therefore the application of EU Consumer regulations. It is well known that national laws include legal entities in the concept of consumer when they act in a private way, as in Austria or the Czech Republic, or when they act as final users, such as in Greece or Spain[25]. Therefore, we need an EU legal presumption for this re-interpretation of consumers concept in national legislation and to solve the problems of national courts regarding the existence of a consumer relationship[26]. Nevertheless, it is interesting to consider the advantages of leaving sufficient discretion for courts to value the existence of a weaker party and to protect their position as a consumer[27].

One might suggest that the consumer concept may be included in national civil codes, but the truth is that it did not appear at all in any of the codes until recently. There are therefore three types of solution[28]. In the first solution, the concept is usually included in a special status for consumer protection - a type of compilation of consumer rules or a 'special body of norms for the protection of consumers'. For example, in the case of Spain, consumer protection rules are included in the Consumer

24 J. LAZÍKOVÁ & L. RUMANOVSKÁ (2016) The notion of consumer in the EU law, cit. 10

25 R. MAŃKO (2013) The notion of 'consumer' in EU law, Library Briefing. Library of the European Parliament. 6.05.2013. Retrieved from http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI-130477_REV1_EN.pdf

26 European Commission. (2017) An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgements and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law. JUST/2014/RCON/PR/CIVI/0082. Retrieved from http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847. 29

27 J. LAZÍKOVÁ, & L. RUMANOVSKÁ (2016) The notion of consumer in the EU law, cit. 2

28 L.M. MARTÍNEZ VELENCOSO (2017) 'The impact of harmonized European Private Law and the *Aquis Communautaire* on National Law around Europe in the book Legal Challenges of the XXI Century, directed by A. SOLANES CORELLA, and E.M. GÓRRIZ ROYO, Tirant lo Blanch, Valencia, 254-263

Protection Act, except for the Unfair Contract Terms Directive, for which the transposition is outside the act; as they are in Austria, France, and the United Kingdom. In the second type of solution, some countries recently decided to introduce the concept into civil codes, as is the case of Netherlands and Germany. The Dutch Civil Code introduced the consumer concept in the reform of 1992, and in their reform of 2002 Germany included EU consumer protection regulation. It is important to note that Germany modified their civil code with the so-called 'great solution'; this may be the most important since the code came into force in 1900 and realised the Europeanisation of the Bürgerliches Gesetzbuch (BGB)[29]. The third type of solution, used by other countries, such as Italy and Austria, is intermediate, where new provisions have been introduced to a country's civil codes.

3.2. EU consumer protection legal framework

Consumer protection was not included in the original European Community Treaty but it was mentioned in the competence and the common agricultural policy. The EC assumed its competence under the flexibility clause (former article 235 EECT and then article 308 ECT)[30], and consumer protection was included with the Single European Act (1986, article 100a) and reinforced under the Treaty of Maastricht which attributed competence for consumer protection to the European Community (1992, article 129a)[31].

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29 See L.M. MARTÍNEZ VELENCOSO (2017) 'The impact of harmonized European Private Law and the *Aquis Communautaire* on National Law around Europe', cit., 263.

30 The flexibility clause was a general clause which allowed European Community institutions to adopt any measure needed to achieve one of the aims of the Community in the functioning of the common market required, in cases where the Treaty had not provided it. As ROSSI outlines, the practice expanded the flexibility clause application, creating new competences, including consumer protection. See L. S. ROSSI (2012) 'Does the Lisbon Treaty Provide a Clear Separation of Competences between EU and Member States?' in the book EU after Lisbon, edited by A. BIONDI, P. EECKHOUT, and S. RIPLEY, Oxford University Press, Oxford, 86.

31 Art. 129a Treaty of the European Community:

"1. The Community shall contribute to the attainment of a high level of consumer protection through: (a) measures adopted pursuant to Article 100a in the context of the completion of the internal market; (b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.

2. The Council, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee, shall adopt the specific action referred to in paragraph 1(b).

3. Action adopted pursuant to paragraph 2 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them."

The ECJ considered that although the scope of article 129a is limited, it provides the European Community with a duty to contribute to the achievement of a high level of consumer protection, and the competence to do it (C-192/04, *Lagardère*) but although consumer protection is one of the objectives of the law in the cited article it is not the sole objective (C-233/94, *Germany v. European Parliament and EU Council*), meaning that the consumer protection policy "is a cross-sectional" one, creating objectives for the internal market[32].

Certainly consumer protection was a key instrument through which to develop the internal market, but there was an interesting development in the regulation of this issue in the Treaties: the Treaty of Amsterdam introduced the competence of promoting consumer rights (1997, article 153)[33], and confirmed the cross-sectional nature of the competence[34]. Finally the Treaty of Lisbon included consumer protection in the 'shared competences' list (a non-exhaustive catalogue) between the EU and Member States (article 4(2) of the Treaty of the Functioning of the European Union, TFEU, 2009)[35].

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32 J. LAZÍKOVÁ, J. (2016) The Consumer Policy in the EU Law, EU Agrarian Law, 5(1), 21

33 Art. 153 Treaty of the European Community:

"1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.

3. The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through: (a) measures adopted pursuant to Article 95 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States.

4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b).

5. Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them."

34 J. LAZÍKOVÁ (2016) The Consumer Policy in the EU Law, cit., 22

35 As we know, article 2 of the TFEU recognised three types of competences: exclusive, shared and supporting. When the Treaties confer a shared competence with the EU, both the EU and Member States may legislate and adopt legally binding acts in the referred area, according to art. 2(2) of the TFEU. In fact, article 2 clarifies the distribution of powers:

"When the Treaties confer on the Unión exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union

This inclusion of consumer protection in shared competences means that Member States may adopt rules in this area, and that the EU harmonisation legislation is subject to the subsidiarity principle, however, a shared competence does not mean a concurrent one: the EU and Member States may act, and therefore state action is not excluded, but the national competence can be exercised to the extent that the EU has not exercised or has ceased to exercise the shared competence[36].

Nevertheless, the existence of the competence depends on the specific regulation[37], and EU consumer protection is regulated in article 169 of the TFEU[38]:

> 1. *In order **to promote the interests of consumers** and to **ensure a high level of consumer protection**, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.*
> 2. *The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:*
>
> *(a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;*
>
> *(b) measures which support, supplement and monitor the policy pursued by the Member States.*
> 3. *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the*

acts. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member State shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decide to cease exercising its competence."

36 The last may occur when the EU decides to repeal a EU act. Declaration N. 28 in relation to the delimitation of competences states that the EU may decide to repeal an act in order to ensure a constant respect of the proportional and subsidiarity principles. See T. TRIDIMAS (2012) 'Competence after Lisbon. The elusive search for bright lines' in the book The European Union after the Lisbon Treaty edited by D. ASHIAGBOR, N. COUNTOURIS, and I. LIANOS, Cambridge University Press, Cambridge, 63 note 55.

37 With the specific regulation one can interpret whether the EU regulation is free to go from a minimum harmonisation to a total harmonisation (with a uniform standard) or less flexible. Certainly, the EU traditionally followed a minimum harmonisation approach until the recent last Directive in which EU adopted a maximum harmonisation approach. The traditional minimum approach allowed Member States to maintain their national pre-existing approaches. See A. KUNNECKE (2014) New Standards in EU Consumer Rights Protection? The New Directive 2011/83/EU, European Scientific Journal, 1, 427-428.

38 Emphasis added.

Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).

4. *Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.*

Although it is true that consumer protection today is also a key instrument to developing the internal market[39], there is a relevant change, because we are developing, as article 3(3) of the Treaty of the European Union (TEU)[40] identifies, the "social market economy"[41].

Furthermore, consumer protection is key to the development of a legal and constitutional status, particularly for EU citizens and residents as equal players in the market, as part of the social dimension (of the market, particularly [social] rights).

According to article 169(1) of the TFEU, EU institutions must guarantee a high level of protection for consumers through **a) measures** adopted within article 114 TFEU *in the completion of the internal market* - article 169(2a), and **b)** measures adopted **to *support, supplement and monitor the policy pursued by the Member States*** - according to article 169(2b) - without preventing national measures which maintain or introduce a higher protection following article 169(4) TFEU. [The emphasis in bold is added]

39 Because, as some authors have outlined, consumer rights is a way of achieving the goals of article 26 TFEU. See D. CHALMERS, G. DAVIES, G., MONTI (2014) European Union Law, 3rd edition, cit., 671.

40 Article 3(3) TFEU:

"The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced." [The emphasis in bold is added]

41 See C. BARNARD, (2010) The Substantive Law of the EU, 3rd edition, cit., 27 and 30. As Barnard noted, Advocate General Cruz Villalón suggested in *Santos Palhota* (C-505/08, Opinion, 51-53) the need to change the former orthodoxy economic approximation.

Therefore we can see two bases on which for legislation:

a) The first is not a general competence or legislative power for EU harmonisation[42], but the limits can be unclear[43] and it is an important legal basis on which to legislate. It could be interpreted that the EU has the flexibility to develop a traditional minimum harmonisation approach or a maximum one[44].

In the first important case on article 114 TFEU, Tobacco Advertising I (C-376/98, Germany v. Parliament and Council - Tobacco Advertising I), the ECJ annulled the Tobacco Directive because the ban on all tobacco advertising in the media exceeded the legal basis of article 114, the purpose of which is to prevent the emergence of future obstacles to trade, and the Court didn't view the general prohibition measure - taking into account the numerous types of advertising - as falling into that category[45]; and provided "a framework of legal principle which continues to define the scope of Article 114[46]" which can be seen as a subsidiary legal basis on which to legislate, to establish minimal harmonisation if there are actual or potential obstacles, but the measures adopted must be limited to the strict minimum required[47]. This doctrine is confirmed in Tobacco Advertising II (C-380/03, Germany v. Parliament and Council - Tobacco Advertising

42 S. WEATHERILL (2013) EU Consumer Law and Policy, 2nd edition, Elgar Publishing Limited, Cheltenham, 352 f.; J. LAZÍKOVÁ (2016) The Consumer Policy in the EU Law, cit., 23; S. MICOSSI (2016) Thirty Years of the Single European Market, CEPS Special Report, n. 148, October 2016, 11

43 D. CHALMERS, G. DAVIES, G., MONTI (2014) European Union Law, 3rd edition, cit., 685. These authors argue that the work 'appreciable' in the case Tobacco Advertising I is the only limit to article 114 to be considered as a general legislative power to harmonise.

44 As noted above, one can interpret through the specific regulation whether the EU regulation is free to go from minimum harmonisation to total harmonisation (with a uniform standard), or be less flexible.

The EU traditionally followed a minimum harmonisation approach until the recent last Directive on Consumer Rights, where it adopted a maximum harmonisation approach. The traditional minimum approach allowed Member States to maintain their national pre-existing approaches. See A. KUNNECKE (2014) New Standards in EU Consumer Rights Protection? The New Directive 2011/83/EU, cit., 427-428

45 However, the decision was based on the general prohibition, and the ECJ admitted deciding that the market distortions could be a basis for recourse to article 114 to prohibit certain forms of sponsorship (C-376/98, *Tobacco Advertising I*, 111)

46 D. CHALMERS, G. DAVIES, G., MONTI (2014) European Union Law, 3rd edition, cit., 680. According to these authors: "(1)Measures based on that article must contribute to removing obstacles to interstate trade, or to removing distortions of competition. (2) While there is no de minimis for obstacles to movements (...) harmonisation to remove distortions is only possible when those distortions are 'appreciable' (...). (3). It is acceptable to harmonise to prevent obstacles arising, rather than removing already existing problems, but those future problems must be likely (...)."

47 MICOSSI, S. (2016) Thirty Years of the Single European Market, cit.

II - and regarding the validity of the introduction of maximum mobile phone roaming charges as a pre-emptive harmonisation regulation in the Vodafone case (C-C-58/8, *Vodafone*)[48].

b) The second legal basis is clearly complementary to the Member States, in the sense that EU measures are adopted to support, supplement and monitor national policies (article 169(2b) TFEU), without preventing national measures that maintain or introduce a higher protection, following article 169(4) TFEU. Certainly, one can ask if the dormant competence or the called pre-emption doctrine can be applied to this area of consumer protection shared competences, preventing Member States from regulating in a way that "jeopardises" an existing EU regulation[49]. Reading both legal bases, however, article 169(2b) in connection with article 169(2a), one can argue that the pre-emption doctrine is explicitly limited in consumer protection and Member States are free to maintain (if they have their own) or introduce new measures in consumer protection if they guarantee greater protection: Member States are only precluded from regulating a lower protection for consumers.

The European Community, and after that the EU, developed several initiatives to ensure the better harmonisation of consumer protection. We will outline:

- The Directive on Consumer Rights (2011/83/EU)[50].

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48 See D. CHALMERS, G. DAVIES, G., MONTI (2014) European Union Law, 3rd edition, cit., 682.

49 Certainly, authors argue about the application of the USA's Constitutional Dormant doctrine or the pre-emption doctrine to the EU shared competences. In this sense, EU law can be interpreted as incorporating a restraining effect on the national powers, i.e., Member States shall - when implementing their own legislation in shared competences - guarantee EU law, including EU principles, and must avoid to jeopardising EU regulation. See S. WEATHERILL (2002) 'Pre-emption, Harmonisation and Distribution of Competences to Regulate the Internal Market' in the book The Law of the Single Market: Unpacking the premises edited by BARNARD C., and SCOTT, J. (eds.), Hart Publishing, Oxford, 41-74; R. SCHÜTZE (2006) Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption, Common Market Law Review, 43(4),1023-1048; T T. TRIDIMAS (2012) 'Competence after Lisbon. The elusive search for bright lines', cit., 74-76, P. LUIF (2014) 'The Division of Powers/Competences Between the EU and the Member States: What Can We Learn from Pre-emption in the United States', in the book The EU after Lisbon. Amending or Coping with the Existing Treaties edited by L. SERENA ROSSI, and F. CASORALI, Springer, Cham, 38-40, and L. S. ROSSI, L. S. ROSSI (2012) 'Does the Lisbon Treaty Provide a Clear Separation of Competences between EU and Member States', cit., 88.

50 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. OJEU L304/64 22.11.2011.

On 13 June 2014 this important directive replaced former Directive 97/7/EC on the protection of consumers in respect of distance contracts[51] and Council Directive 85/577/EEC to protect consumers in respect of contracts negotiated away from business premises[52].

- Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees[53].
- Council Directive 93/13/EEC on unfair terms in consumer contracts[54].

The European Commission explained in several communications that consumer protection is an essential part of its strategic plan, such as under Europe 2020 Strategy for smart, sustainable and inclusive growth; the Action Plan implementing the Stockholm Programme, the Citizenship Report, and the Digital Agenda[55].

Of course, EU member states can maintain or introduce higher consumer protection measures according to article 169(4) TFEU without preventing national measures which maintain or introduce a higher protection following article 169(4) TFEU.

In any case, as we will see, the role of the ECJ in the development of EU consumer protection is very important, and in fact, the Court developed constitutional procedural status for consumers through the effective judicial protection principle[56], which must be applied by national courts, a position that can be described as a constitutional procedural Eurostatus for consumers which must be applied by national courts in civil proceedings.

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51 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts OJ L 144 4.6.1997.

52 Council Directive 85/577/EEC of 20 December 1985 to protect consumer in respect of contracts negotiated away from business premises. OJ L 372 31.12.1985.

53 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. OJ L 171 7.7.1999

54 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. OJ L 95 21.4.1993.

55 See European Commission (2017) Consumer rights and law. Retrieved from http://ec.europa.eu/consumers/consumer_rights/index_en.htm

56 On the development of the effective judicial protection principle in Consumer Protection in the ECJ case law, see my previous work J. SARRIÓN ESTEVE (2014) Effective Judicial Protection in Consumer Protection in the ECJ's Case Law, cit.

4. The development of a constitutional procedural status for consumers in ECJ case law.

In the absence of EU legislation, EU member states are free to regulate the procedure for implementation of EU law, according to each domestic legal system, and therefore including the EU consumer protection legal framework. Nevertheless, according to the principle of cooperation laid down in article 4 EUT, member states shall take the necessary measures to ensure the fulfilment of their obligations under the treaty, and in particular national courts shall provide the appropriate judicial protection of rights which EU law confers on individuals. In this sense, we can say that the principle of procedural autonomy implies that EU member states are free to configure the appropriate procedural rules to guarantee EU law, and particularly rights recognised in EU legislation, because national judges are the EU's ordinary judges and courts.

As the ECJ decided in the Unibet case in 2007[57], there is no national procedural remedy in the treaty for the preservation of EU law other than those laid down in national law. EU law requires, however, the national configuration of procedural rules to ensure the respect for rights deriving from EU law. That national regulation must not be less favourable than those governing similar domestic actions (principle of equivalence), and nor should it render impossible in practice, or excessively difficult, the exercise of rights conferred by EU law (principle of effectiveness). The national courts must interpret the procedural rules 'as far as possible' so that the application of these rules contributes to the goal of ensuring the effective judicial protection of EU law rights attributed to litigants[58]. Procedural autonomy would thus be strongly upheld by the principles of equivalence and effectiveness, limiting the old procedural autonomy and freedom[59].

The so-called ex officio (control) doctrine[60] started in 1998, with the *Oceano Grupo*[61] case as a tool which could be used by national courts

57 C-432/05, *Unibet*

58 C-432/05, *Unibet*, 38-44 and 54

59 SARRIÓN ESTEVE (2014) 'Sobre la necesaria reforma de la legislación española a la luz de la STJUE de 14 de marzo de 2013, Aziz c. CatalunyaCaixa, C-415/11' in the book Il diritto patrimoniale di fronte alla crisi economica in Italia e in Spagna. CEDAM, Milano, 446.

60 HW MICKILITZ (2013) Mohamed Aziz - sympathetic and activist, but did the Court get it wrong? ECLN Conference Florence When The ECJ Gets It Wrong. Retrieved from http://www.ecln.net/tl_files/ECLN/Florence%202013/Micklitz%20-%20The%20ECJ%20gets%20it%20wrong%20Aziz-30-11-14.pdf

61 C-240/98 to 244/98, Oceano Grupo joined cases

to enforce and apply EU consumer law[62]. There has been a coherent development of this doctrine, however, reinforcing the effectiveness of consumer protection (Sarrión Esteve, 2014a)[63].

In fact, in the 2009 Pannon case[64], the court stated that the specific characteristics of judicial proceedings between professionals and consumers, in national law, cannot be an element that may affect the legal protection they enjoy under EU law. The national court is also required to examine ex officio the unfairness of a contractual term as soon as they have the facts and laws required to do it. In the Pénzügyi case a year later, the ECJ ruled that a national court can examine ex officio and declare a contractual term unfair, although where the parties have not requested it, and under national procedural law, the tests can be performed only at the request of a party in the civil process[65].

The ex officio doctrine is an application of the principle of effectiveness that does not involve a simple interpretation of national procedural law, but allows the courts an ex officio action not provided under national procedural law, and therefore against national legislation[66].

Although the ECJ's ruling in the Dominguez case in 2012[67], may seem a backward step, it is not. The ECJ said the national court must determine the applicable procedural rules and, considering all elements of the national legislation and applying the interpretative methods recognised in this, do everything within its power to ensure the full effectiveness of EU law[68]. After that case, the court confirmed that when there is no possibility of guaranteeing effective protection for consumers, the national courts should exercise ex officio control, overruling national law

62 European Commission. (2017) An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgements and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, cit.,188-189.

63 Some authors argue that there is the application of ex officio doctrine by the ECJ is unpredictable. See V. TRSTENJAK & E. BEYSEN (2011) European consumer protection law: Curia semper dabit remedium? Common Market Law Review 48(1), 95-124; European Commission (2017) An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgements and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, cit., 189.

64 C-243/08 Pannon GSM

65 C-137/08 *Pénzügyi*

66 SARRIÓN ESTEVE (2014) 'Sobre la necesaria reforma de la legislación española a la luz de la STJUE de 14 de marzo de 2013, Aziz c. CatalunyaCaixa, C-415/11', cit., 442.

67 C-282/10 *Dominguez*, 27

68 SARRIÓN ESTEVE (2014) 'Sobre la necesaria reforma de la legislación española a la luz de la STJUE de 14 de marzo de 2013, Aziz c. CatalunyaCaixa, C-415/11', cit., 443.

(although national law doesn't allow the national court to exercise and ex officio control): they must apply the Pénzügyi doctrine. We can see this action confirmed in several cases involving Spain, such as Banco Español de Crédito in 2012[69], Aziz in 2013[70], Sánchez Morcillo (in which the ECJ tried to reinforce the consumer position to guarantee the equal arms principle in the judicial process) in 2014[71], and in Gutiérrez Naranjo in 2016[72].

We can thus say that the so-called procedural autonomy principle is greatly reduced, and that EU member states, when implementing and regulating their legal systems, must always guarantee the exercise of rights covered in EU law including consumer protection framework. Of course, the national court may use national law to provide EU consumer protection, but the court should overcome national rules when they can affect the EU consumer status; within this we can see a strictly equal arms principle included in the judiciary process.

69 C-618/10 Banco *Español de Crédito*. The ECJ stated that the Spanish procedural rules about the payment procedure were contrary to the principle of effectiveness in preventing consumer protection. The reason for this is that the Spanish legislation did not allow the national court, when it had the facts and legal elements required, to examine ex officio the unfairness of a contractual default interest clause contained in a contact held between a professional and a consumer when the consumer did not raise opposition to it.

70 C-415/11 *Mohamed Aziz*. The ECJ stated that Spanish legislation was incompatible with EU law because in regulating mortgage enforcement proceedings, it did not provide the possibility of formulating grounds of opposition based on the unfairness of a contractual term (which is the basis of an ejection title). At the same time, the law did not allow the judge of the declarative process (which is the power to assess the unfairness of the clause) to take precautionary measures, including the suspension of the mortgage enforcement proceeding when it is necessary to ensure the full effectiveness of the court's final decision. The problem with the Spanish legislation was that it did not cover and guarantee the rights of a consumer in relation to banks because they could discuss the unfairness of a clause only in the declarative process, not in the mortgage enforcement proceedings. At the same time, the consumer could not argue the unfairness of a clause in the mortgage enforcement proceedings. In this sense, according to that legislation, the consumer usually lost the mortgage enforcement proceedings, and after that if they won the declarative process, it would be impossible to gain repossession of the house, affecting the protection of rights of the Spanish consumer.

71 C-169/14 *Sánchez Morcillo*. The ECJ mentioned the Banesto and Aziz cases, and observed that Spanish legislation in relation to mortgage enforcement 'gives the seller or supplier, as a creditor seeking enforcement, the rights to bring an appeal against a decision ordering a stay of enforcement or declaring an unfair clause inapplicable, but does not permit, by contrast, the consumer to exercise a right of appeal against a decision dismissing and objection to enforcement'.

72 C-154/15 *Gutiérrez Naranjo*. The ECJ rules a national case law such as the Spanish Supreme Court doctrine which restricts the restitutory effects connected with the invalidity of an unfair term to the amounts overpaid after the delivery of the decision, incompatible with the EU consumer protection framework; from the ECJ perspective, the restoring effect has a retroactive effect.

The effectiveness and primacy of EU law thus limits the freedom of the procedural autonomy of the national power, and today there is only a functionalised or oriented procedural autonomy to ensure the EU legal framework[73], which guarantees constitutional procedural status for EU consumers.

EU member states must regulate national procedures, even in the cases when they have the exclusive competence, but they must do it to achieve and guarantee rights guaranteed not only at national level, but also at the EU level, and this is a good solution from the perspective of a multilevel system[74].

In conclusion we can say that the ECJ has developed and configured constitutional procedural status for EU consumers.

[73] X. Arzoz Santiesteban (2013) La autonomía institucional y procedimental de los Estados miembros en la Unión Europea: mito y realidad, Revista de Administración Pública, 191, 159-197; SARRIÓN ESTEVE (2014) 'Sobre la necesaria reforma de la legislación española a la luz de la STJUE de 14 de marzo de 2013, Aziz c. CatalunyaCaixa, C-415/11', cit.

[74] J. SARRIÓN ESTEVE (2018) 'Consumer' cit.

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PARENTS

Lena Seglitz-Baierl *

1. Introduction

Law relating to parents is effectively national law, however, European law, the European Convention of Human Rights (ECHR), the conventions of the Council of Europe, and EU law, have an important impact in this field. EU law in particular regulates a considerable number of issues which are connected with the transnational dimension (families with parents of different EU member state nationalities or of a EU citizen and a third State national). This is of importance for the rights the resulting from EU citizenship or, in the professional field, for the exercise of the fundamental freedoms. Furthermore, profession-related issues of concern for parents have been arranged under the jurisdiction of EU law. Procedural rules for transnational dispute settlements have also been established. The EU Fundamental Rights Charter (FRCh) is also relevant for the protection of family life (article 7) and the right to marriage and to found a family (article 9); it guarantees the rights of the children (article 24 with a specific relation to the parents in its paragraph 3), and the protection of the family in the legal, economic and social dimension (article 33). There are also more general provisions, such as the guarantee of equality (article 20; see also article 23) or, of fundamental importance, the protection of human dignity (article 1) which have an impact on parents and family.

Although the EU is not a contracting partner of the ECHR[1], it nevertheless has a strong influence. The European Court of Human Rights has confirmed that the substantive identity of a national standard paired with an EU directive do not result in national legislation being withdrawn from the scope of the European Court of Human Rights[2].

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1 Negative opinion ECHR: Opinion 2/13 OF THE COURT (Full Court) 18 December 2014, available at http://curia.europa.eu/juris/celex.jsf?celex=62013CV0002-&lang1=de&type=TXT&ancre=

2 Read further Streinz, R.: Europarecht. 2016. p. 90-92.

2. Parents and the FRCh

The status of parents is connected to that of the family and in particular to that of the children, and for this reason it is indispensable from a functional point of view to include them in our consideration.

Article 7 FRCh is, insofar as family life is concerned, relevant to the relationships between parents or a single parent and the children, and this relationship has to be interpreted in a broad sense, to some extent similar to the way this term is used in article 8 of the ECHR[3]. It must also include a single-parent family. It is not important whether the parents are biological parents or have adopted the children, or the children are foster children[4].

The terminological elements relating to parents are regulated by secondary EU law in the field of fundamental freedoms. EU nationals enjoy their fundamental freedoms only if there is no hindrance to doing so for their family members. The integration of the family is required[5]. In the field of the free movement of workers and of free establishment, secondary law has specified who is defined as family member and who enjoys their fundamental freedoms. It is particularly important that the members of the family, even if they are nationals of a third state, are in principle entitled to these freedoms. Family members include a spouse, the children of both the EU citizen and of a spouse with third state nationality as relatives in the descending line if they are not yet 21 years old or if they are dependent on their parents.

3. Parents and EU-Regulations

3.1. Parents and maintenance obligations

The maintenance obligations of parents are settled under Council Regulation No. 4/2009[6]. This regulation secures cross-border maintenance obligations based on family relationship. It applies to family relationships, relationships, affinity or marriage. It determines common rules for the whole European Union to ensure the recovery of maintenance claims, even if the obligated or authorised person resides in another EU country. There is thus a toolkit to facilitate the payment of maintenance claims in cross-border situations[7]. The appropriate authority on maintenance

3 I. Augsberg, in von der Groeben/Schwarze/Hatje, GRC Art. 6/7, p- 573 -580.

4 *Idem*.

5 W. Schrammel, M./Windisch-Graetz, Europäisches Arbeits-und Sozialrecht, p. 36 and Directive 2004/38/EG

6 Lex Europe: Official Journal of EU: Council Regulation No.4/2009: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:007:0001:0079:EN:PDF

7 Read more: Lex Europe: Official Journal of EU: Summary of Council Regulation No. 4/2009: https://eur-lex.europa.eu/legal-content/DE/TXT/HTML/-

obligations is the court of the place where the defendant or the authorised person usually has their main residence. The court with jurisdiction over a civil status procedure (such as a divorce) or parental responsibility may be where a maintenance case is involved (provided that this jurisdiction is not based only on the nationality of either party)[8].

3.2. Matrimonial matters and parental responsibility

The jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility are ruled by Council Regulation (EC) No 2201/2003 of 27 November 2003[9]. This regulation repeals Regulation (EC) No 1347/2000. It has the function of securing the jurisdiction in matrimonial matters and parental responsibility in disputes involving more than one country. It is also intended to allow the easier recognition and enforcement of decisions taken in one EU country in another country, and to create a procedure for settling cases in which a parent kidnaps a child from one EU country to another. The regulation does not apply to material matters of family law. These are subject to the national competence of the EU countries. It is a single legal act that can help international couples settle disputes involving their divorce and the custody of their children across more than one country[10].

The regulation finds applicability in civil proceedings involving more than one country and covering the following subjects: divorce, legal separation, the annulment of a marriage and any aspects of parental responsibility. According to the regulation, parental responsibility applies to custody and the access rights, guardianship and related legal institutions, the purpose and scope of any responsible person, representing or assisting the person or property of the child, the placement of the child in a foster home or a home and measures to protect the child in relation to the administration and maintenance of their assets or the disposal thereof. In matters of parental responsibility, jurisdiction is principally based in the courts of the EU country where the child is ordinarily resident. In cases where it is impossible to determine where a child is ordinarily resident (such as refugees), the EU country in which the child lives automatically receives

?uri=LEGISSUM:jl0024&rid=3

8 So Lex Europe: Official Journal of EU: Summary of Council Regulation No. 4/2009: https://eur-lex.europa.eu/legal-content/DE/TXT/HTML/-?uri=LEGISSUM:jl0024&rid=3

9 Lex Europe: Official Journal of EU: Council Regulation (EC) No 2201/2003 of 27 November 2003: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003R2201&from=DE

10 So Lex Europe: Official Journal of EU: Council Regulation No. 2201/2003: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003R2201&from=DE

responsibility[11]. One of the main objectives of the regulation is to preserve the right of the child to maintain contact with both parents, even if they are separated or living in different EU countries[12].

3.3. Parental leave

Taking into account the increasing diversity of family structures, and in compliance with national legislation, collective agreements and/or practices, Council Directive 2010/18/EU of 8 March 2010 sets minimum requirements for working parents to conciliate their professional and parental responsibilities. Council Directive 2010/18/EU enforces the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC[13]. This agreement applies to all employees who have employment contracts or are employed in accordance with the legislation, collective agreements and/or practices in their respective Member State. Member States and/or social partners may not exclude workers, employment contracts or employment relationships from the scope of this agreement simply because they are part-time, temporary or persons who have concluded an employment contract or employment relationship with a temporary employment agency[14]. Male and female workers have individual rights to parental leave based on the birth or adoption of a child, to take care of that child until a given age, up to eight years, to be defined by Member States and/or social partners. A period of at least four months shall be granted, to promote equal treatment and opportunities between men and women. The leave should be non-transferable in principle. To encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis. The modalities of application of

11 Lex Europe: Official Journal of EU: So Lex Europe: Official Journal of EU:Council Regulation (EC) No 2201/2003 of 27 November 2003: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003R2201&from=DE

12 Lex Europe: Official Journal of EU: Summary Matrimonial matters and parental responsibility: https://eur-lex.europa.eu/legal-content/DE/TXT/?qid=1527108272160-&uri=LEGISSUM:l33194

Related acts to Council Regulation (EC) No 2201/2003 of 27 November 2003: Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU); Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation; Commission Decision of 21 November 2012 confirming the participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation (2012/714/EU); Commission Decision of 27 January 2014 confirming the participation of Greece in enhanced cooperation in the area of the law applicable to divorce and legal separation (2014/39/EU).

13 Lex Europe: Official Journal of EU: Council Directive 2010/18/EU of 8 March 2010: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:-32010L0018&from=DE

14 *Idem*.

the non-transferable period shall be set down at national level through legislation and/or collective agreements, taking into account existing leave arrangements in the Member States[15].

3.4. Education of children with a migrant background

According to Council Directive 77/486/EEC, Member States have to offer the children of migrant workers from EU countries free tuition. This shall include the teaching of the official language of the host state. The conclusions of the Council and the Representatives of the Governments of the Member States to ensure equitable education and training systems that are aimed at providing opportunities, access, treatment and outcomes, are independent of socio-economic background and other factors which may lead to educational disadvantage[16].

3.5. Investing in children: Breaking the cycle of disadvantage

Based on the Treaty on the Functioning of the European Union, in particular article 292, the following shall be considered by the Member States. Child poverty and social exclusion shall be fought by means of integrated strategies. The principle of the best interests of the child shall be given first place. Investments in children and family shall be sustainable, to enable the consistency of actions and long-term planning.

Development of integrated strategies based on three pillars

Access to adequate resources. The close connection between the labour market participation of the parents and the living condition of the children shall be recognised and in accordance with the principles of the recommendation of the commission[17]. There shall be a guarantee of adequate living conditions based on the optimal combination of monetary and non-cash benefits; access to affordable, high-value services. A decrease in disparity in infancy may be made through investments in early childhood education and care. There shall be an improvement of the effects of the education system as regards equal opportunity, and an improvement in the flexibility of health systems considering the needs of disadvantaged children. Secure, adequate living space and a corresponding living environment will be provided. Support for families and an improvement in the quality of alternative care opportunities will be provided. Children have the right to

15 *Idem*.

16 Lex-Europe: Official Journal of the EU: Council conclusions of 26 November 2009 on the education of children with a migrant background, 2009/C 301/07: https://eur-lex.europa.eu/legal-content/DE/TXT/?qid=1527108272160-&uri=CELEX:52009XG1211(01)

17 Commission Recommendation on the active inclusion of people excluded from the labour market 2008/867/EC of 3 October 2008.

participate, and this participation in activities in the area of games, leisure activities, sport and culture shall be supported. Countries should make appropriate use of the relevant financing instruments of the EU to support these elements[18].

4. Parents and the ECHR

The European Convention on Human Rights has proven to be a very effective instrument for ensuring individual human rights protection[19]. The European Court of Human Rights has considered cases concerning the marital or parental status of individuals who are collected in the ambit of private and family life. It has particularly declared that the registration of a marriage, being a recognition of an individual's legal civil status, as well as private and family life, comes within the scope of article 8 of the ECHR[20].

Article 8 ECHR has the primary purpose of protecting against arbitrary interferences with private and family life, home and correspondence. The substantial element of family life is the right to live together, so that family relationships may evolve normally and members of the family may enjoy each other's company. The notion of family life is seen by the European Court of Human Rights as an autonomous concept, so the question of whether family life exists or not is essentially a matter of fact, which depends on the real existence of close personal ties. The Court will look at the de facto family ties, such as applicants living together, if there is no legal recognition of family life[21].

Family life in terms of article 8 of the ECHR integrates the right to respect for decisions to become a parent in the genetic sense. Within the ambit of article 8 ECHR is the right of a couple to make use of medically assisted procreation as an expression of private and family life, however, the provisions of article 8 ECHR by themselves doesn't guarantee the right to found a family or the right to adopt. According to the European Court of Human Rights, concerns based on moral considerations or social acceptance must be taken seriously in a sensitive area like artificial procreation[22]. They are not, *per se*, sufficient reasons for a complete ban on specific artificial procreation techniques such as ovum donation. In face of the large margin of appreciation afforded to the Contracting

18 Commission Recommendation 2013/112/EU

19 Read more: M. Herdegen: Völkerrecht. München, 2016; p. 385 f.

20 European Court of Human Rights: Guide on article 8 of the European Convention on Human Rights, p. 44: https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf.

21 *Idem*., p.45

22 *Idem*., p.48

States, the legal framework, which was created for this purpose, must be shaped in a coherent manner, so that the different legitimate interests can be included[23].

[23] *Idem*., p.49

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European Court of Human Rights: Guide on Article 8 of the European Convention on Human Rights, p. 44, 45, 48, 49: https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf.

THE LIABILITY OF THE EU IN DAMAGES FOR DELAYS IN EU COURTS WITH SPECIAL REFERENCE TO ANTITRUST CASES

Tunjica Petrašević* and Paula Poretti **

1. Introduction

The EU has an obligation to cover the damage that is caused to Member States and/or individuals, on behalf of institutions that cause it (Petrašević, 2017, p. 256; Art. 340(2) TFEU). In this paper we will focus only on the non-contractual liability of the EU for breaches made by EU courts, with the special reference to antitrust cases.

In the first part of the paper we will answer the following question: is it possible for the EU to incur liability for breaches made by EU judiciary? In order to answer that question we will refer to the case of Köbler[1] where the CJEU ruled that Member States could be held liable for the actions of its judiciary (Mlinarić, 2016, pp 16-19).

The second part will analyse relevant case law in order to draw certain conclusions about the application of this principle – the liability of the EU judiciary for damages. An earlier prevalent understanding of the Court of Justice (hereinafter: CJ) was that it was possible to ask for damages in appellate procedures against the judgment of a lower court. The CJ explained: *"For reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding a procedural irregularity of that kind, it must be held that the plea alleging excessive duration of the proceedings is well founded for the purposes of setting aside the contested judgment in so far as it set the amount of the fine imposed on the appellant at ECU 3 million*" (Baustahlgewebe, p. 48)[2].

The CJ decided to award damages in the form of a decrease in the fine originally imposed by the European Commission (EC) and considered it

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1 C-224/01 Gerhard Köbler v Republik Österreich, ECLI:EU:C:2003:513.

2 C-185/95 P Baustahlgewebe GmbH v. Commission of the European Communities, ECLI:EU:C:1998:608.

to be appropriate, that is, a speedy and efficient legal remedy. Over time, the CJ changed its approach. The position adopted by the Court today is that the new court approach involves an independent action and it is now necessary to initiate an independent "fresh" action for damages before the General Court (GC). It is possible that the change in the CJ's approach was conditioned by the fact that it was not until the Treaty of Nice that the GC (earlier: the Court of first instance) acquire competence to decide on individual actions for damages (Sherman & Sterling, 2015, p. 3, n.10; Ćapeta, 2009, pp 99-103).

According to Art. 256 TFEU, the GC is the competent court for the actions of individuals (natural and legal persons) (Petrašević, 2016, p. 55). It is a very unusual situation where the GC decides inactions against "itself", although "sitting in a different composition from that which heard the dispute which gave rise to the procedure whose duration is criticised"(Repsol Lubricantes y Especialidades, par.98-99)[3]. An unusual situation wherein the GC decides on the actions against "itself" could certainly trigger suspicion about whether the requirements of impartiality and independence are met in such cases. We will thus try to critically evaluate the newly established approach of the CJ in the concluding remarks.

2. Liability of EU courts in damages

The length of proceedings before EU Courts[4] has been a problem for many years. It has resulted in a violation of the right to trial within reasonable time, a standard guaranteed in Art. 47 (2) of the Charter of the Fundamental Rights of EU (hereinafter: the Charter), which corresponds to Art. 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR; Ward, 2011)[5].

In order to understand what constitutes "*reasonable time*"[6], it is necessary to consult the view taken by the CJ. According to the CJ the assessment must be made on a case-by-case basis, taking into account

[3] C-617/13 Repsol Lubricantes y Especialidades SA and others v. Commission, ECLI:EU:C:2016:416.

[4] By this we mean all three courts within the CJ, and from 2016 two courts (General Court and Court of Justice).

[5] Art. 47/2 of Charter: "*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*". Art. 6 ECHR: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...)*".

[6] See T-276/04, Compagnie Maritime Belge v Commission, (2008) ECRII-01277, §§41 and ff.

the specific circumstances of each case[7]. The assessment is not without criteria, however. The CJ uses four criteria (not exhaustive) to assess whether the duration of proceedings is reasonable: (i) importance of the case for the person concerned; (ii) complexity of the case; (iii) conduct of the applicant; and (iv) conduct of the competent authorities. If the duration of the proceedings appears justified in the light of one of the criteria, the assessment of the reasonableness of the period in question will not include examination of the circumstances of the case in the light of each of the four criteria. The complexity of the case or the dilatory conduct of the applicant alone may thus be deemed to justify a *prima facie* excessive duration. Conversely, the time taken may be regarded as longer than is reasonable in the light of just one criterion, in particular where its duration is caused by the conduct of the competent authorities. - The last criterion is particularly important in light of the issues we discuss in the paper. The CJ has a large number of cases pending, which has resulted in delays before a large number of courts. Many appeals in complex antitrust cases are pending before the GC (Sherman & Sterling, 2015, p. 1).

Usually, the EU has an obligation to cover the damage to individuals on behalf of the institution that caused it (Petrašević, 2017, p. 55). The liability of the EU could be contractual or non-contractual. In this paper we focus only on the non-contractual liability regulated in Art. 340(2) TFEU, with special reference to breaches made by the EU judiciary in antitrust cases. We will not elaborate on the non-contractual liability of the EU in general because there is already adequate literature on the topic. Conversely, there is a deficit of literature dealing with the liability of the EU for breaches made by EU courts.

The question arises of whether the EU may be liable for damages incurred by individuals for violations caused by EU courts. As this stems from the jurisprudence of the CJ, the answer is positive. In the Köbler case, decided as a preliminary ruling, the CJEU (concretely CJ) established certain criteria for the liability of Member States for the acts of its judiciary: "*As to the conditions to be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible, the Court has held that these are threefold*". The conditions established by the CJ are following: "*the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties.*"(par. 51). Regarding the second condition - the breach must be sufficiently serious -

[7] See C-254/99, LVM v Commission, (1999) ECR II-00931, §§192 and ff.

CJ added: "*In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it*"(par. 54) and "*those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional...*"(par. 55). In other words, for the Member State to incur liability because of the infringement made by its judiciary, the infringement made by the national court should be intentional. The question is: does the same criteria apply for the liability of the EU courts? The authors found, when analysing the relevant jurisprudence, that the case does not need to involve an intentional error by EU Courts (concretely: GC). It is difficult, therefore, to avoid the conclusion that the criteria for the liability of EU courts are set higher than those for national courts.

The failure of an EU court to conduct a trial within a reasonable time may mean the liability of the EU for damages according to Art. 268(2) TFEU (Lenaerts, Maseils & Gutman, 2015, pp. 496). Although the CJEU has a specific position on the issue, new developments, as well as a number of open questions, have emerged. An analysis of the recent jurisprudence will therefore be conducted next, in order to draw relevant conclusions.

3. Analyses of Relevant Antitrust Cases

As mentioned previously, the EU has undisputed liability for damages incurred to individuals through the European courts due to violations of the right to trial within a reasonable timeframe under Art. 47(2) Charter and Art. 6 ECHR. The approach of the CJ in regard to the manner in which such compensation is awarded, however, has changed significantly. In the case of Bausthalgewebe (n. 2) the CJ advocated awarding damages in the form of a decrease in the fine originally imposed by the EC and considered this to be a speedy and efficient legal remedy.

In certain cases, appellants requested that the CJ annul the decision of the GC because of the failure to adjudicate within a reasonable time. The CJ conditioned the decision on the success of the appellants in demonstrating that the delay to the proceedings had a real impact on the outcome of proceedings.

"*In so far as there is nothing to suggest that the failure to adjudicate within a reasonable time may have had an effect on the outcome of the dispute, the setting aside of the judgment under appeal would not remedy the infringement of the principle of effective legal protection committed by the Court of First Instance*" (Der Grüne Punkt, par. 193.).

A failure to adjudicate within a reasonable time may therefore result

in damages, but this is not in itself sufficient reason for an annulment of a decision brought in the proceedings in which such an infringement was determined to have occurred.

The CJ changed its approach, and it is no longer possible to apply for the compensation of damages in appeal proceedings before the CJ against the decision of the GC. The current position adopted by the CJ is that the harm suffered due to an excessive delay to proceedings involves an independent action, and it is necessary to initiate that new and independent action for damages before the GC.

In the case of Kendrion, the CJ concluded: "*It follows that a claim for compensation for the damage caused by the failure by the General Court to adjudicate within a reasonable time may not be made directly to the Court of Justice in the context of an appeal, but must be brought before the General Court itself*" (par. 95).

It is possible that the change in the CJ's approach was conditioned by the fact that not until the Treaty of Nice that the GC (earlier: the court of first instance) acquired the competence to adjudicate individual actions for damages (Sherman & Sterling, 2015, p. 3 n.10; Ćapeta, 2009, pp 99-103).

According to the available information, there have been five actions for damages submitted to the GC (T-479/14, T-577/14, T-725/14, T-40/15 and T-673/15) so far. All actions are a result of the failure of the GC to adjudicate within a reasonable time in antitrust cases. We believe that for now, no such actions were brought against the CJ. The GC awarded damages in four cases and denied damages a single case (T-725/14 Aalberts).

A question arises as to whether it is necessary to submit a complaint in regard of the failure of the CJ to adjudicate within a reasonable time in appellate proceedings before the CJ. The other possibility is for the action for damages to be submitted to the GC independent of the appellate proceedings before the CJ, in which case the GC will determine whether the harm occurred.

The CJ (C-58/12P C-50/12P and C-580/12P) made judgements in the cases of Gascogne, Kendrion and Guardian, and a failure was established by the CJ.

Unlike the aforementioned cases in which the CJ first delivered a judgment in favour of the applicants, action in the ASPLA case was submitted directly to the GC, without the CJ's prior judgment in regard to the duration of proceedings. The GC accepted the action and determined that there was a failure to adjudicate within a reasonable time. We consider such a

result to be logical, since the action for damages is a separate action for establishing liability (Petrašević, 2017, p. 259). The ASPLA case concerned the annulment of the decision brought by the EC(Decision C(2005) 4634), however, which was equal to the decisions in the Gascogne and Kendrion cases, in which the CJ found that there was a failure to adjudicate within a reasonable time. In all three cases the duration of proceedings before the GC was approximately the same, but, in the Guardian case (T-673/15), the appellant had already complained because of the delay to proceedings (C-580/12P). The appellant in C-463/17 P Ori Martin also complained, and this case is pending before the CJ, and will potentially be brought before the GC as an action for damages.

This raises questions as to the necessity of submitting a complaint before the CJ and requesting that the failure to adjudicate within a reasonable be determined. Obviously, the plaintiffs/appellants consider it necessary. Conversely, we consider the action for damages to be a separate action and independent of the proceedings before the CJ. Future developments in jurisprudence will test the validity of our position.

Although in three out of four cases the GC awarded damages, the fact that the GC was given competence to decide against itself in these cases should not be disregarded. Is it possible to uphold the standards of an independent and impartial trial in such cases? Would, the ECtHR determine violation of due process in these cases in the accession of the EU to the ECHR (Duić & Petrašević, 2015, pp. 251-267)?

Finally, the question of who has passive legitimation in these cases should be considered. It is interesting that the CJEU as an institution comprises of three European courts (only two as of 2016; Ćapeta, 2010, pp. 44-51) has already submitted a complaint requesting that the action be dismissed due to the lack of passive legitimation. The EC usually represents the EU in damages cases. Where the complaint is dismissed, the CJEU requests that the EC enters into the EU's procedural position. The GC refused the request of the EU and found the action to be inadmissible, because an action against the EU should be submitted against an institution which is liable for damages. In this case the CJEU is the liable institution, comprising three courts (Sherman & Sterling, 2015, p. 4). Although the CJEU submitted an appeal, the CJ also found this inadmissible and ordered the case to be removed from the register.

We consider it necessary to distinguish between passive legitimation and legal representation before the CJEU. The EU, that is, the institution liable for damages, has passive legitimation. It is thus possible to submit an action against the EU or the institution in question (Petrašević, 2017, p.

258). The level of clarity is not the same with regard to legal representation. Being aware of the appeal in the Kendrion case, after submitting an action against the CJEU (t-577/14, Gascogne also submitted an action against the EC (T-84/13) for prudential reasons. The GC dismissed the latter action. In case T-673/15, Guardian, the action was submitted against the EU, represented by the EC and the CJ. The EC was listed first. This leads to the conclusion that in cases brought against the EU for damages caused by EU courts the question of legal representation is not resolved in a clear and uniform manner.

Analysis of the jurisprudence supports the following conclusion: if an action is submitted against the EU for a violation caused by the EU courts, the EU will be represented by the EC and the CJ. If the action is directed against the GC as an EU institution, it will be represented by the CJ. Jurisprudence will show whether our position regarding these issues was accurate. The interpretation of the CJ in these matters would certainly be welcome.

4. Conclusion

The EU is liable for the damages incurred to individuals by EU courts due to failure to adjudicate within a reasonable time under Art 47/2 of the EU Charter. Our focus in the paper was on the damages awarded in antitrust cases. Originally, the CJ awarded damages to individuals in appellate proceedings against the judgment of the lower court (typically the GC). The damages were awarded in the form of a reduction of the fine the EC had imposed upon the undertakings. The CJ considered this to be an appropriate legal remedy. Over time, the approach of the CJ changed and in order to acquire damages it is now necessary to submit a separate action for damages before the GC. Following this path has resulted in the unusual situation in which the GC has the competence to determine whether any harm has occurred to the parties due to the excessive length of proceedings. It is possible to argue that such proceedings may bring into question the impartiality of the GC. Regardless of the fact that the CJ emphasised that the GC will assess the damages in another composition/Chamber, doubts and the critique remain.

After the change in the CJ's approach, it became uncertain as to whether it was necessary to invoke a failure to adjudicate within a reasonable time in appellate proceedings before the CJ and then submit an action for damages before the GC. On that point we argue that proceedings should be initiated before the GC by submitting a separate action for damages. The GC should assess whether damages occurred to the parties due to the excessive delay in proceedings. The judgment in the ASPLA case confirms our position. The plaintiffs submitted an action

for damages before the GC without the infringement to be determined by the CJ first. The GC considered the action to be admissible (ASPLA and Armando Alavrez v. CJEU, T-843/14), however, in subsequent cases the plaintiffs/appellants requested that the CJ determine the infringement first.

The cases analysed reflect the position of the CJ with regard to the question of what constitutes an appropriate remedy for infringements of the right to have a case adjudicated within reasonable time. The reason for the failure to adjudicate in reasonable time is connected to the backlog at the CJEU, and especially at the GC. It is impossible to disregard the additional pressure which the new remedy will put on the workload of the GC. Indisputably, it will require the adoption of appropriate structural solutions,and so the change in the approach of the CJ seems counterproductive. It is obvious that the CJ abandoned its earlier arguments, which favoured the "*economy of procedure*" and "*need to ensure an immediate and effective remedy*". The new remedy requires a separate action and additional time and cost to process it (Sherman & Sterling, 2015, p. 5). In our opinion the previous solution was more effective.

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REMEDYING MALTESE TRIAL DELAYS: A LABORATORY FOR EUROPEAN INTEGRATION?

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Preliminary note

The research, jurisprudence and full analysis at the basis of this paper is contained in the publications by Caroline Savvidis LL.D. *Court Delay and Human Rights Remedies* (Routledge, 2016) and by David Edward Zammit LL.D. Ph.D., *Maltese Court Delays and the Ethnography of Legal Practice* (Journal of Civil Law Studies, Vol. 4 no. 2 (2011)), and David Edward Zammit with Sean Patrick Donlan & Biagio Ando, "*A Happy Union?" Malta's Legal Hybridity*, 27 Tul. Eur. & Civ. L.F. 165 2012[1].

1. Introduction

Just like E.U. legislation, the European framework for protecting human rights *via* the European Convention on Human Rights and the European Court of Human Rights in Strasbourg is meant to accommodate diversity while promoting convergence between the legal systems of ratifying states. Yet, as regards proceedings alleging a breach of Article 6 rights due to excessive delays in court proceedings, it seems that the decisions of the Strasbourg Court are failing to achieve any meaningful convergence between national remedial practices for such grievances. In matters relating to legal delays, why has the response of national courts been so conservative and ineffectual to date, notwithstanding the clear direction of the Strasbourg Court? Over 5,331 violations based on the length of proceedings, out of a total of 17,754 rulings finding a violation, have been handed down since 1959, and there is no other area of human rights law where the Strasbourg Court has given such unequivocal and clear direction to national courts. Yet, the stream of complaints being filed directly before this Court continues to flow unabated, and this notwithstanding that it is meant to operate no more than a subsidiary mechanism

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1 Abbreviations and capitalised terms used in this paper make reference to the aforementioned publications. Article 6 and Article 13 in this paper refer to articles of the European Convention on Human Rights. The Strasbourg Court refers to the European Court of Human Rights in Strasbourg.

of last resort to redress new points of law which exceptionally arise, and in regard to which its multinational expertise is required.

This paper seeks to address these puzzles through an analysis, from a comparative perspective, of how the Maltese and Italian courts construct a national human rights remedy for legal delays in breach of Article 6. A comparative perspective is critical not only in order to understand the *external* interplay between (ordinary) national and (exceptional) Strasbourg remedies for Article 6 violations, but also to navigate the *internal* diversity of the jurisdiction itself and to seek to identify internal obstacles to the provision of effective remedies for delay. In Malta, the dualism between ordinary national and extraordinary Strasbourg remedies is reproduced internally *within* its mixed legal system, between ordinary private law and extraordinary public law remedies, since in the Maltese courts the human rights remedies under national public law can only be availed of in the absence of an ordinary remedy under national private law. Since in classical mixed jurisdictions such as the Maltese the public/private law divide broadly corresponds to that between the respective spheres of influence of the common and civilian legal traditions, figuring out how the applicable remedy is selected and interpreted entails an exercise of internal comparative law. By superimposing external and internal comparative analyses, we hope to gain insight into why we have not witnessed a 'qualitative race to the top' between European states as regards Article 6 length-of-proceedings violations and effective remedies thereof in terms of Article 13. Instead of harmonisation between national systems, we appear to be witnessing in certain cases significant national resistance to accepting the guidance of the European Court of Human Rights.

2. Seepage of Tort Across the Private-Public Rift and its Impact on the Subsidiarity Mechanism of the Convention

To what extent can the response of national systems be attributed to inadequate positive legislation and to what extent does it reflect a compartmentalised legal culture rooted in the hybridity of the legal tradition? To answer this question, a study has been undertaken of the complete body of Strasbourg jurisprudence relating to judicial delays, and of national mechanisms for redressing delay in various jurisdictions (notably Italy and Malta, being amongst the 'worst offenders').

The Strasbourg Court has historically followed a strictly structured approach to the assessment of an alleged breach of Article 6 relating to delay in national proceedings, determining first the relevant 'period to be considered', and whether, *prima facie*, this period is or is not reasonable. This initial assessment is then considered against 'four heads of examination', namely, the circumstances of the case, conduct of the applicant, conduct of

the authorities and stakes of the case. Equal weight is given to each one of these four factors when placing the relevant period into context. Crucially, the Strasbourg Court has always stressed that a court's examination should take the positive obligations of the state as a starting point, which require it to take active measures to uphold Convention rights. As Savvidis notes, '*Above all, once the period to be taken into consideration is prima facie unreasonably long, a presumption in favour of the applicant arises which the state must rebut...*'

An assessment of Malta's length-of-proceedings human rights jurisprudence brings out stark differences in the methodology adopted by the national courts when compared to that of the Strasbourg Court, encompassing not only the preliminary and substantive investigation into whether there has been a violation of the Convention, but even in the tools employed for determining compensation once a violation has been found[2]. Such points of discrepancy directly account for the overruling in Strasbourg of a large percentage of length-of-proceedings judgements. One of the main points of discrepancy is described as follows by Savvidis:

> *'A tendency in the jurisprudence of Malta to give significantly more weight to the issue of the complainant's fault than that which is attributed in the Strasbourg Court's jurisprudence emerges clearly from a reading of length-of-proceedings case law*[3]*.'*

Indeed, the domestic courts have on occasion even '*inverted the burden of proof completely*' by placing applicant and state on the same level in requiring them to show that they exhibited the required level of diligence in the conduct of the proceedings.

The emphasis on a fault-based approach is a direct legacy of the particularly French civilian legal tradition codified within Maltese private law[4]. The Convention, being a human rights instrument, has as its principal focus the *kind of harm suffered by the victim* of a breach of human rights. This finds expression - as regards alleged Article 6 violations due to trial delays - in the methodological approach adopted by the Strasbourg Court, which focuses initially on whether the period of delay is *prima facie* unreasonable and, subsequently, on requiring the state to discharge

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2 *Idem*. at p. 54 and 63 *et seq.* for a full analysis of the differences emerging from the bodies of case law.

3 *Idem*. at pp. 62 and 64; as per case cited below of *Azzopardi v. Attorney General et* – Civil Court (First Hall) – Application No.669/1998/1, as referenced in Caroline Savvidis, op. cit. at n.1, p.62.

4 See Dr David E. Zammit, "Maltese Court Delays and the Ethnography of Legal Practice," Journal of Civil Law Studies, Vol. 4 no. 2 (2011).

the onus of proof. The state is presumed *iuris tantum* to have violated Convention rights in the face of delay which is *prima facie* unreasonable. By contrast, the Maltese Civil Code follows the Code Napoleon in having a general clause on liability in tort which places the emphasis, when it comes to determining liability, on the *conduct of the alleged tortfeasor*[5] and not on the harm inflicted on the victim[6]; this has had profound implications on ordinary remedies provided in a human rights context.

The case of *Azzopardi v. Avukat Ġenerali Et*[7] provides a good example of how the applicant's fault has been given overriding importance by the Maltese courts at the expense of the guidance given by the Strasbourg Court. This was a constitutional case in which the complainant alleged a breach of Article 6 because proceedings for libel had lasted for ten years, six of which at first instance during which three witnesses were heard. During the main (ordinary) libel proceedings, the action had succeeded at first instance, but was then revoked upon appeal. The applicant himself admitted to causing certain delays, and this was found by the court sufficient for it to conclude that the delay was attributable to his fault: it ruled that there had been no breach of applicant's Article 6 rights. In its assessment, the First Hall did not apply the Strasbourg methodology[8], which would have meant *inter alia*:

> (1) starting from an assessment that the length of the case was *prima facie* unreasonable,
>
> (2) placing the onus on the state to prove why the length proceedings took did not violate the applicant's Convention rights and
>
> (3) holding that ascribing part of the fault for the delay to the applicant did not impede it from assessing the *prima facie* violation in the light of the circumstances of the case (under the 'four heads of examination'), and to hold the state liable for failing in its positive obligations towards the individual if there was other unjustified delay in the proceedings not likewise attributable.

This tendency of the courts of Malta to require proof of the respon-

5 That is, on whether the conduct of the tortfeasor can be said to demonstrate delictual or quasi-delictual fault.

6 The relevant articles are 1031-1032 of Chapter 16 of the Laws of Malta, which read as follows: "Article 1031: Every person, however, shall be liable for the damage which occurs through his fault. Article 1032 (1): A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a bonus paterfamilias. (2) No person shall, in the absence of an express provision of the law, be liable for any damage caused by want of prudence, diligence, or attention in a higher degree."

7 *Azzopardi v. Attorney General Et* – as cited in no. 4 above.

8 *Idem.* see n 6.

dent's fault as a prequel to finding a violation of Article 6 clearly reflects an unexpected seepage of tort law concepts across the gap which should separate private from public law. The result of this heavy reliance on the concept of 'quasi-delictual' fault in the context of human rights proceedings is very different to the rulings generated by the Strasbourg methodology, where the positive obligations incumbent upon the state require it to provide justification of why any period of delay which is *prima facie* unreasonable is not in violation of the applicant's rights[9]. The overruling of a large percentage of local judgements in Strasbourg can be directly traced to the differences which result from an independently developed yet distinct vernacular approach[10].

While the civil law concept of fault has constrained the criteria applied by the Maltese courts in their determination of whether an unduly delayed trial constitutes a breach of Article 6 rights, it is interpretative stances rooted in common law[11] which have conditioned their *modus operandi* in determining the type of redress due under ordinary civil law[12]. Here it is important to keep in mind the overarching difference in the interpretation of remedies between common and civil law traditions, neatly captured in the competing maxims: *ubi remedium ibi jus and ubi jus ibi remedium*[13]. Yet in terms of substantive law it is the *civil* law rules relating to the compensation of tort damages which have traditionally been understood by the courts of Malta as limiting compensation to the specific heads of damages expressly mentioned in Article 1045 of the Civil Code[14], and this is fully in accordance with the *common* law principle that conditions the existence of a right to compensation upon the availability of a procedural remedy.

9 *Idem*. at pp. 39-45, 55, 68-73.

10 *Idem*. at p. 56.

11 *Idem.* See for instance: 'Proportionality in respect of other domestically delivered decisions' at pp.68-73.

12 See Fiona Cilia, *Quantifying Damages for Lucrum Cessans in Tort: A Fusion of Sources Creating a Unique Legal Structure for Malta*, Journal of Civil Law Studies, Vol. 4 no. 2 (2011) and Claude Micallef-Grimaud, *Article 1045 of the Maltese Civil Code: Is Compensation for Moral Damage Compatible Therewith?*, Journal of Civil Law Studies, Vol. 4 no. 2 (2011).

13 See n 8.

14 "Article 1045 (1): The damage which is to be made good by the person responsible in accordance with the foregoing provisions shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused. (2) The sum to be awarded in respect of such incapacity shall be assessed by the Court, having regard to the circumstances of the case, and, particularly, to the nature and degree of incapacity caused, and to the condition of the injured party."

In the field of human rights, by contrast, the dominant approach is the civil law approach: *ubi jus ibi remedium*, and there is nothing in the positive or soft law of the legal system which justifies a transposition of civil law limitations into the provision of human rights remedies; on the contrary, the letter of the law implies the exact opposite[15]. As Professor Cremona remarks: "*According to section 46* (of the Maltese Constitution) *any person who alleges that any of the human rights provisions 'has been, is being or is likely to be contravened' in relation to him... may apply to the Civil Court First Hall for redress, which is not restricted, as in some other constitutions, to named remedies. The court is empowered to 'make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement' of any of the protective provisions*"[16].

In addition to these mixed influences brought to bear on remedies for the compensation of Article 6 violations, a further filtering procedural framework requires the Maltese courts to treat human rights remedies as exceptional ones: access to them is only granted if proof is provided that effective ordinary remedies for protecting the rights in question either do not exist or have been exhausted. The first recourse of the applicant for redress of the harm caused by excessive trial delays should therefore be found within the span of remedies provided by ordinary law, in particular the possibility of using the civil law remedy of tort[17]. The study of the manner in which Maltese courts have handled such applications, and of the relevant jurisprudence has further confirmed the existence of an idiosyncratic approach developed by the Maltese courts, which while acknowledging the jurisprudence of the ECtHR yet refuses to fully integrate it. This is owing to the incompatibility with domestically developed constraints governing access to a private law remedy; particularly the drawback that the ordinary civil courts will not compensate for moral damage as part of a tort remedy for an unduly delayed trial[18]. The situation is no clearer if an action is pursued seeking damages directly for a human rights

15 Caroline Savvidis, *Court Delay and Human Rights Remedies* (Routledge, 2016), at p. 99.

16 (Emphasis added): J.J. Cremona, The Maltese Constitution and Constitutional History Since 1813, (Malta, Publishers Enterprises Group Limited: 1997), at p. 83.

17 Caroline Savvidis, op.cit. at n.1, Chapter 4, p. 86 *et seq.*: an assessment of possible ordinary law remedies, and to what extent these could prove suitable to the individual case, can be found in the same Chapter 4.

18 As moral damages are not expressly listed under the heads of compensable damage mentioned in article 1045 of the Civil Code, the Maltese courts have traditionally affirmed that such damages cannot be awarded as an ordinary remedy for delictual or quasi-delictual conduct. The reader should however note a number of recent judgments referenced in this paper and the background research cited at its outset. See also 14/12/2015 Constitutional Court Agius Jane v. L-Avukat Generali Et.

violation, in terms of Article 6 of the Convention and section 46 of the Constitution. Here the right of access to an effective and comprehensive remedy is again smothered by the practice of the Maltese courts which has repeatedly led to the awarding of 'manifestly inadequate' sums of compensation according to the Strasbourg jurisprudence.

The development of vernacular criteria for compensating the damage caused by an excessively delayed trial appears to be an attempt to fill the normative lacuna left by the highly compartmentalised remedies available in Maltese human rights and civil law. The compartmentalisation itself - which is a direct effect of the normative mixing which characterises Maltese law and the contradictory principles which operate in its different sectors - appears to result primarily in an inability to elaborate a comprehensive and effective remedy instead of, as one might suppose, in multiplying the available remedies[19]. As the positive law base out of which effective remedies may be delivered is wide and permissive, and since there is extensive clear guidance provided by the Strasbourg Court, the challenge remains to identify the underlying cause which accounts for the continued reticence of national courts to grant a satisfactory remedy in the face of repeated and manifest violations of the right to access justice within a reasonable time.

One seeming explanation is that compartmentalisation itself appears to be a spontaneously chosen pragmatic response on the part of Maltese jurists to the uneven way in which different sectors of Maltese law have been impacted/influenced by different legal traditions. As the recently deceased Professor of Civil Law at the University of Malta, Joseph Ganado remarked: "*To avoid confusing legal principles deriving from different sources, it is natural that caution is to be exercised. I would say that it is necessary to view the system as composed of a number of clearly distinguished compartments*"[20]. One might therefore expect that Maltese human rights law, as part of Maltese public law, would be located firmly within the "common law" compartment of the Maltese legal system; whereas the civil law of tort, being located in a civil code derived from the *Code Napoleon*, would be located securely within the "civil law" compartment. While this appears to be true of the drafting styles of the Constitution and the Civil Code, we have seen that the practice of the courts is to interpret the remedies available in respect of the constitutional provisions protecting human rights, and which reflect the civilian principle that *ubi jus ibi remedium*, as being fettered by the Civil Code provisions on damages in

19 Caroline Savvidis, *op. cit.* at n 1, p. 101.

20 J.M. Ganado, "Malta: A Microcosm of International Influences" in Studies in Legal Systems: Mixed and Mixing (E. Örücü, Elspeth Attwooll, & Sean Coyle eds., 1996).

tort, which are drafted in such a way as to permit a common law interpretation restricting the damages compensable to a few expressly defined heads of damages. Since the spontaneous decision of the courts to maintain such an interpretation places the cited principles in direct contradistinction, they have self-imposed an inability to deliver the type of remedies envisaged in the constitutional provisions; compartmentalisation has seemed to provide the path of least resistance to handling the dissonance between these applicable principles, but it is unclear why the courts feel thus obliged[21].

In the field of Maltese constitutional law it appears that an express attempt was originally made by the legislator to ensure that remedies for human rights breaches and those remedies intended to enforce ordinary liability in tort or contract were kept separate and distinct from each other. In addition to the broad powers given to the courts by the letter of the law to offer remedies for human rights violations, unlinked and unlimited by the civil law heads of damage, as Giovanni Bonello, former Maltese Judge on the Strasbourg Court has observed: "*The Independence constitution of 1964 contained a curious provision that 'saved' the civil code from the operation of the human rights provisions enumerated in the constitution that meant that no challenge was admissible before the courts of constitutional jurisdiction on the ground that anything contained in the civil code was deemed to be incompatible with human rights... This highly anomalous saving clause was done away with in 1993, and now any provision in the civil code can be tested as to its compatibility with the human rights enumerated by the constitution and those protected by the European Convention on Human Rights*"[22]. While this rule was eventually removed from the Constitution, the other rule requiring exhaustion of any available "ordinary remedy" before recourse is had to the "exceptional" human rights remedy remains on the books. As former Malta Chief Justice Joseph Said Pullicino has observed, this rule has a significant impact, promoting a: "*culture that human rights protection is extraneous to the mainstream of judicial organs guaranteeing the rule of law through ordinary remedies... This pigeonholed approach to human rights protection has contributed in no small measure to the stunted growth of constitutional jurisprudence that during 1970's and 80's left much to be desired*"[23].

What is particularly noteworthy about the rules we are considering is that they can easily be interpreted as express attempts by the legislator to

21 See n 20.

22 G. Bonello, The Maltese Civil Code: A Brief Historical Introduction, in *Histories of Malta: Reflections and Rejections – Volume Five* (Bonello ed., 2004).

23 J. Said Pullicino, The Ombudsman: His Role in Human Rights Promotion and Protection, in David E. Zammit (ed.) *Maltese Perspectives on Human Rights*, (Malta: 2008), p.122-123.

ensure the separateness of civil from human rights law and to avoid any 'contamination' of a distinct and autonomous compartment by principles which 'belong' to other compartments. They can in fact be understood in terms of Vernon Palmer's taxonomy of mixed jurisdiction jurists as reflecting an attempt to unite a pragmatic acceptance of the legal hybridity which characterises the Maltese legal system with a purist emphasis on the need to safeguard and protect the integrity of each legal tradition, as it is reflected in each compartment of Maltese law[24]. Zammit has elsewhere termed this a policy of "pragmatic purism" on the part of Maltese jurists[25]. It is evident from jurisprudence however that the attempt to maintain the purity and integrity of each compartment has resulted in unnatural cross-pollination which seems to maintain a semblance of consistency only at the cost of compromising the integrity of the legal system as a whole in its ability to effectively redress Convention violations. As Savvidis observes: '*The actual situation, therefore, is one where there are multiple remedies which are theoretically capable of providing effective redress, but not a single one which effectively does so in practice*'[26].

The attempt to preserve and protect Malta's legal hybridity through rules designed to maintain the separateness of the different compartments of Maltese law has thus failed to avoid the seepage of legal concepts across the public/private rift. This process appears to be directly implicated both in producing the seeming inability of the courts to 'close the gap' between applicable common and civil law principles in order to deliver effective ordinary remedies and prevent the need for recourse to extraordinary national human rights remedies, as well as in reproducing the mismatch between the remedies granted locally for such human rights violations, and those which are mandated by the body of Strasbourg jurisprudence.

3. Recent Promising Developments in Malta's Jurisprudence

In a series of judgements culminating in a *res judicata* on the 14th December 2015 under the names Jane Agius v. Prime Minister, the courts set out an interesting workable approach for the harmonisation of private law remedies with constitutional ones[27]. In that case, the First Hall had held that non-patrimonial damages should be made available as a human rights remedy, provided the victim and the respondent were in a legally recognised relationship which does not fall within the realm of damages

24 See Vernon Valentine Palmer, Mixed Jurisdictions Worldwide: The Third Legal Family (2nd edition, Cambridge) pp. 528–76.

25 See the Malta chapter in Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide the Third Legal Family*, 2nd Edition, Tulane University, Louisiana, November 2014.

26 Caroline Savvidis, *op. cit.* at n 1, p. 101.

27 Agius Jane v. L-Avukat Generali Et (14/12/2015, Constitutional Court).

ex delicto for delict and quasi delict, wherein the Civil Code provisions 1045-6 would operate, limiting damage to *damnum emergens* and *lurcum cessans*. Several points worth noting emerge from this judgment:

(i) The Court declared that wherever the civil courts enjoy the possibility of interpreting ordinary law in a manner that is compatible with constitutional and human rights values, they have a duty to do so. This bold declaration, although practically an *obiter dictum*, structures the relationship between tort and human rights in such a clear and logical manner that this decision seems destined to operate as an extensively cited precedent. While the court only spelt out what appears to be the logical corollary of the rule that where possible an ordinary remedy should be sought for a human rights violation, the conclusion that in such cases the civil courts have a *duty* to search for and adopt a constitutionally-compatible interpretation of ordinary law where one is available, should have revolutionary repercussions and, if followed, could possibly provoke developments in the direction of implementing indirect *drittwirkung* within civil jurisprudence.

(ii) The Court showed great openness to the possibility of awarding non-patrimonial damages in civil litigation for damages. This decision comes in the wake of the judgment of the European Court of Human Rights in *Brincat v. Malta*[28], which had allowed the plaintiff access to a human rights remedy in order to obtain non-patrimonial damages over and above the patrimonial damages liquidated in tort; the *ratio decidendi* of this ruling was grounded in the interpretation that an ordinary action for damages cannot be considered as providing an effective ordinary remedy for a human rights violations since moral damage is not usually compensated under Maltese tort law[29].

(iii) The court provided a workable balance between affirming the integral part of non-patrimonial damages in the provision of effective remedies for human rights violations and ensuring that such awards are not made liberally and automatically, but only once convincing proof is brought that real emotional pain and suffering have been inflicted upon the victim, and that this has not already been indirectly compensated under other headings. This is a balanced approach to the *vexata quaestio* of the compensability of non-patrimonial damage under ordinary Maltese civil law. It has the

28 *Idem.*

29 Albeit psychological damage could be compensated insofar as it reduces the income earning capacity of the victim. See also *op. cit.* n 1, Chapter 4, Section 4, Ordinary Remedies for Delay in Judicial Proceedings – The Action for Damages in Tort, Sub-Section 3, The legal basis; and see also Claude Micallef Grimaud, The Rationale for Excluding Moral Damages from the Maltese Civil Code: A Historical and Legal Investigation.

additional merit of clarifying that the *jurisprudence constante* that such damage is not compensable under Article 1045 of the Civil Code is based on nothing more than a judicial interpretation amenable to change, and that such article is restricted in its scope to actions in tort and quasi-tort.

4. Comparative Study Malta/Italy: If obstacles are common, so might be solutions

Notwithstanding the significant differences between the legal systems of Malta and Italy, the former being classified as a hybrid, while the latter being more 'purely' civilian, parallels seem to emerge between the Maltese and Italian systems for awarding compensation in length-of-proceedings cases. In both legal systems, the European Court of Human Rights ruled that existing national avenues for redress were 'efficient' in terms of Article 13 and that they therefore required exhaustion for the purposes of Article 35, and also in both legal systems subsequent violations resulted from repeated attempts to utilise this remedy which failed to prove effective in practice[30]. In the Italian case:

> *"...the findings hinged on the issues of the insufficient quantum of compensation, which ranged from 8–27 per cent of what the Court itself would have awarded pursuant to the facts at the basis of the domestic proceedings, coupled with excessive delays in the enforcement of such awards"*[31].

In both the Maltese and the Italian cases it is worth noting that although the national judges, in deciding what remedies to develop for breaches of human rights protected under Article 6 of the European Convention on Human Rights, were mandated to utilise all the lawful tools at their disposal to compensate the victims before them, they still seem to have been influenced by conservative understandings of the sorts of remedies they could provide. It appears that national adjudicators were sufficiently influenced by the remedies available under ordinary private law to transpose these tools, ordinarily used in a tort-based context, into the specialised field of human rights law.

While the Strasbourg Court allows national courts a margin of discretion in the implementation of Convention obligations, this bias towards a private law understanding of applicable remedies has gone so far as to lead the courts astray from the pre-defined boundaries set by the European Court of Human Rights, and directly accounts for the overturning of a

30 See the 'Scordino-Type Cases' in Caroline Savvidis *op. cit.* n 1 p 37 *et seq.*.

31 *Idem*.

significantly high percentage of national rulings by the Strasbourg Court.

There is promise in knowing that ingrained practices are not unbeatable. A 2001 test study, provided by the Court of First Instance of Turin, is a further shot in the arm to the successful implementation of creative methods to tackle internal obstacles of legal tradition. Under the banner of reform headed the 'Strasbourg Programme', the court succeeded by April 2009 to reduce the percentage of pending cases older than three years to under 5%, where 85% of its cases were not more than two years old. Dr Marco Fabri notes that:

> *"It is worth mentioning that the remarkable success of this delay reduction programme is not the fruit of a major law or structural reform, but of a systematic and tenacious local initiative, which has followed most of the key factors already pointed out by the international literature to fight court delays."*

5. Conclusions from Comparative Studies: Explaining National Resistance

In response to our initial question it seems that ingrained legal schisms, atavistic legal traditions and vernacular criteria developed by national courts can pose formidable obstacles to the efficient delivery of remedies, even in spite of clear guidance delivered by the European Court of Human Rights in this field. Despite the flexibility and multiplicity of remedies available in the books of Maltese law, the existence of a mixed system does not, in itself guarantee the successful integration and harmonisation of principles derived from different legal traditions. Indeed, the response of the Maltese jurisdiction to Article 6 length-of-proceedings violations, exposes special difficulties which characterise such jurisdictions. These obstacles work against the overall coherence and integrity of the legal system, while preventing its courts from properly following the guidance of the Strasbourg Court. At the same time, the *Jane Agius* case highlights the possibility that national judges may use constitutionally-compatible interpretations of private law in order to ensure that ordinary law really does function as a first line of defence against human rights violations.

It therefore seems that the co-existence of national and European remedies for length-of-proceedings violations of Article 6 has not served to promote sufficient harmonisation and integration between the approaches of the national and Strasbourg courts. The reluctance of domestic courts to correctly apply the Strasbourg criteria to hold the state responsible for unreasonable delay in breach of Article 6 has been in large part explained in terms of their tendency to transpose private law concepts of fault into the separate and distinct field of human rights litigation. Furthermore, their

tendency to award 'manifestly insufficient' damages for Article 6 violations in length-of-proceedings litigation has been explained in terms of the lack of successful internal harmonisation between private law remedies and remedies for human rights violations within the Maltese jurisdiction. The need felt by adjudicators to "mind the gap" between these two kinds of remedies reflects real differences between them corresponding to the compartmentalised nature of mixed jurisdictions. It reflects the constitutional framing of human rights as an "exceptional remedy", which is one of last resort, failing an ordinary remedy. The persistence of such gaps and the lack of coherence they connote reveals very real barriers to the internal harmonisation of the legal systems of mixed jurisdictions, and exposes the flipside of triumphant claims concerning the 'flexibility' and 'creativity' said to characterise jurists and judges working in such settings.

Confronted with the challenge of delivering effective remedies for trial delay, legal hybridity can function as an obstacle as well as an enabling factor which can spur the courts on to finding ways of harmonising national remedies both internally and externally. It is clear that hybrid legal systems are not the only ones to face formidable obstacles to harmonisation deriving from the ingrained practices of their courts, but it must be observed that, by their very fissile nature, hybrid systems, perhaps more than others, require some kind of harmonisation of their various component to maintain the integrity of the legal system.

THE WORK EXPERIENCE AND LEGAL CONSCIOUSNESS OF FORMER BOAT PEOPLE IN MALTA

David Edward Zammit*

Characteristics of Migrants Interviewed

IN	A	S	R	D1	D2	D3	N	W	E	E1
2A	28	Rej	Marsa	33	18	15	Chad	No	5	K

Legend: IN = Interview Number, A = Age in Years, S = Legal Status, R = Current Residence outside Detention, D1 = Duration in Malta in months, D2 = Time in Detention in months, D3 = Time outside Detention in months, N = Country of Original Nationality, W = Work Permit, E = Years of Education, E1 = Kind of school: K = Koranic School

Presentation of Self and Family: Idriss (2A), a rejected asylum seeker from Chad presents himself as totally decontextualised: not married, mother died, no knowledge of where dad & siblings are...no possibility of meeting family again...no desire to return to Chad.

Their Experience of Work: Idriss (2A): Idriss (2A) currently unemployed only works for one day a week...did work once but complained of long hours (from 6am to 7pm)..was paid 1000 for the job.

Legal Consciousness regarding Work: Idriss (2A) No possibility of finding work in Malta, no permit as rejected (but actually can get one although he does not know it)...What are the skills that are required to find a job in Malta? "I have no legal right to work. I cannot claim any rights. My status is rejected. He would like to attend courses to learn if knew of any opportunities (no knowledge).

Kind of Future (if any) envisaged in Malta: Idriss (2A) Not Surprisingly...when asked whether he would like to study more in Malta, he replies that he does not want to stay here, but to go to Italy.. when asked

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what skills he needs in Malta, he repeats: "I don't want to stay in Malta". When asked what is the main reason why you would like to work; "I am person who is suffering. I don't have job. *I want to help my family!*".

My Interpretation and Comments: Idriss (2A): Factors militating against being candid: rejected status, has not been out of detention long..precarious lifestyle...quite close parallel to interview held before he was rejected in the kinds of questions asked and the monosyllabic answers (overlap between methodology and aims of social science and mechanisms of governance and control as Foucault observed)....one suspects that he is not quite as socially decontextualised as he presents himself as being, given that he says that he wants to work to help his family. He is also careful to say that he left his country because of problems...no outrageous claims to persecution. Interestingly he lays a lot of store on being rejected...says he cannot get work permit because of this although he actually can...shows how detention (he did the full 18 months) together with rejected status produces individuals who are here "provisionally", in limbo...his insistence that he is about to leave can be seen as a response to this...lack of desire to be interviewed...to look for jobs...to regularise employment...can all be seen as linked to this legally produced state of suspended animation...this is one extreme of the range...not clear whether he is an outcome of the laws and policies or whether it is because he was so inert and unforthcoming that he was deemed not to have a valid asylum claim...chicken & egg question.

Characteristics of Migrants Interviewed

IN	A	S	R	D1	D2	D3	N	W	E	E1	R1	M	C	PJC	JT	HFJ
2A	28	Rej	Marsa	33	18	15	Chad	No	5	K	No	No	No		S	
3A	43	Ref*	Isla	24	6	18	Somalia	Yes	10	C	4	Yes	6	A	S/A	F

Legend: IN = Interview Number, A = Age in Years, S = Legal Status, R = Current Residence outside Detention, D1 = Duration in Malta in months, D2 = Time in Detention in months, D3 = Time outside Detention in months, N = Country of Original Nationality, W = Work Permit, E = Years of Education, E1 = Kind of school in last year of schooling: K = Koranic School C = College equivalent of 6^{th} Form, R1 = Shares apartment with friends: number of people sharing the apartment, M = Married, C = Children, PJC = Previous Job in Country of Origin: A = Agriculture, JT = Job in Transit: S = salesman/delivery assistant for shop, HFJ = How find jobs: F = Through Friends

Presentation of Self and Family: Abdi (3A), a recognised refugee from Somalia presents himself as totally embedded within a large family...has a sister in the EU, wife and six children, parents and one child in Somalia (exploded transnational families).

Their Experience of Work: Abdi (3A): "In my country there is no time to work like here. Whenever you need to work you work" In transit: worked in Uganda as a salesperson for a businessman. In Malta it is not easy to find a job. Obstacles are: firstly "no opportunities...if they have some kind of job possibility they see nationality. If I got there, if I can fill all the requirements of the job and somebody who is from the country. Always employer select or give the opportunity to Maltese" (Accuses us of discrimination...more serious as he has refugee status). Since he has been in Malta: "I've never been in part-time job. Never in something permanent. Always occasional." (NB He is still in a liminal temporary status). His job is as an Interpreter. He works up to 10 hours a month at most. He has been working for around a year. Pay him around €7 an hour. No problem with work permit. He has a Diploma in Forestry, in Wild-Life Management.

Legal Consciousness regarding Status/Work/Family Reunification: *Abdi (3A) has Refugee status valid till October 2011...confident...willing to talk...says he tried to get family to reunite with him in Malta. Observes re family reunification: "In Malta I tried but no possibility. I contacted my lawyer. *Of course I have refugee status. I have a right to reconnect with my family*" when asked how long he has tried..he said: *Since October 2008. Yes I applied...in the same position always*". Feels he has full rights with refugee status as an employee in Malta...(but this does not mean much given his work experience).

Kind of Future (if any) envisaged in Malta: Abdi (3A): He is keen to receive more training...better education, would like to go to university if an opening exists, "But at this point I don't see a future here. I want to leave".

My Interpretation and Comments: Abdi (3A): He has more to say...has refugee status...less sense of being illegal but feels discriminated against not so much on grounds of colour but of nationality...first they seek a Maltese...comes second. More forthcoming regarding Family...Does not present himself as decontextualised but still put off by what he sees as low opportunities in Malta still rather apathetic...perception that first seek Maltese...and that no jobs are available. Very significant comments re family reunification: I have the right but here not possible.

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Presentation of Self and Family: Berhan (4A), enjoys subsidiary status from Eritrea presents himself primarily as a student...it seems he is following a University course in Malta and therefore does not plan to work for the present...has parents, three brothers and three sisters in Eritrea, but father kidnapped in 2006, mum in 2008 and sister & husband too...had a psychological problem was too stressed to continue his education, had to stop. Does not have many friends in Malta so "who can help me here?" main focus is on himself as a student which exempts him from the need to work.

Experience of Work: Berhan (4A): "In Africa certificates are not used. There is a different way of understanding people's skill and capacity." Having a job in Malta will not necessarily help you to integrate in Maltese society as "I know many people who are isolated at work. Some of them had many problems applying for a job". "Here there's so many educated people that they are washing dishes, why don't they do some foundations to give them opportunities of education?" He started studying again in Malta in 2008...his last chance to study.

Legal Consciousness regarding Status/Work/Family Reunification: Berhan (4A) has Subsidiary Protection status valid till March 2010...Yet has not applied for a Work Permit...his perception is that he would like to get a work permit and work legally "but the problem is that I need money to apply for the work permit and to get money I need to work and it would be illegal work". Even when pointed out to him that he could probably obtain a work permit quite easily, shows little interest. How government treats them: "if they give me an education during my 18 months of detention I could get some opportunity to use it outside, but the *government does not want that. The problem is the government doesn't want to integrate us*"

Refugees cannot integrate into Maltese society: "For all the relationships, first of all I have to see your face and if you are angry on me I can't have the confidence to say: Hi!"...Here there is misunderstanding about economy, because the refugees could help so much in Malta...Vint quote (p.3) Based on colour and religion...media: "If someone has to think how to survive he will never think of something like this (cultural integration). First of all...very interesting hierarchy of needs (like Maslow)...*we need our offices to speak for us...we have no right to speak*...people say they are Catholic to avoid problems..

Kind of Future (if any) envisaged in Malta: Berhan (4A): He would like to continue his studies in "Law and International relations" but: "To be honest I don't know if I'm able to do it here ok, but I think Malta won't be my final destination".

My Interpretation and Comments: Berhan (4A): He provides perhaps the best analysis of why migrants don't integrate...squarely places the blame on Maltese government policy rooted in the hostility towards migrants in Maltese society...he shows how "we need people to speak with, someone who's in contact with the government"... "I can't change my colour, even if I wish, believe me. I would like to bring the Maltese and the migrants communities integrate, to put two in one, but there's no way, I really can't". Shows scepticism regarding work permit...believes that what is needed is informal integration...people who are not angry...real problem is that government does not want to integrate...problem of colour and religion.

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Presentation of Self and Family: Bakri (5A), has subsidiary status from

Sudan presents himself as having family in Sudan

Experience of Work: Bakri (5A): Currently unemployed

Legal Consciousness regarding Status/Work/Family Reunification: Bakri (5A) Does not want to bring his family over as "I have no life here to bring. Here no job. No School." "No Malta doesn't have work." Claims that his skin colour prevents employers from contacting him...goes to check companies "they say they have no work for you". Claims that had experience of not being paid after work completed. Trying to find work it often happened that: "commonly they took your number and say I will call you. I experienced one time. I asked to work for someone they told go to Gozo they will get you a work. I thought thank you very much"

Kind of Future (if any) envisaged in Malta: Bakri (5A): "I came to Malta to study, to continue my study to get work. I didn't get work. I didn't get good studies. Here is no place for me. I can't stay here longer. The purpose is to get work". Refers to state of indecision induced in him by system "I can't convince my mind. I can't decide something". He cannot choose a training course as "first of all this kind of training. To choose I need financial help. Then *courage*."

My Interpretation and Comments: Bakri (5A): What comes across clearly is his sense of total alienation, which seems to be related to his experience of detention...even of the open center...seems to have become a kind of "welfare dependant." Does not seem to have much first hand experience of discrimination, but he interprets everything through this frame. His desire to move on while being in Malta makes him an undecided person who cannot even take a decision to start a training course. He has not been given the security to plan a long term future.

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4A	25	Sub		32	18	14	Eritrea	No	14		6	No	No		B	No
5A	21	Sub	Marsa	24	6	18	Sudan	No				No	No	No	No	
6A	41	Sub	Marsa	24	12*	12	Cote D'Ivoire	Yes	18	C		Yes	3	S	A	F

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Presentation of Self and Family: Moussa (6A), has humanitarian status from Ivory Coast. He spent 12 months in detention, of which around two in hospital. He has a wife at home who remarried after he left and he has children: three boys. Apart from that hardly any family except for a cousin in France. He sends remittances over to his children... (If I earn 6-700, I send 300 for my children and I keep 100-150. I save again for my children). He's thinking of taking his wife back and would like to reunite with his children, but not really sure whether he wants to do so in Malta...no stable job. He was quite well off shop keeper but lost everything due to the war. He has a Baccalaureate in Agronomy, but left all documents at home. Worked in a farm in Libya in transit and earned quite a lot.

Experience of Work: Moussa (6A): "Malta right now it is just like my country. I don't have any problems with Maltese I am getting my life. The problems Malta is small. The Maltese when they see I am working here I know the problem here. They don't want more people to stay here. For three month, two month no work here. No work here. That's why I have my family. In Europe I prefer to go to live in France. I speak French, I can write, read. I can have my family. I prefer to go to France or any other country." "*It's not easy working with Maltese because they're always thinking you want to cause problems*, but I'm doing my job I'm just looking mine. When the boss calls me at the telephone I just do what he ask me to d my first job was in a market in San Julian, I used to wash cars and clean rooms for Mr. George's shop, I started in August 2008 they gave me about 20 Euro at day. After that job I worked in a Mellieha Bay

Hotel for six month I used to clean the restaurant, the corridors and the game room from ten o'clock in the night to six o'clock in the morning. I started my job there in September 2008 and I worked until March 2009." He found jobs through friends: people he knew in detention would call him. Now he works with a company on the Marsa golf course. He left his job with the cleaning company as "I was not paid regular, he paid me when he felt like". After that work, he stopped working as he had applied to go to France. When he discovered that this was not possible, he came to work in Marsa...drives tractor, uses ball cleaning machine, no standard hours of work, paid around 3 Euro per hour every week. NOTE: a Maltese colleague of the interviewee passed through the road and replied to the hail of the migrant only after three times he shouted to him, even they were very close. "You see, we work together but they see me like an outsider. But I have to work here because I have to give something to my children so I look beyond. I work here four days at week from six in the morning to six, they give me 32 Euro. Not even 3 Euro for hour. I also have to bring my bottle of water and food."

Legal Consciousness regarding Status/Work/Family Reunification: Moussa (6A): He has humanitarian status but is about to change to subsidiary status (sic) When he arrived "The police was very, very, very angry, 'Why, why, why? Go to Libya!' After they took us to detention." He found a patron(ess) in Malta: "I don't have any family in Malta. I have only when I came to Malta I was in hospital one woman she take care of me. That woman just like my mother in Malta. When I need anything I say mother I need and she says no problem. Anything I need. She is just like my momma." He would like to leave Malta...applied to go to France but then he was told that despite having a travel doc., his protection status does not entitle him to leave Malta. "I paid and I had my working permit, it was not difficult, just a process with documents and money. But *in Malta they do not use the working permit, they do not ask for that*."

Kind of Future (if any) envisaged in Malta: Moussa (6A): No desire to return home. "The war made me lose everything, my family. I don't want to return" Experience of working in Malta is: "a bad experience: They know me good, I'm doing my work 12 hours at day and I earn only 32 Euro, they give more than 50 Euro at day to the Maltese who work 8 hours. I feel underpaid." However he is resigned and stoical and accepts that: "In my life I've been to school and I know even if they mistreat me I remember that if I lose this job I will make my children suffer. They always say – because your mother, because your father -, but I don't care. I'm looking mine, I'm thinking of my children...I'm focusing on it. I forget all when I think that I have someone back to feed. I have many friends and everybody would tell you about me: I do have friends, I don't

drink, I don't smoke and I don't like to have problems. I like to live in peace and love and *the police in here if you do something bad they will lock you and you'll lose your life*, you'll make your family live bad."

My Interpretation and Comments regarding Moussa (6A): He sees the hostility of the Maltese as the main problem he faces, which he explains by Malta being small. Maltese don't want more people...lack of work (echoes government rhetoric). He adapted to situation: worked initially in informal economy, accepts discrimination, realizes that if he makes a fuss, police will make his life difficult, so he tries to conform, to blend in (like Kratzmann observes). But he exercises some agency, changing job to one with more regular pay. Treats work permit as just a formality which employers do not ask for in Malta. Revealing that *Maltese suspicion of migrants makes it difficult to work with* them...they always think you want to cause problems. This is a case of someone hard working, skilled and educated who is not finding a job which matches his qualifications but still adapted and has accepted a degree of discrimination and ostracism in order to be able to work. He realizes that insisting on his rights may make his situation worse. Police appear as agents of arbitrary punishment: while Maltese may see people like him as unlawful...he sees Maltese society as preserving his extra-legal situation and punishing him if he asserts his rights. NB very interesting trajectory in terms of work highlighting flexibility and ability to move into and out of a variety of jobs and statuses...gives a lot of importance to family: remittances.

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6A	41	Sub	Marsa	24	12*	12	Cote D'Ivoire	Yes	18	C		Yes	3	S	A	F
7A	29	Sub		48	9	39	Somalia	Yes		C	2	No	No	S		

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Presentation of Self and Family: Khadra (7A), has subsidiary status from Somalia presents himself as quite isolated with no wife or family, apart from his parents in Somalia.

Experience of Work: Khadra (7A): A problem with his first job in construction in Gozo: it was unsafe (legally insecure but also dangerous): ... "If you are working, you have no safety, For instance, sometimes I was working in a 3 floors building, and you must be very high in a small line... It is dangerous. So, I stop, I left. After that I come back here, in Malta." After 3-4 months, he started to work again in a cleaning job with a hotel and it is safer both legal (I start with a contract of 3 months, then after this 3 months, then 6 months, then one year and now I am still there). He is keen to stress that it is also safer physically: "But this is more safety than what I was doing before, for example, I don't lift up, that is dangerous... So, it is more safe".

A central complaint is (Maltese) people *imagining him through his colour*...he does not like the way Maltese, even work-mates refer to him as 'l-iswed' (he can understand Maltese although not speak it), instead of asking him his name. Particularly he notes the Maltese way of talking about him behind his back...bus does not stop for him sometimes...'Ginger' as a nickname he particularly resents: "Just one question... for example, in the place I am working, there are other foreign people, like European people... This people are normal when they speak with us... they are normal... they don't talk about us, or thing about us through our colour, they are normal... But this people that I am mention, that image something about our colour, something no good, they are all Maltese. Some of them, sometimes, they call us ginger.. You know ginger? If someone call you by something that is not your name, and this thing is not concerned to you, then you ask yourself... what they mean? Then you classify, by yourself what this thinks means to you... For example, ginger... If I call you ginger? What do you feel? What do you feel if I call you ginger? I: I don't know... Ginger has a strong taste..., maybe bad... R: Something strong, bad, also ugly... That is why they call we ginger. It is ugly... when they call you ginger, they are calling you ugly person. So... "

His wages only cover his daily life, no fringe benefits like food or transport.

He complains that Maltese discriminate against former boat people, operating a ranking system: "*First they prefer Maltese*. For instance, I know a Germany woman. She was working with me. She wasn't in the same session. She was working in the reception of the hotel. She was there long time... She use to teach the new people, Maltese most of them, how

to do their work. Then, she told me, she ask her boss to a manager position (...) Then they don't give it to here... And the people, that came after her, she help them... They give them supervisions, shift they legal, and she is still where her were in the beginning... And then she was telling about it...*She say to me that Maltese people are racist. Not just with African people, but also with people like her... So, that is why I am telling you that they prefer Maltese, the second other people, European, or Arabian... then the third Africans... So, we have no choice*."

He is quite educated, maths, accounts and computing at a professional level. Yet he has not tried to find work related to his education in Malta: "No, I didn't tried. Because I'm thinking that it is not possible. Because I think that, before they give a work like this to me, they will give it to another people, Maltese people. You know... the problem... Something that I saw here. Most of the people, if you tell them you say them: I know this things... They are surprised.. Really? They are surprise... Do you know that? It is difficult to move that thinks..."

Legal Consciousness regarding Status/Work/Family Reunification: Khadra (7A): he received subsidiary status but is not happy with it: "You know, for my self, I am thinking... my problem... I am not happy with the humanitarian... Because the situation in my country, my family... I deserve more than humanitarian." The problem regarding his first job in Malta with 5 brothers in construction was the illegality he claims. He suffered an occupational injury and just left: "every time I tried my best, I do my best. But the problem was that I wasn't a legal employment. So If I have any insurance or heart... *I don't have any right, because I am illegal. I have nothing*, I cut my leg with a machine here, like this... I can't get a sick licence. I went to clinic and after to my home and I stayed until I get better."

He sees his rights, which he calls *his documentation as constantly being reduced*: "I wish that I will stay, but until now it's not seemed to me that the process is on the way to improve. In Malta... The people how has one year humanitarian protection... now they have subsidiary protection...They decrease your documentation. Some people with humanitarian now have subsidiary protection, some people with refugee status now have humanitarian...I have humanitarian, but it is less than it was before... So, what I am imagine in my mind... I am thinking why they are decreasing our documentation? *They don't want give us our rights. So, this is way they are decrease what we get before...They don't want to give you more rights. That is why they decrease our document. Not just to me, to everyone*." "*They don't change... They only decrease the humanitarian...* The state of humanitarian, and the state of refugee... For

instance, people with humanitarian that want to go to another European countries, they gave to them the travel document. The travel document is from the Geneva conference, 1951... Now they change that, they decrease. They give to them a licence passport... A licence passport means that you can stay inside the country.... But they can accept you or no... Some people that travel, when they arrive, they catch the people, ask about their documents, some of them are arrested, some of them are sending back. So, this licence passport is for nothing...For nothing, if I want to go to Brazil, I can't go with a licence passport..."

Kind of Future (if any) envisaged in Malta: Khadra (7A): "I would like to increase my studies and my knowledge. But the situation of my life... to learn or to improve your education... it not accept each other... If I try to learn something, I can't get the time that I need to work. If I go to learn something only, I don't get the life... You understand? So... Maybe in the future.. But for now... I wish, after a time, to go out... But I'm here to keep my life, for safe... That it is way I working. *But I don't work because I believe or I realise that I can get a better future here or achieve a better life. I am here, and I know how things are here*. So, if you can go to another place, better than here, then you can learn more, you can improve your profile, have more knowledge... I am going on that way..."

"The people, when they are there, they imagine the situation they have there, the war or something... But when they go out, there are a lot of other problems. Like you are far away from you relatives, or you don't have a good future... So, I think that the only think to say is: Reach their future in their country. Their future in their country is the best. I don't mean that they just accept the situation... In Somalia you can't imagine your future... Hear the noise of the guns, you can imagine your life or your future... But there are other problems here..."

My Interpretation and Comments: Khadra (7A): Interesting he complains about illegal work on safety grounds and shifts towards a regular job (agency). This is the same problem with Maltese...recent death of a Sudanese migrant in construction. His complaints about discrimination on the one hand correctly reflect the order of priorities established by Maltese immigration and industrial law...only he sees it as racism. Interestingly his complaint that he is seen as part of the wider category of "suwed" reflects the collectivising aspect of Maltese policy...the lack of individualised differentiation. His complaint about the Ginger nickname appears as over-sensitive...clearly not realising that this is not necessarily a racist attack but that it can be seen as a mechanism for creating intimacy. Responds in an aware way to Maltese erection of barrier by speaking Maltese (Annabel Black). Unfortunately for them he can understand most

of what is being said about him. Idea that his documentation is being decreased...paranoid myth that reflects his (correct) perception of what Maltese would like. Similarly, the idea that Malta is breaking international law on family reunification is not correct, but it is interesting that he should have such an idea. He found his job through informal ways (asked my friend to tell his boss about me) not by going to ETC. He believes Maltese will not allow him to work in job that matches his education as this would contrast too much with the stereotype they have formed about the "klandestin".

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7A	29	Sub		48	9	39	Somalia	Yes		C	2	No	No	S		
8A	40	Sub	Bugibba	57	5	52	Somalia	Yes	11		2	Yes	No	IDP	P	

Legend: IN = Interview Number, A = Age in Years, S = Legal Status, R = Current Residence outside Detention, D1 = Duration in Malta in months, D2 = Time in Detention in months, D3 = Time outside Detention in months, N = Country of Original Nationality, W = Work Permit, E = Years of Education, E1 = Kind of school in last year of schooling: K = Koranic School C = College equivalent of 6^{th} Form, R1 = Shares apartment with friends: number of people sharing the apartment, M = Married, C = Children, PJC = Previous Job in Country of Origin:, JT = Job in Transit: A = Agriculture, S = salesman/delivery assistant for shop B = barber's shop IDP = Centre for Internally Displaced Persons P = Porter, S = Self employed shop owner, HFJ = How find jobs: F = Through Friends

Presentation of Self and Family: Asad (8A), has subsidiary status from Somalia. He wishes to reunite with his wife who is in Ethiopia...has no children. Has mother and siblings in Somalia. He speaks 8 languages...experience with University of Malta in Diploma Course in Management (did not get a good overall grade and was kicked out).

Experience of Work: Asad (8A): Currently works as a Cultural Advisor/Mediator at Marsa Open Centre. It is not easy for migrants to find a job in Malta: "before was easier in 2004-2008 it was very easy. But from 2008 until now is very difficult: people are getting in difficulties to find a job, I'm speaking generally." He worked initially for Wasteserv Malta, "doing the wash" (9 months). Then for 9 months in an administration office, a year with Refcom as an interpreter, worked for a year with Farsons, "after this I worked 3 months as a developer in a construction company, it was

from June until September 2008, *but I had to fight to make myself legalised. I left this job because I didn't like to be an illegal worker*." He found this job through the Emigrant's Commission.

He earns a good pay from Marsa. But "sometimes there are some complication, sometimes there's lack of communication. I'm a technician and I know how to deal with all the people here (Marsa), I know their mentality. I was like them and I can understand their problems. *If my employer doesn't understand applying the policies of the government so we are always misunderstanding, because I'm applying the humanitarian policies and we are always clash(ing)*"

Legal Consciousness regarding Status/Work/Family Reunification: Asad (8A): How he sees humanitarian protection (actually subsidiary status): "it facilitates a lot of things that you should be kept in Malta as a *humanity*. As your country has a civil war, a common problem and it shows *they can help you, assist you as a humanity*." Note that he is mistaken as it is now subsidiary status...but it is a telling mistake as focus is not on law but on generosity...they help you...What he misses most is chance to reunite with his family, but he observes that this is "blocked by the status" and "*even if I was a refugee I could not get this*": again a mistake but a telling one...Aware of a disjunction between European and Maltese law in this regard: claims that if you stay 6 months in the EU you earn the right to stay more. But although he has been in Malta for five years, he does not think he will ever be eligible for citizenship: "*No I don't. There's no law to give it to us. If the people who was before me didn't get it how far will I get? You can get this information from the GI Malta: it is written but they do not apply it*" (he explains that GI Malta is the group of lawyers giving this service for the refugees). "No one I know has the citizenship, I think someone took 18 years for the application (to be processed). He appealed for 3 years to try to reunite his family but he found out that the policy created by some Maltese aimed at "created *to block the issues from the refugees for qualifying that need to not have more rights* to bring here our family and grow up in Malta. That's what I find out". His wife thinks he is the cause of the missing family reunification and this makes me a stressed person".

Kind of Future (if any) envisaged in Malta: Asad (8A): "I would like to stay but my mind is changing. I feel that I'm wasting my time day after day here in Malta because I'm not getting any rights any more. There's no consideration of the international law of family reunification".

My Interpretation and Comments: Asad (8A): He has gone as far as he could with integration and had a long time to do it in. He showed agency

in leaving illegal work for a more regular job. However, he believes that government policy, while inclined towards humanitarian principles, is also against international law and aims to prevent people in his position from obtaining more rights, as was clear with his experiences with family reunification and citizenship. He subsequently left Malta for the US. Aware of difference between law as written down and as (not) applied...also of difference between EU law and Maltese law...he has grasped the strange mixture of humanitarian principles and exclusion that characterises Maltese immigration policy (defensive giving).

Characteristics of Migrants Interviewed

IN	A	S	R	D1	D2	D3	N	W	E	E1	R1	M	C	PJC	JT	HFJ
2A	28	Rej	Marsa	33	18	15	Chad	No	5	K	No	No	No		S	
3A	43	Ref*	Isla	24	6	18	Somalia	Yes	10	C	4	Yes	6	A	S/A	F
4A	25	Sub		32	18	14	Eritrea	No	14		6	No	No		B	No
5A	21	Sub	Marsa	24	6	18	Sudan	No				No	No	No	No	
6A	41	Sub	Marsa	24	12*	12	Cote D'Ivoire	Yes	18	C		Yes	3	S	A	F
7A	29	Sub		48	9	39	Somalia	Yes		C	2	No	No	S		
8A	40	Sub	Bugibba	57	5	52	Somalia	Yes	11		2	Yes	No	IDP	P	
9A	18	Sub	Marsa	24	1	23	Somalia	No								

Legend: IN = Interview Number, A = Age in Years, S = Legal Status, R = Current Residence outside Detention, D1 = Duration in Malta in months, D2 = Time in Detention in months, D3 = Time outside Detention in months, N = Country of Original Nationality, W = Work Permit, E = Years of Education, E1 = Kind of school in last year of schooling: K = Koranic School C = College equivalent of 6th Form, R1 = Shares apartment with friends: number of people sharing the apartment, M = Married, C = Children, PJC = Previous Job in Country of Origin:, JT = Job in Transit: A = Agriculture, S = salesman/delivery assistant for shop B = barber's shop IDP = Centre for Internally Displaced Persons P = Porter, S = Self employed shop owner, HFJ = How find jobs: F = Through Friends

Presentation of Self and Family: Dalmar (9A), left his country when he was 13, travelled around various other countries, came to Malta & spent 1 month in detention and 8 months in a centre for minors. He is alone here & the rest of his family are in Somalia. Not married, no children. Aunt lives in Germany & uncle in US.

Experience of Work: Dalmar (9A): currently has humanitarian status. His one experience of work is 5 months with Wasteserv Malta...job dealt with "plastic, no rubbish". He has been unemployed for 8 months. Would like to improve his education/learn English but has no idea where to go for courses. He needs to work in order to send remittances "to help my mother, my father, two brothers and two sisters." While working in Malta,

he observed that he earned less income than a Maltese: "Me 3.5, Maltese 8 Euro".

Legal Consciousness regarding Status/Work/Family Reunification Dalmar (9A):

Kind of Future (if any) envisaged in Malta: Dalmar (9A): "In the future I want to marry. Rich is better." "I am totally different person now."

My Interpretation and Comments: Dalmar (9A): Lost, lost, lost.

Characteristics of Migrants Interviewed

IN	A	S	R	D1	D2	D3	N	W	E	E1	R1	M	C	PJC	JT	HFJ
2A	28	Rej	Marsa	33	18	15	Chad	No	5	K	No	No	No		S	
3A	43	Ref*	Isla	24	6	18	Somalia	Yes	10	C	4	Yes	6	A	S/A	F
4A	25	Sub		32	18	14	Eritrea	No	14		6	No	No		B	No
5A	21	Sub	Marsa	24	6	18	Sudan	No				No	No	No	No	
6A	41	Sub	Marsa	24	12*	12	Cote D'Ivoire	Yes	18	C		Yes	3	S	A	F
7A	29	Sub		48	9	39	Somalia	Yes		C	2	No	No	S		
8A	40	Sub	Bugibba	57	5	52	Somalia	Yes	11		2	Yes	No	IDP	P	
9A	18	Sub	Marsa	24	1	23	Somalia	No								
10A		Sub	Marsa	21	6	15	Somalia	Yes	5			Yes	Yes	LD		

Legend: IN = Interview Number, A = Age in Years, S = Legal Status, R = Current Residence outside Detention, D1 = Duration in Malta in months, D2 = Time in Detention in months, D3 = Time outside Detention in months, N = Country of Original Nationality, W = Work Permit, E = Years of Education, E1 = Kind of school in last year of schooling: K = Koranic School C = College equivalent of 6th Form, R1 = Shares apartment with friends: number of people sharing the apartment, M = Married, C = Children, PJC = Previous Job in Country of Origin:, JT = Job in Transit: A = Agriculture, S = salesman/delivery assistant for shop B = barber's shop IDP = Centre for Internally Displaced Persons P = Porter, S = Self employed shop owner LD = Lorry Driver, HFJ = How find jobs: F = Through Friends

Presentation of Self and Family: Ghedi (10A), a bit isolated but has family, plus wife and children in Somalia. Like all the others he insists that he does not want to return.

Experience of Work: Ghedi (10A): Speaking about Malta in general do you think it is difficult to find a job? "very very difficult. Because I tried a lot of times. I went to work a farm. Pick up tomatoes in 2008 I worked and in a garage. And I worked in construction. September 2008 to now (almost one year) I didn't get a work"...found a job by being stopped while walking and offered to him: "I was stood up near the country. I've got all of work half there. Tomatoes at Gozo, someone was working there and

they needed more workers and I was unemployed." He had few problems with pay or hours of work. "I went all the companies. Every one asked my number of telephone to convince that they will call me but they never called."

Legal Consciousness regarding Status/Work/Family Reunification Ghedi (10A): Has it been difficult getting a work permit and your license especially? "You need money. It was expired and to get a new one you need money and to get money you need to work". Do you think there is a way the law or the policy that can change to improve your possibilities? "Firstly to get work permit easily. Secondly to create more jobs. And I am not getting benefits from government and I don't work."

Kind of Future (if any) envisaged in Malta: Ghedi (10A):

My Interpretation and Comments: Ghedi (10A): Interesting that he also mentions issue with work permit...check with Robert...

Characteristics of Migrants Interviewed

IN	A	S	R	D1	D2	D3	N	W	E	E1	R1	M	C	PJC	JT	HFJ
2A	28	Rej	Marsa	33	18	15	Chad	No	5	K	No	No	No		S	
3A	43	Ref*	Isla	24	6	18	Somalia	Yes	10	C	4	Yes	6	A	S/A	F
4A	25	Sub		32	18	14	Eritrea	No	14		6	No	No		B	No
5A	21	Sub	Marsa	24	6	18	Sudan	No				No	No	No	No	
6A	41	Sub	Marsa	24	12*	12	Cote D'Ivoire	Yes	18	C		Yes	3	S	A	F
7A	29	Sub		48	9	39	Somalia	Yes		C	2	No	No	S		
8A	40	Sub	Bugibba	57	5	52	Somalia	Yes	11		2	Yes	No	IDP	P	
9A	18	Sub	Marsa	24	1	23	Somalia	No								
10A		Sub	Marsa	21	6	15	Somalia	Yes	5			Yes	Yes	LD		
11A	25	Rej	Marsa	36	15	21	Chad	No				No	No	A		

Legend: IN = Interview Number, A = Age in Years, S = Legal Status, R = Current Residence outside Detention, D1 = Duration in Malta in months, D2 = Time in Detention in months, D3 = Time outside Detention in months, N = Country of Original Nationality, W = Work Permit, E = Years of Education, E1 = Kind of school in last year of schooling: K = Koranic School C = College equivalent of 6th Form, R1 = Shares apartment with friends: number of people sharing the apartment, M = Married, C = Children, PJC = Previous Job in Country of Origin:, JT = Job in Transit: A = Agriculture, S = salesman/delivery assistant for shop B = barber's shop IDP = Centre for Internally Displaced Persons P = Porter, S = Self employed shop owner LD = Lorry Driver, HFJ = How find jobs: F = Through Friends

Presentation of Self and Family: Haroun (11A), is single but has family in Chad.

Experience of Work: Haroun (11A): While he worked on a farm at home in Chad, since he came to Malta he has had no work for the past 18 months: "the only way you can get a work to go outside. So that's why we stand or sit down for hours but every time it is the same. That shows *there is no employment assistance*. The other European countries they do in the centre refugees and centre work together. Center of the people living works together. Everybody has to learn language and skills. Then they find job. *By the connection of the employment and finished skills, studying.* If there is employment centre they could send letter we need for persons that can apply. In Sweden even by local councils". "My importance is to find work and I am going to work". Yet he has applied for no courses to work. Nor will he go to companies to apply for work: "I can't go to company and ask for work. Like I am begging." Hardly any education.

Legal Consciousness regarding Status/Work/Family Reunification Haroun (11A): He has no desire for family reunification in Malta. He suggests that we should "legalise it...legal work". "I am rejected. I don't have any rights or to say something. Maltese will reject me."

Kind of Future (if any) envisaged in Malta: Haroun (11A): Stuck in limbo.

My Interpretation and Comments: Haroun (11A): Interestingly he is not aware that rejected asylum seekers may still obtain a work permit sometimes. He seems totally clueless as to how to get a job and his sense of honour does not allow him to pursue it. He really needs the employment centre he is advocating. Interestingly he agrees with official rhetoric stressing Maltese exceptionalism.

SUBSIDIARY STATUS

David Edward Zammit*

1. Introduction

Subsidiary status is a new status which has developed within EU law as an alternative to refugee status for: 'a person who is facing a risk of serious harm in his country of origin and is unable to enjoy the protection of that home country' (Jakuleviciene, 2010). This paper explores the way subsidiary status has been constructed in EU law as a way to grant asylum to such persons and explores the implications of this particular approach on the scope and content of subsidiary status. With reference to the Maltese experience, it is shown how while this status initially replaced the pre-existing THP 'Temporary Humanitarian Protection Status', it is often practically assimilated to it, while THP has also been revived, as an inferior form of protection creating dependency.

2. Subsidiary Status in the Qualification Directive

Subsidiary Status was introduced into EU law through the 'Qualification Directive', also known as Council Directive 2004/83/EC of 29 April 2004; as subsequently 'recast' on the 13th December 2011 by Directive 2011/95/EU. The Qualification Directive seeks to harmonise EU law in order to: 'ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States' (Gil-Bazo, 2006).

The Directive represents an attempt at 'minimal harmonisation', which leaves Member States free to offer higher levels of protection should they wish. It seeks to achieve its objectives mainly through the creation of two statuses: (1) refugee status; meant for those who qualify as refugees under the Refugee Convention[1] and (2) subsidiary status; meant for persons who would not qualify as refugees under this Convention, but who are

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1 The Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33 and Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267, art 2.

nonetheless protected from *refoulement* by international human rights law and who fall within the scope of this Directive.

Subsidiary status seeks to cater, through one broadly defined status-category, for a range of protection statuses which, prior to the entry into force of the Directive, had been developed separately by various Member States. These statuses would be granted to applicants who, while not qualifying for recognition as refugees, could not be *refouled* in terms of the obligations these states had assumed under international human rights treaties. Here it is important to keep in mind that Member States always retain a discretion to grant protection to new categories of vulnerable persons who do not qualify either for refugee or subsidiary status. This discretion is based upon the minimal harmonisation aimed at by the Directive; which means that Member States may still grant asylum on humanitarian grounds to some persons who do not even qualify for subsidiary status. Furthermore, the scope of subsidiary status is defined in the Directive such that it does not include all the persons entitled to protection in terms of the relevant human rights treaties; indicating that Member States are obliged, in regard to such persons who do not qualify either for refugee or subsidiary status, to grant protection on a different basis (Gil-Bazo, 2006).

3. Subsidiary Status as a Substitute for Asylum

Prior to transposing the Qualifications Directive, the asylum laws of EU Member States were based upon the Refugee Convention and echoed the prevailing position at international law, that: 'as the United Nations High Commission for Refugees (UNHCR) has insisted, refugee status is not a status that is granted by states; it is rather simply recognized by them' (Hathaway and Foster, 2014). Since at international law the right to grant or refuse asylum remains a prerogative of the State (Edwards, 2005), the Qualification Directive was innovative as it: 'constitutes the first legally binding instrument in Europe of supranational scope that imposes an obligation on states to grant asylum to refugees and other persons in need of protection' (Gil-Bazo, 2006). At the same time, the way in which this duty to grant asylum was worded in the Directive is problematic precisely because instead of referring to asylum, the Directive refers to refugee or subsidiary *status*. This wording is:

> *'unfortunate, as a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition –regardless of whether his refugee status has been formally determined- something that the Directive itself recognizes. As UNHCR has pointed out, 'the Qualification Directive appears to use the term "refugee status" to mean the set of rights, benefits and obligations that flow from*

the recognition of a person as a refugee. This second meaning is, in UNHCR'S view, better described by the use of the word "asylum"'. A similar analysis can be made of the protection granted to other persons in need of protection, who don't meet the criteria for the recognition of refugee status.' (Gil-Bazo, 2006, p.8).

It is thus clear that the Directive conflates asylum with refugee or subsidiary statuses (Gil-Bazo, 2015). In the process it moves away from the orthodox meaning of refugee status within the Refugee Convention as a status which is acquired by fulfilling the criteria of the international definition of refugees, regardless of whether it is *recognized* by the state or not. This new understanding of refugee status introduced by the Directive makes this status appear to be something which it is in the discretion of the Governments of Member States to *grant or withhold*; which is not the case according to the Refugee Convention. It also means that the preferred way by which asylum could be granted according to the Directive to persons who qualify because they could not be refouled according to international human rights law, could only be through the creation of yet another separate and distinct 'subsidiary' *status*. Since this new status is 'subsidiary', there is a tendency –which appears to have no basis in international refugee or human rights law- to consider this status as inferior to refugee status, leading to a status-based differentiation between stronger and weaker forms of asylum which reduces the protection afforded to persons possessing this status.

4. The Restricted Scope of Subsidiary Status

In terms of the Directive, subsidiary status is granted to persons who face a real risk of suffering serious harm if forcibly removed from EU territory. The definition of 'serious harm' encompasses:

'1) The death penalty or execution (Art.15(a)); 2) Torture or inhuman or degrading treatment or punishment of the applicant in the country of origin (Art.15(b)); 3)Serious threat to a civilian's life by reason of indiscriminate violence in situations of international or internal armed conflict (Art. 15(c)).' (Jakuleviciene, 2010)

This codifies the obligations of Member States not to refoule persons at risk which emerge from various international human rights instruments, notably the European Convention on Human Rights, the Convention against Torture and the Charter of Fundamental Rights of the European Union. At the same time, there are various persons at risk of serious violations of their human rights who cannot be forcibly removed from EU territory under international human rights treaties to which Member States are

signatory and who do not qualify for subsidiary status. EU nationals, for example, may not apply for subsidiary status because Article 2e) of the Directive only targets third country nationals (TCNs) or stateless persons. Furthermore this category of persons includes persons who were denied status under the Qualification Directive but cannot be returned according to international human rights treaties such as the Convention against Torture and individual asylum seekers who are the victims of 'systematic or generalized violence and human rights violations.' (Jakuleviciene, 2010)

Over and above the inherent discretion which states possess to grant asylum on a humanitarian basis to deserving applicants, there is thus a category of persons who do not qualify either for refugee or subsidiary status but who nevertheless cannot be refouled according to international human rights law. Keeping in mind that the Directive is meant to bring about a minimal harmonization in this field and does not abrogate Member States' duties under international human rights treaties they signed, this should not per se be a problem. However the equation established by the Directive between refugee/subsidiary *status* and asylum in EU law has rendered the position of persons who are legally entitled to asylum but nevertheless lack a recognized legal status, extremely problematic in practice. Such persons risk having their entitlement to asylum completely ignored and even if they are not refouled, they may be effectively condemned to a marginal existence, without meaningful recognition or asylum in the Member State which is hosting them.

The principal solution developed by particular Member States to resolve the problematic position of this category of asylum seekers has been to develop new forms of (non-harmonised) protection-statuses at a national level. These statuses can be granted to persons who fall within this category in order to clarify their legal positionality and entitlements. However this is problematic because, apart from fomenting the proliferation of new national statuses leading to 'conceptual confusion' (Haddad, 2004) and flatly contradicting the harmonizing aim of the Directive, these new statuses are generally of a humanitarian kind and: 'the situations that these people face must be clearly distinguished from the situations of people applying for asylum on purely compassionate grounds' (Jakuleviciene, 2010).

5. 'Reduced Rights' as the Content of Subsidiary Status

Since EU law has effectively replaced the unitary concept of asylum with the binary dichotomy of refugee or subsidiary status, it is not surprising that the actual rights which form the content of subsidiary status should be not only distinct from, but also less than those associated with refugee status (Battjes, 2007). In 2011 the Recast Directive, which made

both statuses part of a broader category of 'beneficiaries of international protection, managed to reduce but not to eliminate this disparity between the rights granted to subsidiary status holders when compared to refugee status holders. The content of subsidiary status currently reflects this disparity in that it allows:

5.1 Discriminatory Access to Family Reunification

While Family Reunification is made available to refugees according to the Family Reunification Directive, also known as Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Article 3(2)(c) of this Directive specifically excludes holders of Subsidiary Protection from its scope. This has permitted particular Member States to impose particularly stringent requirements, such as requiring a two year period of residency before subsidiary status holders are allowed to accede to family reunification in the German case (Laubach, 2016). This disparity appears to lack an objective justification, since: 'the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees' (Ecre-Elena, 2016). Moreover it appears to violate the principles of equality and non-discrimination enshrined in the EU Charter and the European Convention of Human Rights (Ecre-Elena, 2016).

5.2 Discrimination in the Duration of Residence Permits

While Refugees are entitled to receive a renewable residence permit which is valid for at least three years, Subsidiary Protection status recipients 'will receive a renewable residence permit which must be valid for at least one year and, in case of renewal, for at least two years' (ECRE: 2013). Again this is a distinction which does not appear to be 'objectively justifiable' (ECRE: 2013), since the protection needs of Subsidiary Status holders do not appear to substantially differ from those of Refugees (ECRE: 2013).

5.3 Discrimination in Social Welfare Entitlement

The Recast Qualification Directive states that refugee and subsidiary status holders are both in principle entitled to the same social assistance as is provided to its nationals by the hosting Member State. Yet this Directive nevertheless allows Member States to 'limit social assistance granted to beneficiaries of subsidiary protection status to core benefits' (Gil-Bazo, 2006).

Various attempts have been made by scholars to find an objective basis for this discriminatory treatment of subsidiary status recipients. Hemme Batjes dedicated an important article to this question (Battjes, 2007). After observing that, in terms of these Directives, subsidiary status holders are generally entitled to the same kind of asylum as refugee status holders,

he observes that when these Directives were drafted it was expected that subsidiary protection would be utilised in cases of mass influxes and/or that it would be a temporary measure to cater for protection needs shorter in duration than refugee status. In practice, the ways in which the Directive are interpreted and applied by Member-States ensures that Subsidiary Status is not available to cater for situations of mass influx and that recipients require precisely the same kind of long-term protection given to Refugee status holders. He concludes:

> *'A balance of interests of the refugee and the host state resulted in the set of refugee benefits in the Refugee Convention and (with slight alterations) in the Qualification Directive Exactly the same interests are at stake when defining the benefits for subsidiary protection beneficiaries' (Battjes, 2007).*

The 'reduced rights' which characterize subsidiary status in relation to refugee status thus appear to lack an objective legal justification and to have developed on the basis of: (1) the conceptual replacement of asylum by status and (2) the consequent distinction between 'subsidiary' and 'refugee' statuses resulting from the EU's Qualification Directive.

6. Subsidiary Status in Malta

Until 2008 in Malta there was only one kind of intermediate protection status apart from refugee status. This was 'Humanitarian Protection', colloquially known as 'Temporary Humanitarian Protection' or THP; which according to Maltese law: 'constituted special leave to remain in Malta for those persons who did not qualify for Refugee status but could not be returned safely to their country of origin' (European Migration Network, 2009). Beyond this, the scope of Humanitarian Protection was at the complete discretion of the Refugee Commissioner who would grant this status both to persons who would subsequently qualify for subsidiary status and to those whom he considered deserved this status on a humanitarian basis (European Migration Network, 2009, Zammit, 2016). The content of Humanitarian Protection was not legally defined and thus unspecified benefits could or could not be granted at the complete discretion of the Refugee Commissioner (Zammit: 2016).

In 2008, the Qualification Directive was transposed into Maltese law, with the result that 52% of the total applicants for asylum were granted Subsidiary status by the Refugee Commissioner; reflecting the situation previously where, in 2007, for example, 65% of applicants were granted Humanitarian Protection (Zammit 2016). To a certain extent, Subsidiary Status simply replaced Humanitarian Protection. However, there are important differences in the scope and content of Subsidiary Status.

Maltese law now reflects the Recast Qualifications Directive, both in terms of the persons entitled to receive subsidiary status and its content. This has created difficulties in granting asylum to persons who deserve protection while not qualifying for subsidiary or refugee status. The solution has been to create other forms of inferior status, on an extra-legal basis, which reflect the previously existing Humanitarian Protection in being national statuses granted and renewed at the complete discretion of the Refugee Commissioner and giving access to an opaque set of benefits instead of rights. These problematic un-harmonised statuses include Temporary Humanitarian Protection (THP), Provisional Humanitarian Protection and Temporary Humanitarian Protection New (THPN) (Zammit: 2016)[2]. As regards the content, Subsidiary Status holders now have access to various legally defined rights instead of benefits. However the flip-side is that the Maltese state has transposed the Directive very restrictively and has not granted any access to family reunification to Subsidiary Status holders. Moreover, Maltese law has restricted their access to social welfare and medical care to undefined 'core benefits and care' (Zammit: 2016). In so doing it has also assimilated Subsidiary Protection Status holders to recipients of Humanitarian Protection. In this field the latter, like the former, only have access to opaque 'benefits' instead of legally enforceable rights.

7. Conclusion

This paper has argued, referring to the Maltese experience, that while the introduction of Subsidiary Status has helped to harmonise and enhance protection for persons falling within the scope of the Recast Qualifications Directive, it has negatively impacted on those who do not. Moreover, holders of this status are generally treated as second-class refugees and important rights continue to be denied to them by states which have restrictively transposed the Directive.

[2] 'In 2014 Temporary Humanitarian Protection status was awarded to 165 applicants (Zammit, 2016).

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