



Deconstructing and Reconstructing Family Law through the European Legal Order

Keiva Carr

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 19 September 2014

European University Institute

Department of Law

Deconstructing and Reconstructing Family Law through the
European Legal Order

Keiva Carr

Thesis submitted for assessment with a view to obtaining
The degree of Doctor of Laws of the European University Institute

Examining Board

Prof. Hans-Wolfgang Micklitz, EUI (Supervisor)
Prof. Marise Cremona, EUI
Judge Marek Safjan, CJEU, Luxembourg
Prof. Katherina Boele-Woelki, University of Utrecht.

© Keiva Carr, 2014

No part of this thesis may be copied, reproduced or transmitted without prior
permission of the author

Abstract

This thesis investigates the hypothesis that the interpretation of European Union law, both primary and secondary, is having a deconstructive effect on national family law and is reconstructing it via the European Union legal order. The broad impetus of this research stems from the assumption that the nation state has undergone significant change and is, in addition, now influenced by the fast-pace development of a supranational/transnational body of law. As a result of these twin-dynamics, what are termed here as peripheral family law cases are being reconceptualised by the European legal order. This is quite incredible considering the isolated position family law was forced to assume as a result of it being coupled with tradition, morals, and local custom in the past.

The research conducted herein follows a genealogical approach to developments concerning the regulation of family relationships based on a framework adopted from Duncan Kennedy's *Three Globalizations* thesis. It begins with an analysis of the globalization of Classical Legal Thought, during which family law did not even exist as a distinct legal field, to an evaluation of the Social where we note the failure of social engineering attempts in terms of breaking down the family/market dichotomy that had been so firmly entrenched previously. Finally, the study arrives at the crux of the thesis in investigating the neo-formalist *langue* and its influence in resolving the peripheral family law issues that have come before the Court of Justice of the European Union demonstrating how the family has been incorporated into the citizenship discourse which has led to its reconceptualization and lifted it outside of the traditional, patriarchal framework.

What we question, however, is the change in discourse at the EU level from being based in market logic to a more socially inclined grammar. In this vein, the fundamental rights perspective is examined, particularly considering the influence of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Following on from this, we proceed, to investigate the effects of the EU Citizenship provisions and how this move, to what can arguably be conceived as a European identity-building project, could potentially reconceptualise family law in Europe.

Table of Contents

Abstract	5
Acknowledgements	11
Introduction	17
I) The Impetus	18
A. The National Impetus	23
B. The European Impetus	26
II) The Hypothesis	27
III) Methodology	33
Part One – The Family: The Unruly Teenager of Private Law	39
The Premise	39
Chapter I: The Classical Family	43
I) Introduction	43
II) Marriage	46
A. The Household	46
B. Contracts: the “web and woof of actual life”	52
C. Marriage as Status.....	55
III) The Family’s National Roots	58
A. The Foundations of Classical Legal Thought.....	59
B. Family Law in the <i>Corpus Juris</i>	63
C. Colonization.....	67
D. A Synopsis.....	69
IV) The Classical Family	70
A. Public/Private Divide	71
B. The Family and the Social Dynamic.....	73
C. The Family and the Private Dynamic.....	76
V. Concluding Remarks	80
Chapter II: Attacking the Classical Family via Social Law	83
I) Introduction	83
II) The Potential Of The Social	85
III) The Impetus For The Social	87
IV) Socializing The Market Side Of The Dichotomy	89
A. From Master/Servant to Modern Employment: An Interdependent Approach	90
V) Socialising The Family Side Of The Dichotomy	94
VI) The Constitutionalization Of Private Law	99
VII) Preempting The Potential Of Europe’s Role	111
VIII) Continued Discontent	116
IX) Concluding Remarks	119
Chapter III: Deconstructing The Classical Family	121
I) Introduction	121
II) Neo-Formalism	122
III) The Union’s Move Toward Recoding The Social	127
A. Anti-Discrimination	128
B. Fundamental Rights	129
IV) Shifting Interpretations...	130
A. Economic to Social.....	131

B. Protecting Fundamental Rights.....	131
C. Equal Treatment.....	133
D. From Master/Servant To Modern Employment	134
V) ...And Beyond	135
VI) Concluding Remarks	142
Part Two: The Family Coming of Age	145
I) Introduction	145
II) The Premise.....	148
Chapter IV: Swash and Backwash: A Post-National Conception of the Family	151
I) Introduction	151
II) The ‘European’ Family: The Swash	152
A. Rights Of Residence	153
B. Welfare Benefits.....	161
C. Name Registration	166
D. Employment.....	167
III) Jurisprudential Evolution.....	170
IV) The European Family: The Backwash.....	173
V) Concluding Remarks	181
Chapter V: Beyond Equality - The Influence of Fundamental Rights ...	183
I) Introduction	183
II) Introducing The Interpretation Of Fundamental Rights By The CJEU... 185	185
III) The European Convention On Human Rights	189
A. Article 8: Right To Respect For Private And Family Life	190
B. Article 12: The Right to Marry	191
C. Article 14: Prohibition of Discrimination	191
D. Application.....	192
IV) The Charter Of Fundamental Rights Of The European Union	207
A. Early Reference to the Charter.....	208
B. The Family and the Charter	209
C. Interpreting The Charter.....	211
V) Cross-Referencing Of The Courts.....	212
VI) Concluding Remarks	215
Chapter VI: Reconstructing the Family	217
I) Introduction	217
II) EU Citizenship	219
III) European Citizenship As A Developing Concept.....	222
A. From Market Citizenship to Consumer Citizens	222
B. ...to Union Citizens: “Putting Flesh on the Bones”	226
IV) Concluding Remarks	245
Conclusions	249
I) Recalling The Hypothesis.....	249
A. The Deconstruction Process.....	249
B. The Reconstruction Process	251
II) Beyond Neo-Formalism	256
Bibliography	259
Books and Book Chapters	259
Journal Articles	265
Case Law	272
Court of Justice of the European Union	272

European Court of Human Rights.....	274
National	275

Acknowledgements

As I sit here contemplating my acknowledgments, I recall that exactly 3 years ago to the day, 25th July 2011, my alarm sounded at 4 a.m. and I set out from Aguas Calientes to reach the peak of Machu Picchu, Peru. It was a physically and emotionally demanding climb of approximately 1500 steps carved out of solid granite and the aim was to reach the summit before sunrise. I had my doubts. However, with the help of those I had met on our 4 day trek to Aguas Calientes and a mutual awareness of everyone's need for encouragement at difference intervals during the ascent, I, along with my fellow climbers, reached the 15th-century Inca site located 2,430 meters above sea level just in time to watch the spectacular, unforgettable sight of the sun rise over one of the seven wonders of the world. It was more than worth it!

I set off on my PhD journey almost five years ago. In bringing this research to an end, my alarm has sounded early on many occasions and I, once again, had doubts concerning my resilience in terms of the strength needed to complete the last leg of the journey. Thankfully, I had a support network that made the journey not only achievable but also a pleasure and today I can say with confidence that this expedition has also been worth every minute of effort. I owe my gratitude to many “fellow climbers” who supported me along the way.

I would firstly like to sincerely thank my supervisor, Professor H-W. Micklitz. Over the past five years, his help, guidance, availability to discuss certain aspects of my research and above all his warmth have proven to be invaluable. I have very much enjoyed our interesting, frequent, discussions on the changing nature of private law and more particularly the influence of the post-national setting on family law. I will genuinely miss our close collaboration and our academic exchanges. I only hope that our cooperation continues as I further develop my ideas and that we have many more opportunities for discussions over coffee.

I would like to thank all the members of the *famiglia del LIDER-Lab* not only in terms of providing an institution within which I was permitted, as a very young researcher 7 years ago, to develop my ideas on private law and essentially arrive at the hypothesis I propose in this thesis but also for the friendships I have been able to develop with the researchers and staff that have managed to create an atmosphere I have yet to find elsewhere. I would particularly like to thank Professor Giovanni Comandé – without his support, encouragement and guidance I would not have arrived at this point and I am greatly indebted to him for all the opportunities he has presented to me.

Much gratitude is owed also to Marlies Becker and Rossella Corridori for their warmth and support.

To Basia and Matt – your support and friendship, not only in the last six months, but over the past three years has been invaluable. I am fully aware that one cannot conclude a thesis without the proximate presence of good friends like you. I thank you for your encouragement, your patience with me and of course the

nourishment and musical entertainment (!) you provided on a regular basis permitting me to keep my strength up and have many laughs along the way! To Marija – I recently came across a napkin on which I had drawn the principal figure on which my research rests. On the back of the napkin were written notes from a discussion we had following my explanation of the hypothesis. Although your physical presence in Florence was sorely missed during this time the positive energy you gave me on your visits is very much appreciated. I will be forever grateful to all three of you for your support and friendship. To Yvonne – the friendship we have built from the age of 12 has stood not only the test of time but also the test of distance (helped by your willingness to jump on a plane and visit me wherever I find myself!). I thank you for your considerate nature, for being available on Skype whenever I needed a chat and for understanding when you called and I simply didn't have the time or energy to talk. In a similar vein, I would like to thank Louise who is even further away but when we do manage to catch-up it's like we saw each other yesterday. Your messages of support are very much appreciated. To Sinead - again the distance between us could have negatively influenced our friendship but instead we have managed to maintain a closeness I very much appreciate. I thank you all for your support.

Many close friends at EUI have made this journey in Florence an absolute pleasure. I would particularly like to thank Katherine and Emma for their unfailing, unforgettable support and friendship. To Donagh, Tommaso, Mery and Chiara for knowing when and when not to ask how things were going and simply for being available at the drop of a hat for a chat about the difficult-to-manoeuvre boat we all find ourselves in! To Conor and Constanze for the early lunches (!) and the chats. To Karolina, Heko, Miluska, Chris, Ciaran, Angela, Maria, Jacob, Camille, Alanna, and Joris for the good times and perhaps better forgotten late nights! I am indebted to Rónán for our discussions on Duncan Kennedy's Three Globalizations thesis and his insightful comments on an earlier draft of my thesis providing much food for thought. To the ladies back home, Claire and Trisha, who were always ready for a nice catch-up and to the ladies in Luxembourg, particularly Melanie, for all your messages of support and encouragement.

To Jean-Luc – it can't be easy getting to know the true nature of someone while she finishes her thesis. I thank you for your patience and understanding, for taking care of me on my visits to "Thiontown", and, most importantly, for making me laugh after a long day of contemplating the changing nature of family law. Your support during this last stretch to the finish line is much appreciated. Also, I thank *les petites*, Thelma and Violette, for reminding me just how relaxing it is to sit and colour!

To members of my family, particularly Eamon and Pauline, for their encouragement and support. To "mammies 2 & 3 & 4", Brigid, Mary G. and Kathy, for the vino and 'craic' down by the river in Pisa. To Ellie for your infectious smile, Skype calls, text messages, your visit to Italy and for all the "crema crema"! To my brother-in-law, Michael, whose encouragement, kind nature and interest in my well being in the preceding months is very much appreciated and to Noel who always provided a laugh when home - "*Dia duit, fhéachann tú álainn*"!

Ascending the 1500 steps of Machu Picchu would have been considerably more difficult if not for the support of my two sisters, Avril and Laura – a glance between us sufficed to understand that someone needed a break! The same goes not only in terms of their support while finishing my thesis but in life in general. You have been rocks of support and I cannot express my gratitude enough. No matter the distance - from Florence to Abu Dhabi or to Truro - I have always felt that you were by my side encouraging and supporting my decisions both in terms of my career and personal life. I am forever grateful for your friendship, our memories and all the laughs we have had thus far.

Last but not least, I would like to thank my parents. When I think about the support they have given me I cannot contemplate how a person in my position could adequately express appreciation in words. They have given me all that I ever needed, and more. They have shown by example what it is to dedicate oneself to the achievement of goals and that perseverance and hard work go a long way in life. I would not be the person I am today if not for the example they have set for their children. Although in this thesis I argue for a reconceptualization of the family, I wouldn't reconceptualize mine for the world! For this, and so much more, I thank you from the bottom of my heart and I dedicate this thesis to you both with much love.

To my parents, Isobel and John.

Introduction

The research conducted and set out in this thesis rests upon the following hypothesis: *The interpretation of European Union law, both primary and secondary, is having a deconstructive effect on national family law and is reconstructing it via the European Union legal order.* Its broad impetus stems from the position that the nation state has undergone significant change and a simultaneous shift is noted in terms of the face-pace development of a supranational/transnational body of law. As a result, what are termed here as peripheral family law cases are being reconceptualised by the European legal order. This is quite incredible considering that just over one hundred years ago, not even colonial courts were prepared to engineer local family law.

To exemplify: in 1908, a case was heard in Singapore by the Court of Appeal by an English judge sitting in a colonial court – *The Six Widows Case*.¹ A merchant named *Choo* died intestate and an issue arose concerning the distribution of his estate. No less than six women presented themselves before the Court claiming to be Mr. Choo's widow and consequently a share in his property. The Court of Appeal was faced with a conundrum in that it was, on the one hand, precedent bound and therefore there was no avenue to legally accept polygamous marriages, and, on the other, there was a qualification in the settlement that English law should be applied only '*as far as the religions, manners and customs*' of the inhabitants permit. The Court therefore was forced to balance the English conception of the family and its regulation, and a foreign conception that rested on the particularities of the family institution in Singapore. The Court placed heavy weight on the latter consideration and the estate was divided between five of the six wives.²

¹ *In the Matter of Choo Eng Choon, Deceased* (1908) 12 SSLR 120; extracted in Leong Wai Kum, *Family Law in Singapore: Cases and Commentary on the Women's Charter and Family Law* (1990), 106, 275 and summarized in Harding, A., "Global Doctrine and Local Knowledge: Law in South East Asia", *The International and Comparative Law Quarterly*, Vol. 51, No. 1 (Jan., 2002), pp. 35- 53.

² The sixth widow was found to be a fraud.

I use this case by way of introduction so as to delineate the premise of this thesis. It clearly demonstrates the exceptionalism that characterised family law for such a long time and permits us to consider the current position of the family in relation to legal regulation. The principal question to be considered is how it has come to pass that the family is being considered at the supranational level whereas one hundred years ago courts took a non-interventionist approach to such relationships and left its regulation to local custom, religion and essentially self-regulation in terms of the private dynamics within the family structure.

In fact, through the genealogical approach used here to uncover the persistent peculiarities of the family, we note that the family has gone from private, self-regulation to regulation via the state and state bodies. In some instances, we are even now witnessing a re-privatisation of the family sphere.³ The unsettled picture concerning the regulation of the family will become apparent from Part I of this thesis that aims to juxtapose the family with the characteristics of Classical Legal Thought, The Social and finally Neo-formalism – a useful template adopted from Duncan Kennedy.⁴ The principal goal is to analyse the family against the background of diverse cycles of historical, economic and political changes in consideration of fluctuations between various legal perceptions necessarily impacting the family sphere and its relation to market ideologies. This analysis permits us to establish a framework within which the current situation concerning the adjudication of peripheral family law cases before the Court of Justice of the European Union can be examined.

I) The Impetus

The impetus underlying this thesis stems from the apparent overall consensus in political sciences and legal research that the nation state is undergoing a

³ Reference here is made to recent trends concerning the mediation of family law disputes. This is not dealt with specifically in this thesis but it is an interesting point in terms of dispute resolution in the private sphere which should be borne in mind.

⁴ D. Kennedy, “Three Globalizations of Legal Thought 1850-2000”, in D. Trubek, *The New Law and Economic Development: A Critical Appraisal*, (Oxford 2006).

transformation.⁵ Even though the concepts and methodological lenses differ, we note the trend recognizing the evolving nature of the European transnational legal order which provides a forum within which both citizens and private actors can avail of increased opportunities to participate in the changing economic and political environment. Within this framework, the principal focus of this research is the role of anti-discrimination, fundamental rights and EU Citizenship in deconstructing and reconstructing family law.

To this end, the thesis embarks on an examination of the relationship between the family and the market in three theoretical steps, scrutinising the relationship between the two in terms of the legal language⁶ that characterized Classical Legal Thought, The Social, and finally Neo-formalism. By way of brief introduction, we note that the first globalization of Classical Legal Thought⁷ was centred on legal formalism: the idea that law provided facilitative rules, which meant formal equality in terms of the parties and on the basis of procedural fairness. In other words, the rules of the game apply to all meaning that the outcomes, even those resulting in distributive inequality, are therefore also fair. It was essentially characterised by ‘law *without* politics’. The second globalization, The Social,⁸ on the other hand, was typified by a ‘law *versus* politics’ approach and an increase of using law to meet social ends. Private law in this period was overlain with an increased awareness of social obligations and the idea of social protection. When we come to the third globalization,

⁵ We can think here about the effects of globalization on the nation state, the effects of international agreements and the establishment of international institutions, such as the World Trade Organization, but more specifically for our purposes we focus attention on the influence of the European legal order on the individual nation states as constitutive members. See Slaughter, A.M., “Global Government Networks, Global Information Agencies, and Disaggregated Democracy”, *Harvard Law School, Public Law Working Paper* No. 18.; Slaughter, A.M., *A New World Order* (Princeton University Press, 2009); Fischer-Lescano A., & Teubner G., “Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law”, 25 *Mich. J. Int’l L.* 999 (2004); Sassen S., *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006).

⁶ In Kennedy’s contribution, legal consciousness (a term he does not define very well), determines how various ‘interests’ are integrated into the legal dominant language. He argues that in order to assert a legal claim, this claim must be framed in the governing legal language. For example, the contemporary language is neo-formalism i.e. constitutional rights, resulting in, what we refer to here, as the development of a constitutional rights rhetoric as the language within which the parole must fit.

⁷ For a more detailed discussion of Classical Legal Thought see Chapter I.

⁸ The characteristics of this globalization are detailed in Chapter II.

Neo-formalism,⁹ we witness a change in legal grammar in an attempt to integrate ‘*politics through law*’ via rights discourse which can be exemplified via the employment of proportionality, balancing, the emergence of identity rights and the use of law to meet a variety of ends including distributive and social functions.

It is precisely here in terms of the language of Neo-formalism that we can locate the principal hypothesis of this research. Rights, in the third globalization, cut across the tensions that persisted after the globalization of Classical Legal Thought and The Social because they have the potential to give rise to solutions considered more satisfactory as opposed to the purely private or the purely social solutions that were adopted during the earlier globalizations. For instance, take for example the potential of relying on one’s market rights before the Court of Justice of the European Union such as to undermine or reduce the scope of social regulation – recall the Sunday Trading debate thrashed out by jurisprudential advances made at the EU level.¹⁰ These same rights however can simultaneously give voice to those who would previously not be considered during Classical Legal Thought - for instance, during the first globalization there was a right to personal autonomy but no recognition of unequal bargaining power. It is posed here that we are witnessing the progression of an identity-based notion of rights and a recodification of The Social into the legal system via arguments based on constitutional and fundamental rights. Consequently, political disputes are being portrayed as legal disputes in courts.

If we parallel these developments in legal language with the family law sphere and its horizontal and vertical dynamics, we are enabled to construct a framework within which interesting questions in relation to the effects of the three globalizations on the family can be examined. In fact, the genealogical approach to this research is motivated, as we will see in Part II, by the added value of deciphering the effects that different time-frames, various power struggles in terms of market-state relations and variable customs, traditions and approaches have had on the family. The aim is to decipher, such as to inform and explicate, why the principal hypothesis of this

⁹ See Chapter III below.

¹⁰ Micklitz, Hans-W. *The Politics of Judicial Co-Operation in the EU: Sunday Trading, Equal Treatment and Good Faith* (Cambridge University Press, 2005).

research could be construed as controversial given resistance on the part of national courts to assume the role of social engineers in terms of family regulation. In other words, the hypothesis i.e. that the family is being deconstructed and reconstructed by the European legal order - is controversial given the traditional reticence of national courts to submit the family to legal regulation. The geneological approach applied here assists in understanding this resistance and therefore is essential in terms of depicting the current understanding of the family.

It is argued that the impenetrability of the family is largely owed to its exceptional position within the private law structure. This has resulted in its isolation and it being quarantined within local law and morals based on the perception that legal concepts closely connected to the conflictual, individual ethos of the market would corrupt and destroy the family sphere. In fact, according to some of the functions of the family it could reasonably be argued that the family is indeed better situated alongside morals, local law and tradition. Consider the argument that values defining the personality of an individual are nurtured within the family sphere¹¹ and the evidence produced by anthropologists and sociologists¹² demonstrating that the family is more suitable than any other social structure to balance the contrasting values inherent in various local communities.¹³ Additionally, it is settled that ethic, religious, and cultural values are essentially home to the private sphere of the family in reflection of the social system at any given historical moment.¹⁴ Considering this, the

¹¹ This argument is played out by D. Amram in “Homosexuality and Child Custody Through the Lenses of Law: Between Tradition and Fundamental Rights”, Vol 15, No. 1 *Electronic Journal Of Comparative Law*, (December 2011).

¹² Paola Ronfani, *Il diritto e le nuove famiglie: una lettura sociologica di un rapporto complesso*, Min. e giust., Rome, 2, 13-26 (2008); Maurice Godelier, *Métamorphoses de la parenté*, éd. Fayard (2005); Agnès Martial, *L’anthropologie de la parenté face aux transitions familiales contemporaines: des interrogations en suspens*, La Découverte - Travail, genre et sociétés, 158-163 (2005); Gérard Lucas, *Quelques préalables à l’étude des parentalités homosexuelles*, Revue française de psychanalyse, Vol- 67, 229-240, (2003).

¹³ The topic has been first apprehended by social science. On these issues, see Douglas Laycock, Anthony R. Picarello Jr, and Robin Fretwell Wilson, *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Rowman & Littlefield Publishers, 2008). Interdisciplinary legal scholars have further approached the argument through the lenses of other fields: see Nicholas Kasirer, “The Dance Is One” in Sylvio Normand, ed., *Mélanges offerts au professeur François Frenette: Études portant sur le droit patrimonial* (Ste. Foy, Qc.: Presses de l’Université Laval, 2006).

¹⁴ Antokolskaia, Masha. “Family law and national culture. Arguing against the cultural constraints arguments”, in Woelki, K. Boele. Debates in *Family Law around the Globe at the Dawn of the 21st century*, Intersentia, 37-51 (2009); Celerier, Marie C. “La famille homoparentale: continuité ou rupture?”,

family's isolation from the rest of the private law system, it could be argued, may be the most desirable situation.

In anticipating the counter-argument that will be presented in this thesis, let us briefly delineate the genealogical path of the family such as to formulate the starting point for arguing for a more neo-formalist approach to the family. During the classical period, the governance of the family structure and family relationships was conducted in a strictly private bubble with little or no intervention from external forces aside from paying lip service to the social relevance of the family as an institution that in some way economically supported the market. The result, it was noted, was a 'hands off' approach to both the horizontal and vertical dynamics of family relations. The emergence of the welfare state however made some attempts to burst this bubble. To this end, we note the clear delineation of the public/private divide in family law stemming from a shift in focus from the will of actors to interdependence and the ensuing rise of The Social. In terms of family regulation, this is particularly evident from the enactment of national constitutions that were influenced by this shift in legal consciousness essentially creating a new legal langue resulting in the family being placed in an important position claiming that it deserved the utmost protection based on the argument that it was the fundament of good in society. That being said, aside from some isolated attempts to socialise the family, it remained exceptionalized in the sense that its progression lagged considerably when juxtaposed with the leaps and bounds that, for instance, the master-servant relationship made in reaction to the rise of The Social. It is not until the birth of the internal market, essentially catapulting the family into the post-national sphere, that we can note shifts in relation to the family and its relationship with fundamental rights, initially with anti-discrimination law based on the economic ethos of the market and more recently with reference to the Charter of Fundamental Rights and the European Convention on Human Rights. To note briefly, for instance, at the EU level anti-discrimination in its early days aimed to reintroduce women into the market place by providing for equal pay for men and

Champ psychosomatique, n. 38, 167-170 (2005); Françoise Héritier, "Quel sens donner aux notions de couple et de mariage? A la lumière de l'anthropologie", *Information sociales*, n. 122, 6-15 (2005).

women.¹⁵ Today, however, we note the extensive character of anti-discrimination law at the European level and its expansive reach in many directions. In relation to the family this has had considerable effects not only on the regulation of family relationships but also on contract law and labour law as can be deduced from, for example, Case C-104/09 *Roca-Alvarez v Sesa Start España ETT SA*¹⁶ which dealt with breastfeeding leave and gender roles within the family.

Suffice it to note that isolating the family - a real player in the market with a need for protection considering the increase of what we term peripheral family law issues and their effect on what is termed as the core - is no longer an option. The undercurrent of this thesis demonstrates that neither Classical Legal Thought nor The Social were forceful enough to consider the changing nature of the family essentially permitting the resistance of hierarchical structures that remained unresponsive to calls for equality of treatment within the family in terms of individual members and indeed equality of treatment in horizontal terms.

A. The National Impetus

In addition to the desire to flesh out the potential of the neo-formalist language in terms of the family, this research also takes inspiration from the changing nature of the family and the catch-up position it often finds itself in at the national level. The family has gone through radical changes in the last one hundred years. Traditionally home to religion, culture, local norms and customs, there was a clear demarcation line between the regulation of the market on the one hand and that of the family on the other with family regulation lagging behind. What resulted was what we may term a horizontally characterised unit in that governance was strictly private. That being said, vertical, hierarchical tendencies within that

¹⁵ Importantly however, this must be noted as an economic based advance, at least to some extent, on the preoccupations of the French that their equal pay laws would place them at a competitive disadvantage.

¹⁶ The Court ruled that the right to breastfeeding leave in favour of women to the exclusion of employed fathers is contrary to the principle of equal treatment between male and female workers according to Art. 2(1), (3) and (4) and Art. 5 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

structure were very much at play given the role of the patriarch within family units. This will be dealt with in more detail in chapter one but suffice it to say that the self-governing, traditional family, has altered dramatically in terms of structure, composition and ideology essentially invoking a shift between ‘the family’ and ‘the rest’.

These developments have proven difficult for national courts to resolve since, as we will see, the conception of the family as being based on marriage and rooted in local law persisted though *The Social*. Therefore, national courts had their hands tied when it came to the recognition of new family compositions, conceptions and ideologies. In 2006, for example, the High Court of Ireland, in the case of *Mc D. v L. & Anor*,¹⁷ found that a lesbian couple and their child, conceived via sperm donation, constituted a “de facto family”, opening up the possibility of expanding upon the Irish definition of the family, one that might concentrate on the substance of the family rather than its constitutional form. Shortly after this revolutionary pronouncement, the High Court judgment was appealed to the Supreme Court of Ireland¹⁸ which categorically rejected the notion that there exists an institution of a de facto family in Ireland, maintaining the exclusionary approach to furthering the family beyond the classical notion enshrined in the Irish Constitution. In fact, difficult issues such as the one just described are bringing to the fore more prominently the institutional choices¹⁹ that are being made when such controversial issues present themselves as demonstrated by another recent case heard before the *Corte Costituzionale*²⁰ in Italy. The case concerned the refusal of the local administration in Venice to recognise a same sex marriage and was referred to the Constitutional Court on the three points of law to be considered i.e. whether the recognition of a same sex marriage would be in conflict with the civil code, whether Article 3 of the Italian Constitution prohibits discrimination based on sexual orientation in cases of same sex marriage and also, the court sought guidance from the Constitutional Court regarding the gender neutral

¹⁷ *Mc D. v L. & Anor* (2008) IEHC 96

¹⁸ *Mc D. v L. & Anor* (2009) IESC 81

¹⁹ Komesar, N., *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (Cambridge University Press, 2001.)

²⁰ *Corte Costituzionale*, ord. 15 April 2010, n. 138

marriage stipulation in Article 29 of the Constitution. The case was declared inadmissible, citing the inappropriateness of deciding this issue in the courts and rather inferring that the matter is one for the discretion of Parliament. This already gives us some indicative response to the questions of how and why controversial issues, not only or necessarily this one concerning same sex families, arrive before the CJEU, i.e. national legal courts are not equipped with legal tools to resolve intricate issues that arise outside the limitations of national traditional family law.

This being said, other shifts that have occurred within family structures and ideologies over time have indeed been recognised by national courts. For example, the procreation ideology has come into question, one that, for a considerable time within the realm of the traditional family, was upheld by the courts. The notion, and indeed for a long time the reality, that families should be composed of a married couple, the principle scope of which should be procreation, was reflected in Ireland right up until 1974 when legislation was finally introduced overturning the ban on contraceptives after the case of *McGee v. The Attorney General* rendered the ban unconstitutional.²¹ This case finally led to the recognition in Ireland that even within marital bonds, procreation is a choice and not a requirement of the marital relationship, emphasising the importance of autonomy and self-determination within relationships. The traditional ethos failed to accept that in society there are many couples who freely choose not to procreate and many couples who cannot procreate. Moreover, many people nowadays procreate outside the bonds of marriage²² illustrating that marriage is not a necessary condition for procreation and vice versa.²³ This is largely due to the complex society we now find ourselves living in and the influence that self-

²¹ *McGee v. The Attorney General* (1974) I.R. 28.

²² According to the 2006 census in Ireland there were 152,500 lone parent families in Ireland. See <http://www.cso.ie/>. In fact, a recent poll conducted by the BBC in the UK demonstrates that marriage levels in Britain are at an all-time low. For every three weddings there are now two divorces - the highest rate in Europe. Moreover, cohabitation has risen 64% in a decade, with almost half of children now born outside of wedlock, inherently signifying a decrease of births within the bonds of marriage. The complete results of the poll are available online at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/05_11_07familypoll.pdf

²³ Abrams, K. & Brooks, P. "Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation", *Yale Journal of Law and the Humanities*, Vol. 21, No. 1, (2009).

determination has in the private sphere.²⁴ Even adoption law now refutes the presumption that procreation goes hand in hand with marriage. In Ireland,²⁵ for example, it is possible for a single person to adopt if the Adoption Board considers it desirable, considering the welfare of the child as its paramount condition. Indeed, more extensive rights regarding adoption are evidenced in the UK where adoption rights for homosexuals are in fact specifically legislated for.²⁶ In Italy, adoption remains to a large extent reserved for married couples. However, there are exceptions based on the best interests of the child.²⁷ In addition, scientific advances,²⁸ for example, artificial insemination,²⁹ have reduced procreation barriers faced by lesbian couples and single people.³⁰

B. The European Impetus

An additional factor that has considerably influenced the family is the cross-pollination of diverse cultures, traditions, religions and so on. From the local level to the global, migration has been a constant occurrence. It is defined as the movement of

²⁴ See Brüggemeier, G., Ciacchi, A., Colombi, & Comandé, G. (eds.) *Fundamental Rights and Private Law in Europe* Vol. 1 (Cambridge: Cambridge University Press, 2010); Brüggemeier, G., Ciacchi, A., Colombi, & Comandé, G. (eds.) *Fundamental Rights and Private Law in Europe* Vol. 2 (Cambridge: Cambridge University Press, 2010).

²⁵ In Ireland, adoption is governed by the Adoption Acts, 1952, 1964, 1974, 1976, 1988, 1991 and 1998.

²⁶ See sections 49 and 144 of the Adoption and Children Act 2002. For a European picture see M.B. Baraldi, "Different Families, Same Rights? Freedom and Justice in the EU: Implications of the Hague Programme for Lesbian, Gay, Bisexual and Transgender Families and their Children", *ILGA Europe*, (2007).

²⁷ Art 44 I. Law No. 184/1983

²⁸ In general here see J. Shapiro, "Changing Ways, New Technologies and the Devaluation of the Genetic Connection to Children" in Maclean, M. (ed), *Family Law and Family Values*, (Hart Publishing, 2005).

²⁹ Waldman, E.A. "What Do We Tell the Children?", *Capital University Law Review*, Vol. 35, No. 2.; TJS Legal Studies Research Paper No. 1020095 (2006), offering a discussion on the rights of children in relation to Assisted Reproductive Technologies (ART) that are now offering an array of ways to parenthood for infertile heterosexuals, gay and lesbian couples, and singletons of varying sexual preferences.

³⁰ This depends of course on whether or not national legislation provides for artificial insemination for same sex couples or single people. There is no Irish legislation dealing with assisted reproduction as yet. The Irish Medical Council's ethical guidelines do not specify that unmarried partners or same sex partners are excluded from availing of fertility treatments. The Human Fertilisation and Embryology Act, as amended in 2008, in the UK extends clear legal rights to lesbian couples permitting fertility treatment and indeed granting parental rights and responsibilities. The actual moral implications of this will not be discussed here. For an overview see E.A. Waldman, *ibid.* Suffice to say that scientific advancements have led to a situation in which marriage is not necessarily a precondition of procreation.

people from one place to another and has become an increasing phenomenon³¹ in Europe ever since the creation of the European Economic Community and subsequently the European Union which has over time rendered invisible the geographical boundaries of Member States resulting in the free flow of goods, services and, most importantly for our purposes, persons within the Union's borders. However, quite obviously, when we speak of migration we cannot simply consider the migration of the physical self. Rather, both the mutable and immutable characteristics of migrants naturally migrate with the subject and this has indeed led to further changes in the nature of the family. Indeed, this has recently been noted by Advocate General Sharpston in highlighting that "*when citizens move, they do so as human beings, not as robots. They fall in love, marry and have families*".³² Intercultural and interreligious bonds have been formed as a result of the fusing of these mutable and immutable characteristics of European migrants and immigrants. It is precisely this migration that brings the family under the scope of protection of the European legal order, as we will see from a more informative description of the hypothesis.

II) The Hypothesis

As mentioned, the broad impetus of this research stems from the position that the nation state has undergone significant change and a shift can be noted toward supranational/transnational law-making. In correlation to this, if we juxtapose the changes that have occurred in the family sphere, we note that the family, particularly its 'new' forms, has become disconnected from the nation state and has in turn been catapulted into the transnational sphere as a result of free movement within Europe. From this shift, the following hypothesis has been delineated:

³¹ Indeed Eurostat estimates that approximately 3.5 million people settled in a new country of residence within the EU-27 in 2006. See Herm, A. (2008), "Recent Migration Trends: Citizens of EU-27 Member States become ever more mobile while EU remains attractive to non-EU citizens", Eurostat, Statistics in Focus, available online at: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-08-098/EN/KS-SF-08-098-EN.PDF

³² Opinion of Advocate General Sharpston delivered on 30 September 2010 Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)* para. 128.

The interpretation of European Union law, both primary and secondary, is having a deconstructive effect on national family law and is reconstructing it via the European Union legal order.

The Primary law of the European Union, particularly the Treaty provisions on free movement,³³ anti-discrimination,³⁴ fundamental rights,³⁵ and citizenship³⁶ are very powerful in themselves. This - coupled with the pivotal role of the CJEU in developing and indeed widening the scope of these elements of primary law³⁷ and giving shape to them based on the reality facing migrating families - is a potent influence in shaping Europe. The hypothesis of this thesis concerns the development of the neo-formalist language in terms of anti-discrimination and fundamental rights. Additionally, this research aims to investigate European Citizenship as a force going

³³ Free movement of workers is enshrined in Article 39 of the EC Treaty. As a result of the Maastricht Treaty the rights of economically-active persons to free movement within the EU have been complemented by limited rights for non-economically-active citizens to move freely within the EU, under Article 20 (1) of the TFEU. Furthermore, Directive 2004/38/EC on the right to move and reside freely within the EU, coined 'the Citizens Directive', has further bolstered the free movement rights of EU citizens.

³⁴ The Treaty of Amsterdam reinforced existing provisions in the EC Treaty on preventing pay-related discrimination between men and women which were contained in Article 141. In fact, it went beyond this by delineating a new role for the EU in promoting equality between men and women in general (Articles 2 and 3). Article 12 of the Treaty bans all discrimination on the basis of nationality. And, in a ground-breaking new article, Article 13, the Treaty empowers the EU to combat all discrimination based on sex, racial or ethnic origin, religion, disability, age, and sexual orientation. On the basis of this Article, the Council adopted a directive designed to combat discrimination based on racial or ethnic origin (Directive 2000/43/EC) and a directive banning discrimination in employment on the grounds mentioned in Article 13 with the exception of sex (Directive 2000/78/EC).

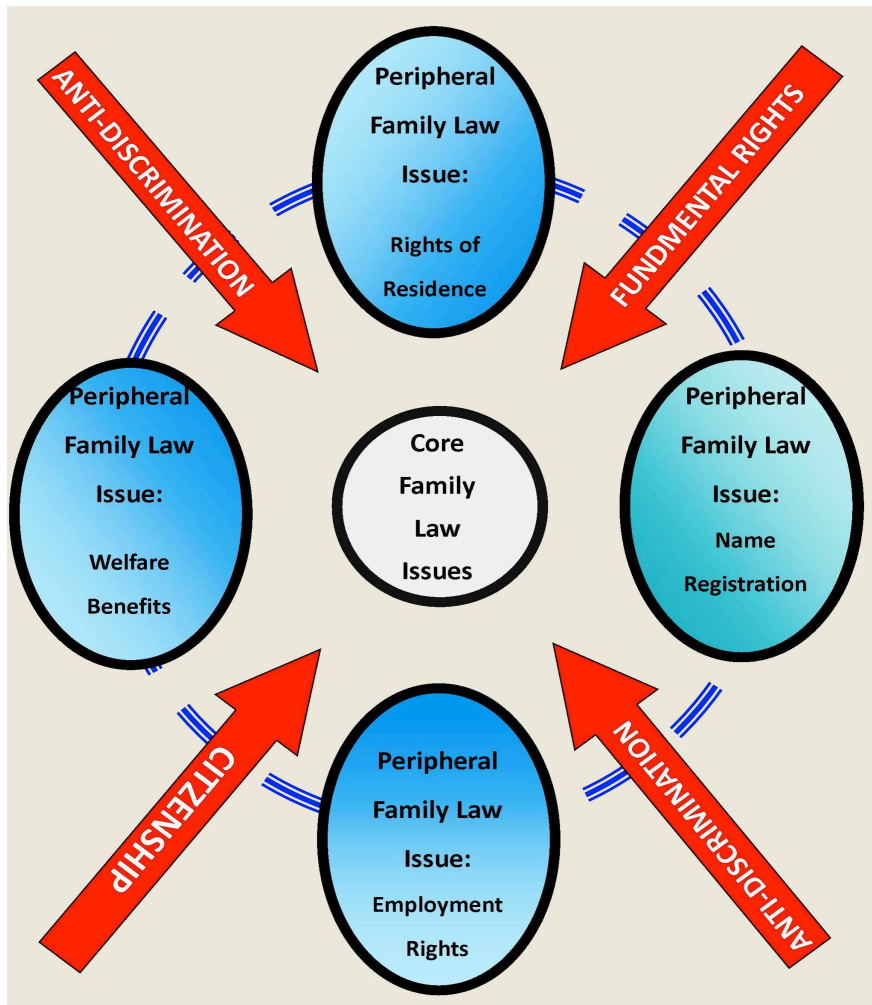
³⁵ Consider the Charter of Fundamental Rights of the European Union and additionally the influence of the European Convention on Human Rights and the constitutional traditions common to the Member States.

³⁶ Article 17 of the TEU (now Article 20 of the Treaty on the Functioning of the European Union) states: (1) Citizenship of the Union is hereby established. 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. (2) Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties.

³⁷ Among some of the most interesting cases concerning non discrimination, please see Case C-144/04, *Werner Mangold v Rüdiger Helm*; Case C-555/07 *Seda Kucukdeveci v Swedex*; Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*; Case C-164/07 *James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions*; Case C-148/02 *Carlos Garcia Avello v État belge*; Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul v Leonhard Matthias Grunkin-Paul and Standesamt Stadt Niebüll*; Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*. See also A. Eriksson, "European Court of Justice: Broadening the Scope of European Non Discrimination Law", 7, *International Journal of Constitutional Law*, 2009.

beyond neo-formalism in attempts to provide for access justice³⁸ in the construction of a new societal ideal.

The visual of my hypothesis below demonstrates its simplicity:



Families migrating within Europe's borders are not, in many circumstances, granted full recognition by the host Member State's legal system. This is evident from an examination of the CJEU's case law, which reveals that an increasing number of cases concerning family law issues are being referred to it by national courts. I refer to these

³⁸ Micklitz H-W., *The Many Concepts of Social Justice in European Private Law* (Edward Elgar Publishing, 2011).

cases as peripheral cases, in other words those perhaps not dealing with the core of family law as we traditionally know it, for example, inheritance, divorce, separation, child custody.³⁹ Rather, these peripheral issues are issues that are coming to the fore as a result of free movement, for example questions concerning rights of residence, welfare benefits, name registration and employment rights, issues that are a direct result of the right to free movement granted by the Treaty.⁴⁰ As we can see from the figure, the prohibition of discrimination, fundamental rights, and citizenship can be described as the external forces used to resolve the peripheral issues eventually reflected back into the national legal systems.

The core of family law here refers to that regulated by the domestic law of Member States. When one considers the family, at least as was the case until more recent times, one typically imagines the traditional family based on marriage, the classic definition of which is provided in the case of *Hyde v. Hyde*⁴¹ by Lord Penzance as “*the voluntary union of one man and one woman, to the exclusion of all others*”. This traditional family is significantly protected by domestic legal systems, with particular reference often made to it in national constitutions. For example, in Ireland, despite the fact that ‘the family’ is referred to in Articles 41⁴² and 42⁴³ of *Bunreacht na hEireann* (the Irish Constitution),⁴⁴ nowhere in these articles is the term defined.⁴⁵ Through judicial

³⁹ This phenomenon must be considered also in light of the fact that family law is a Member State competence, therefore the traditional issues are generally dealt with in domestic courts, for example, at least until recently, divorce, separation and child custody. See also, however, The Brussels Regulation.

⁴⁰ Which do then fall within the competence of the EU.

⁴¹ (1866) L.R. 1 P & D 130 at p. 133.

⁴² Article 41.1 reads as follows: The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. Article 41.2 The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State. More importantly for our purposes Article 41.3.1 stipulates that: The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

⁴³ Article 42.1 reads as follows: The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

⁴⁴ The Constitution of Ireland, 1937.

⁴⁵ For a detailed discussion see, (2006) The All Party Oireachtas Committee on the Constitution: Tenth Progress Report: The Family, available online at: <http://www.constitution.ie/reports/10th-Report-Family.pdf>; Kiernan, K. “The Diversity Initiative – Welcoming the Diversity of Family Life in Ireland”, available at: www.equality.ie/index.asp?IocID=90&docID=197; Ryan, F.W. (2004)

interpretation of both Articles, however, it is clear that it is the family based on marriage to which the Constitution refers to as the most important social unit within the State.⁴⁶ The leading case, *The State (Nicolaou) v An Bord Uchtala*⁴⁷ clarified in no uncertain terms this position.⁴⁸ A similar result was found in the later case of *G v An Bord Uchtala*⁴⁹ in which O’Higgins CJ stated that Article 41 “refers exclusively to the family founded and based on the institution of marriage”. Similar references to the family can be found in the Italian Constitution. Article 29⁵⁰ concerning Marriage and Article 31⁵¹ entitled the Family contain the relevant constitutional provisions regarding the definition of the family recognising it as a ‘natural association founded on marriage’. We can therefore note that national, constitutional definitions of the family in these countries are firmly focused on the formal ties that are created between persons by the marital union. This will be dealt with in Chapter II.

This definition of the family, however, which has its roots in traditional ideologies and a family structure and composition which is no longer the exclusive one, has failed to move with the times and to a large extent has neglected to expand the scope of its definition in recognition of the diversity of family life in today’s

“Marriage at the Boundaries of Gender: The Transsexual Dilemma Resolved?”, *Irish Journal of Family Law*; Mee, J. & Ronayne, K. (2000) report on the “Partnership Rights of Same Sex Couples”, The Equality Authority; Ryan, F. (2000) “Sexuality, Ideology and the Legal Construction of Family: Fitzpatrick v Sterling Housing Association”, *Irish Journal of Family Law*

⁴⁶ The State’s pledge in Article 41.3.1. to guard “with special care the institution of marriage on which the family is founded” has been criticised by a leading family law scholar in Ireland, Shatter, declaring that the family based on marriage in Ireland “has been placed on a Constitutional pedestal” since the enactment of the Constitution in 1937. See Shatter, A. (1997) *Shatter’s Family Law*, 4th ed., Butterworths, Dublin.

⁴⁷ *The State (Nicolaou) v An Bord Uchtala*, (1966) IR 567.

⁴⁸ This case concerned Nicolaou who was the biological father of a non-marital child who challenged the constitutionality of the Adoption Act 1952 on the basis that it allowed for the adoption of his child without his consent. The Supreme Court rejected his case basing its decision on the fact that he had no constitutional rights to his child since the ‘family’ was not a family based on marriage.

⁴⁹ *G v An Bord Uchtala*, (1980) IR 32.

⁵⁰ Article 29 [Marriage] (1) The family is recognised by the republic as a natural association founded on marriage. (2) Marriage entails moral and legal equality of the spouses within legally defined limits to protect the unity of the family. Article 31 [Family] (1) The republic furthers family formation and the fulfilment of related tasks by means of economic and other provisions with special regard to large families. (2) The republic protects maternity, infancy, and youth; it supports and encourages institutions needed for this purpose. English translation of Italian Constitution available online at: http://www.servat.unibe.ch/icl/it00000_.html

⁵¹ Article 31 [Family] (1) The republic furthers family formation and the fulfilment of related tasks by means of economic and other provisions with special regard to large families. (2) The republic protects maternity, infancy, and youth; it supports and encourages institutions needed for this purpose.

societies. Radical changes have occurred concerning the nature of the family that are reflected in Part I which delineates the genealogical analysis.

It is precisely this shift that motivates this research. These peripheral family law issues are orbiting on the periphery and are outside the reach of the core of family law regulation due to its confinement to the periphery of private law for ideological reasons. Generally, although not always as we will see, the cases have one common denominator i.e. the peripheral issues arise as a result of the influence of EU law. The free movement provisions and subsequently enacted secondary legislation necessarily mean that families are now migrating within Europe's borders and therefore new types of cases are being considered before the Court. In fact, one might say that the free movement provisions have paved the way for a new generation of legal issues that have moved beyond the control of national states and into the supranational sphere. However, the CJEU, not being equipped with a body of family law to resolve these issues, has had to dip in to its internal market tool-box in order to resolve the peripheral issues. It is precisely this development that captures the essence of this thesis since from an examination of the case law we can delineate that anti-discrimination, and more recently fundamental rights have provided the basis for the legal resolution of the cases. This recognition can be directly linked to Kennedy's theoretical template and the recognition by the Court that difference requires management and that legal tools need to be developed at the European level so as to adequately accomplish this. The Court's tendency to apply the neo-formalistic language to peripheral family law issues, as we will subsequently uncover, is in fact paving the way for a new branch of family law aimed at the protection of its substance rather than its form. In short, we have witnessed the disconnection of the family from the nation state via the internal market and an attempt to reconnect it via the social aspirations – be they well founded or not – of the European legal order. The extent to which EU primary law i.e. free movement provisions, anti-discrimination, and fundamental rights affect family law is an area very much underdeveloped in legal research.⁵² Therefore, this thesis aims, in the second part, to fill this gap by delineating

⁵² For an interesting discussion on the influence of fundamental rights in private law see G. Brüggemeier, A. Colombi Ciacchi & G Comandé (eds.) *Fundamental Rights and Private Law in*

the evolution of EU primary and secondary law concerned with a view to deconstructing/reconstructing family law in Europe.

In going beyond the Third Globalization, this thesis takes a further step based on the analysis of the case law of the CJEU. The pronouncement of the Court, that “*Union Citizenship is destined to be the fundamental status of nationals of the Member States*” is very telling in terms of an advancement of a new, transnational, or perhaps post-neo-formalist approach, which is materializing at the supranational level. It expresses clearly the goal that the introduction of European citizenship into the primary law of the Union intends to meet. Our goal is to question the extent to which citizen rights go beyond the formal rights the Court has developed on the basis of its progression from a market-based approach to anti-discrimination to its interpretation of fundamental rights in providing for a new societal ideal. What we will see emanating is that the ‘rights rhetoric’ in terms of the shifting goals of the EU assumes an additional dimension not only when we consider individuals as the recipients of citizenship rights but also in consideration of the family as a unit in providing for a new societal ideal.

III) Methodology

The harmonisation of family law has been deemed a “hopeless quest”.⁵³ One of the theories that has been advanced is Watson’s theory of Legal Transplants;⁵⁴ however, this well-known theory has been critiqued on many occasions, and not only in the field of family law. The main criticism remains Kahn-Freund’s analysis encapsulated in the following extract:

Europe Vol. I Cambridge: Cambridge University Press, 2010; G. Brüggemeier, A. Colombi Giacchi & G Comandé (eds.) *Fundamental Rights and Private Law in Europe* Vol. 2 Cambridge: Cambridge University Press, 2010; C. Mak, “Fundamental Rights in European Contract Law. A comparison of the impact of fundamental rights on contractual relationships in Germany, Italy the Netherlands and England”, *Kluwer Law International*, 2008; Jan M. Smits. “Private Law and Fundamental Rights: A Sceptical View”, in T. Barkhuysen, & S. Lindenbergh (eds.) *Constitutionalisation of Private Law*. (Leiden-Boston: Brill, 2006). 9-22. Available at: http://works.bepress.com/jan_smits/5;

⁵³ Kahn-Freund, O. “Common and Civil Law – Imaginary and Real Obstacles to Assimilation”, in Cappelletti (ed), *New Perspectives for a Common Law of Europe*, 1978.

⁵⁴ Watson, Alan. *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974).

*...we cannot take for granted that rules or institutions are transplantable. The criteria answering the questions whether or how far they are, have changed since Montesquieu's day, but any attempt to use the pattern of law outside the environment of its origin continues to entail the risk of rejection*⁵⁵

Kahn-Freund continues by arguing that law is socially, and perhaps more importantly, politically embedded. Therefore, like a kidney 'foreign law' may be rejected by its host if it cannot be adapted to its surrounding environment. It might be perspicacious, therefore, to recall the 'six wives' case⁵⁶ outlined above. The law in this case in effect adapted to the particulars of the society to which it was being applied. The English law that was in force at the time had been 'transplanted' but was capable of adapting to the needs of society and of considering the morals, traditions and inherent differences in the structure of the family at issue in the case as opposed to what the law was accustomed to i.e. the English family where polygamy was not recognised. In effect, the transplanted law adapted to the local law.⁵⁷

The transplant theory has been significantly debated and greatly criticised by other scholars. Kahn-Freund's sentiments have already been noted. More radical critiques have also been advanced by Pierre Legrand that Legal Transplants are impossible; somewhat arrestingly, that the word *Brot* in German does not mean the same as the word *pain* in French.⁵⁸ Another prominent scholar in this area, Gunther Teubner, in reference to the difficulties of legal transplants, has coined the term '*legal irritant*' which he uses to explain the impact of legal transplants on the law of the receiving legal system. According to Teubner, the transfer of a legal concept from one system to another will have unpredictable effects:

⁵⁵ Kahn-Freund, O. "On Uses and Misuses of Comparative Law", *Modern Law Review*, Vol. 37, No 1, 1974

⁵⁶ See Harding A., "Global Doctrine and Local Knowledge: Law in South East Asia", *The International and Comparative Law Quarterly*, Vol. 51, No. 1 (Jan., 2002), pp. 35- 53

⁵⁷ Ibid

⁵⁸ Legrand, P. "The Impossibility of 'Legal Transplants'", 4 *Maastricht Journal of European & Comparative Law* 111, 1997.

When a foreign rule is imposed on a domestic culture...it is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events... 'Legal irritations' cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.⁵⁹

Another strand of opposition to legal transplants, relates to the argument that it is a form of colonial imposition and, as such, contrary to the principles of democratic governance.⁶⁰ It is argued that transplants interfere substantially with the sovereignty of the receiving country and clashes with domestic legal concepts are inevitable.

With the opposition laid out, in investigating anti-discrimination and fundamental rights and the role they play in delegating the neo-formalist grammar, and European citizenship as going beyond this in the direction, as argued here of a post-neo-formalism and identity building project, we must bear in mind that the relationship between the CJEU and the Member States is a reciprocal one. The development of both legal systems is actually dependent on one other and the preliminary reference procedure provides for the 'swash and the backwash' of legal issues. On this basis, I would propose a variation in terminology.

To this end, this research is more concerned with the catalytic effects of European Union law on the Member States as opposed to viewing it as an imposition of law or as a legal transplant. This would also perhaps lessen the apprehensions of scholars in relation to the severity of the imposition of foreign laws on domestic legal systems; an assumption frequently made when one considers legal transplants. In fact, the notion of the catalytic effects of Union law here is based on that advanced by Lord Denning in 1974:

⁵⁹ Teubner, Gunther. "Legal irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences" (1998) 61 *Modern Law Review* 12.

⁶⁰ However for a discussion on colonial transplants' absorption of local law see A. Harding, "Global Doctrine and Local Knowledge: Law in South East Asia" *The International and Comparative Law Quarterly*, Vol. 51, No. 1 (Jan., 2002), pp. 35-53.

*when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.*⁶¹

I will maintain his metaphor in arguing that when an incoming tide flows into the estuaries it naturally carries with it sediments of rock, sand and other materials which inevitably get left behind as residue with the backwash of the tide. In support of this hypothesis, I argue that the case law emanating from the CJEU is acting as a legal catalyst, with the preliminary reference procedure acting as the vehicle through which the reconstruction of family law can occur. Moreover, the Court is in fact a court among courts⁶² in the sense that the issues that are dealt with by the Court are those being referred to it by the national courts. Therefore, they are issues that national courts request to be interpreted. As argued by M. Maduro:

*the development of EU law is at least partially a function of, or dependent upon, national courts and national litigants.*⁶³

It is an interdependent relationship. When one actually considers the preliminary reference procedure,⁶⁴ one notes that the judgments of the Court are not only binding on the referring Member State but also on all the other Member States.⁶⁵ In other words, the decision of the Court in any particular case has effects reaching far beyond the individual case. Could this not in fact aptly be termed as a legal catalyst? One could visualise a consequential rippling effect – the effect perhaps being more concentrated for the referring Member State but nonetheless reaching the beyond its borders to the corners of the Union, affecting, to some extent or another, sooner or later, the national laws of all Member States.

⁶¹ *H.P. Bulmer Ltd v J. Bollinger SA* [1974] Ch 401 at 418.

⁶² See Maduro, M.P., “Interpreting European Law – Judicial Adjudication in a Context of Constitutional Pluralism”, *Working Paper IE Law School, WPLS08/02*, 2008.

⁶³ *Ibid.*

⁶⁴ Micklitz, H-M. *The Politics of Judicial Co-operation in the EU – Sunday Trading, Equal Treatment and Good Faith* (Cambridge University Press, 2005).

⁶⁵ Bertelsmann, K. “Who’s afraid of the European Court of Justice? A Guide to the Preliminary Reference Procedure for National Courts”, *European Anti-Discrimination Law Review*, Issue No. 2, Oct 2005.

On the basis of the foregoing, the thesis is divided into two parts. Part I is concerned with family law exceptionalism and the process of embedding the well-entrenched family versus market dichotomy. It moves from an analysis of the classical family to the social family and finally sets the theoretical scene for a consideration of the neo-formalist language. We note a deconstruction of the classical family as a result of the infiltration of market-based reasoning at the EU level. Part II proceeds to deal with the process of reconstructing the family via EU law in consideration of anti-discrimination and fundamental rights. However, what emanates is the potential of EU citizenship not only in broadening the scope of rights available to EU citizens but also in terms of moving towards a new societal ideal according to which rights rhetoric gains an additional dimension.

Part One – The Family: The Unruly Teenager of Private Law

The Premise

Legal institutions and ideas have a dynamic relationship with economic activity and society.⁶⁶ This necessarily alters the discourse of law and the way legitimate arguments are made in that various social contestations form the parole of the legal consciousness⁶⁷ at any given time. The purpose of this Part is to position the family within legal theory in relation to economic and social variations in an attempt to debunk ‘Family Law Exceptionalism’⁶⁸ setting the scene for an examination of The Social and the Neo-formalist period. This is imperative to the thesis considering that the underlying premise is that the internal market has provided a forum within which peripheral family law issues are being decided according to the internal market logic.

This claim might indeed appear rather controversial vis-à-vis the prevailing view which positions the family as distinct from, and dealing with issues that, the market could not resolve. For instance, it provided a space for mutual dependency,

⁶⁶ Kennedy, Duncan. “Three Globalizations of Law and Legal Thought: 1850-2000“, in Trubek, David. & Santos, Alvaro (eds.) *The New Law and Economic Development. A Critical Appraisal*, (Cambridge, 2006).

⁶⁷ Ibid. Kennedy uses the term legal consciousness in expressing how various ‘interests’ are integrated into the legal dominant language, for example, the contemporary language he talks of is neo-formalism i.e. constitutional rights. He connects shifts in legal discourse to changing attitudes about state/society relations that are subsequently reflected in new legal discourses dependent on a new dominant language.

⁶⁸ Halley, Janet. “What Is Family Law?: A Genealogy Part I,” *Yale Journal of Law & the Humanities* 23, no. 1 (May 8, 2013), <http://digitalcommons.law.yale.edu/yjlh/vol23/iss1/1>; Halley, Janet. What Is Family Law?: A Genealogy Part II,” *Yale Journal of Law & the Humanities* 23, no. 2 (May 8, 2013), <http://digitalcommons.law.yale.edu/yjlh/vol23/iss2/1>; Nicola, Fenanda G. “Family Law Exceptionalism in Comparaitve Law” 58 *Am. J. Comp. L.* 777 (2010) p. 787.

provided a safe haven from individualism and kept the fire of moral and spiritual life burning.⁶⁹ In other words, the family did what the market was not equipped to do.

When we speak of family law exceptionalism then, we are essentially making reference to the “special nature” that characterizes the family; the unique and autonomous domain that it occupies based on the intimate, private and emotional relationships it governs; its quest to preserve traditional, national and customary ways of life against the upheavals of postmodernity and globalization and its derivation from values other than market rationality. In more specific terms, Halley and Rittich’s use of the ‘exceptionalism’ language encompasses:

“the extremely broad range of ideas and practices – legal, cultural, social, economic, ideological, aesthetic – that set marriage, reproduction, the family, childhood, sexuality, the home (the list could go on) aside from domains of life deemed to be more general, more political, more international, more economic (and again the list could go on indefinitely)”.⁷⁰

When embarking on any research, one must question where precisely to start? In considering a reconceptualization of family law, I found myself pondering the development of family law relations in terms of their private/horizontal dynamics and public/vertical dynamics in the past. For this reason, I felt it imperative to investigate The Classical Family and The Social Family with a view to providing a better understanding of the neo-formalist family.⁷¹ The purpose of this delineation is not an attempt to pinpoint the origins of family law but rather to uncover distinct historical ideas and theoretical underpinnings that influenced the development of modern family law. The intention is to combat the idea that the family is a constant but rather that it is historically contingent and rests on power relations. We are not concerned here with pinpointing A, i.e. the origins, but rather with gaining an understanding of

⁶⁹ Foucault, M. “Security, Territory, Population”, Lectures at the College de France, 1977-1978, 203-05 (2004) cited by J. Halley and K. Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism* p. 758.

⁷⁰ Halley, Janet. & Rittich, Kerry. “Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism,” *The American Journal of Comparative Law* 58, no. 4 (October 1, 2010): 753–75.

⁷¹ In line with F. Nietzsche, *The Genealogy of Morals* (Horace B. Samuel trans., Boni & Liverwright 1913) (1887) and M. Foucault, “Nietzsche, Genealogy, History”, in *The Foucault Reader* 83 (Paul Rabinow ed., 1984).

how A, B, and C have influenced the construction of a modern family law that is considered peripheral in relation to the rest of private law.

Therefore, in Part I, Chapter I will analyse the effects of Classical Legal Thought and its impact on the notion of the family necessarily entailing a discussion of the manifold struggles legal theorists faced when attempting to decipher the regulation of the family. This analysis has been fruitfully informed by Janet Halley's work on Family Law Exceptionalism, particularly her research culminating in "What is Family Law?: A Genealogy Part I",⁷² and Duncan Kennedy's "Three Globalizations of Law and Legal Thought"⁷³ in terms of the historical template followed here. The aim in Chapter I is to illustrate the path the distinction between the family and market followed. As we will see, the influence of German Legal Thought and the globalization of Classical Legal Thought led to a process of deduction – a process whereby everything that could not be equated to a contract was pushed to the periphery of private law. Essentially, this deductive reasoning marginalized the regulation of the family.

Chapter II will continue to analyse the reaction of the Classical Family to the globalization of The Social that pervaded legal discourse in the aftermath of the decline of Classical Legal Thought. We will examine the socialization process that occurred in terms of the master/servant relationship noting that the same advances that revamped this field had little effect on the family since in actual fact, the classical notion of the family was the one that was constitutionalized leaving the family quarantined with tradition and morals in terms of legal regulation.

Chapter III introduces the third globalization. It sets out the neo-formalist language and its dissemination through the CJEU in interpreting issues with a view to achieving equal treatment and respect for fundamental rights. It preempts a discussion on EU Citizenship as a further step in the legal discourse – one that goes beyond

⁷² Halley, "What Is Family Law?," May 8, 2013.

⁷³ Kennedy, Duncan. "Three Globalizations of Law and Legal Thought: 1850-2000", in Trubek David. & Santos, Alvaro (eds.) *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006).

Kennedy's neo-formalism arguably in the direction of providing for a new societal ideal.

Chapter I: The Classical Family

Women are marriageable in hot climates at eight, nine, and ten years of age; thus, childhood and marriage almost always go together there. They are old at twenty: thus reason in women is never found with beauty there...

Therefore, when reason does not oppose it, it is very simple there for a man to leave his wife to take another and for polygamy to be introduced.

In temperate countries, where women's charms are better preserved, where they become marriageable later, and where they have children at a more advanced age, their husbands' old age more or less follows their own; and, as they have more reason and knowledge there when they marry, if only because they have lived longer, a kind of equality between the two sexes has naturally been introduced, and consequently the law permitting only a single wife.

In cold countries, the almost necessary use of strong drink establishes intemperance among the men; so women, who have a natural reserve in this respect because they must always defend themselves, again have the advantage of reason over the men⁷⁴

I) Introduction

As is clear from the introductory quote from Montesquieu's *The Spirit of the Laws*, two principal elements characterized the classical family: marriage being the first and its variable character influenced by tradition, culture, gender structures, and secondly, the customs underpinning the society where the act of marriage took place. Montesquieu's analogy in terms of the volatility of global weather patterns rings loud

⁷⁴ Montesquieu, "The Spirit of the Laws" 264-77 (Cohler, Anne M., et al. trans., eds., Cambridge Univ Press 2009) (1748) cited by Nicola, Fernanda G. "Family Law Exceptionalism in Comparative Law" 58 *Am. J. Comp. L.* 777 (2010) p. 787.

and clear to C21st comparativists who struggle with the study of family law given its deep-rooted, national-specific, moral peculiarities.⁷⁵

These constitutive elements of the classical family go a long way towards explaining the state of disarray of modern family law. Confusion concerning the relationships that are encompassed, how they are regulated, and which situations and structures can be classified as coming within the purview of family law permeates the modern debate on family law. In many instances, states and courts⁷⁶ insist that the legal family is to be considered as that relating to the traditional family structure, that is, one based on the institution of marriage, the classic definition of which is provided in the case of *Hyde v. Hyde*⁷⁷ by Lord Penzance as “*the voluntary union of one man and one woman, to the exclusion of all others.*” Why has this definition of the family, especially considering the myriad of relationship forms that are discernable in society, withstood variation for so long? Why, in times of increased consideration of transnational law making, has so much attention been paid to the harmonisation of private law in Europe to the exclusion of family law?⁷⁸ How have we come to consider the family as

⁷⁵ In fact, it has been argued that attempts to harmonize or Europeanize family law are doomed to failure based on the fact that “...we cannot take for granted that rules or institutions are transplantable. The criteria answering the questions whether or how far they are, have changed since Montesquieu’s day, but any attempt to use the pattern of law outside the environment of its origin continues to entail the risk of rejection” see Kahn-Freund, O. “On Uses and Misuses of Comparative Law”, *Modern Law Review*, Vol 37, No 1, 1974. That being said, we cannot but make reference here to the significant work of the Commission on European Family Law including Boele-Woelki, K., Ferrand, F., González Beilfuss, C., Jantera.Jareborg M., Lowe, N., Martiny, D., Pintens W., “Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses”, *European Family Law Series*, No. 7, Intersentia, Antwerp, 2004; Boele-Woelki, K., Ferrand, F., González Beilfuss, C., Jantera.Jareborg, M., Lowe, N., Martiny, D., Pintens, W., “Principles of European Family Law Regarding Parental Responsibilities”, *European Family Law Series*, No. 16, Intersentia, Antwerp, 2007. See also Antokolskaia M., “Harmonisation of Family Law in Europe – A Historical Perspective”, *European Family Law Series*, No 13, Intersentia, Antwerp, 2006; Martiny D., “Is Unification of Family Law Feasible or Even Desirable”, in Haartkamp, A., et al (eds), *Towards a European Civil Code*, 2004. Muller-Freienfels, W., “The Unification of Family Law”, 16 *American Journal of Comparative Law*, 1968.

⁷⁶ Reference can be made to Ireland and Italy from which much of the supporting evidence herein is drawn.

⁷⁷ *Hyde v. Hyde* (1866) L.R. 1 P & D 130 at p. 133.

⁷⁸ Lando, O., *Can Europe Build Unity of Civil Law Whilst Respecting Diversity?*. Europa e Diritto Privato, 2006. In fact it has even been noted by Watson himself that peculiarities regarding any field of study are not homogeneous even within countries let alone across the twenty seven Member States. He states that “*It is banal to notice that the same legal rule operates differently in two countries: it operates to different effect even within one*”, see Watson, A., “Legal Transplants and European Private Law”, Belgrade, 2006.

distinct from the market in upholding the traditional characteristics of this societal structure?

In order to examine these questions, this chapter proposes to delineate early family law developments beginning with Blackstone's early pronouncements and subsequently traces successive developments influenced by classical theorists in order to inform our understanding of the well-entrenched family/market dichotomy. We will map the construction and development of the legal relationship between family members with a view to informing our understanding of early family law so as to construct the foundations for a debate which juxtaposes ideological, theoretical and practical questions concerning modern family law.

What we will note is, as reflected in *Hyde v. Hyde*, that marriage as an institution, considering both its private and public intricacies, provided for fruitful discussion on the construction of legal relationships and the rights and duties that resulted from this act.

We proceed to examine the concept of marriage delineating how the actual formation of the family came to be that based on this single act. In addition, we will note the difficulties early theorists faced in their attempts to understand the difference between domestic labour and domestic love. Subsequently we assess the influence of Classical Legal Thought on the family and its place in the legal framework particularly considering the influential work of Friedrich Carl von Savigny.⁷⁹ This analysis will permit us to appreciate the foundations of the family/market dichotomy and the origins of family law exceptionalism that have characterized much if not all family law advancements – or stagnation as the case may be – until recent times. With the theoretical, genealogical analysis set out, we will proceed to draw from early family case law so as to bring to the fore the repercussions of distinguishing between, and indeed excluding, family relationships from private law. We conclude by

⁷⁹ Friedrich, Karl von Savigny. & Holloway, William. *System of the Modern Roman Law, System Des Heutigen Römischen Rechts*. 1. Band. English. (Madras: J. Higginbotham, 1867); Kennedy, Duncan M. "Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought," 58 *American Journal of Comparative Law* 811 (2011).

summarizing the particularities of the family during the Classical period setting the scene for an analysis of the influence of “The Social” and its failed attack on the dichotomy entrenched by Classical Legal Thought.

II) Marriage

The classical debate on the family focused on marriage and attempts to gauge the legal and social effects of this institution. Legal thinkers at the time were preoccupied with figuring out that what was considered deviant from contract law. Marriage provided no exception and classical theorists set about deciphering the nature of relationships that were conducted within the household sphere.

A. The Household

The early nineteenth century knew no notion of family law that corresponded to the social order prevalent at that time. Familial relationships and their regulation i.e. sexual relations, reproduction, and cohabitation belonged within the household sphere. The principal question in this field prevalent at the time was *is marriage contract or status?* In fact, a certain preoccupation with this question evolved and to some extent smothered the potential emergence of other theoretical considerations. In order to gain a fruitful understanding of the development of marriage as the crux of the debate we must go back to Blackstone and his efforts to disentangle the relationships contained within the household sphere.

In 1765, Blackstone, in Book 1 of *Commentaries*⁸⁰ classified the laws of marriage under the heading of “Rights of Persons”. He made reference to the rights and duties ensuing from such relationships in terms of “*private oeconomical relations*”. Blackstone, reflecting Aristotle’s use of the term, refers to the household by the term *oeconomical* which might be confusing to the modern reader.⁸¹ At that time, the term *oeconomical*

⁸⁰ Blackstone, William. *Commentaries on the Laws of England*, (1765).

⁸¹ It does not mean to refer to the spontaneous order of the modern ‘economy’ which is more accurately referred to as a *catallaxy*. In this regard, see Hayek “Competition as a Discovery Procedure” *The Quarterly Journal of Austrian Economics*, Vol. 5, No. 3 (Fall 2002), pp. 9-23.

– the etymological root for the term *economy* - meant “*of or relating to household management, or to the ordering of private affairs: domestic*”.⁸² It related therefore to all activities that were performed within the household and all relationships that were created by and lived out within the household structure such as the relationship between husband and wife, that between parents and children, guardians and wards and masters and servants. The household represented something on par with semi-public spaces⁸³ creating “*a space for both human and material production, for the making, consumption, and distribution of wealth and material goods*”.⁸⁴ Therefore, for Blackstone, laws governing these oeconomic relationships determined all interaction, duties, and obligations that arose within the social order of the household. The ramification of this construction was that the relationship between man and wife was considered contractual in nature as made clear from Book 1 Chapter 15 ‘Of Husband and Wife’ where he states:

Our law considers marriage in no other light than as a civil contract....And, taking it in this civil light, the law treats it as it does all other contracts; allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and, lastly, actually did contract, in the proper forms and solemnities required by law ⁸⁵

Halley rightly points to the meaning and effects of this contractual notion of marriage in elegantly noting that if Blackstone were to hear utterances of mid-nineteenth century jurists referring to “marriage as a *civil contract*” he would surely insist that they were “putting the *accent* and the wrong syllable”⁸⁶ in that his definition of marriage as a civil contract was more likely meant to emphasize its *civil* nature that had evolved in the revolt against ecclesiastical law. The point that Blackstone was trying to accentuate was the shift from religious law to civil control of marriage. He coupled it

⁸² Farrar John. & Atiyah, P.S. “The Rise and Fall of Freedom of Contract,” *British Journal of Law and Society* 8, no. 2 (1981): 277; *Ibid.* p. 8.

⁸³ Halley and Rittich, “Critical Directions in Comparative Family Law.”p. 756.

⁸⁴ Halley, “What Is Family Law?,” May 8, 2013. p. 8.

⁸⁵ Blackstone, William. *Commentaries on the Laws of England*, (1765) p. 421

⁸⁶ Halley, “What Is Family Law?” Part I, p. 10.

with contract simply because the form of the agreement reflected those elements belonging to the contractual construction i.e. will, capacity, consideration.⁸⁷

Regardless of potential interpretative misunderstandings, the lucidity of this pronouncement “*our law considers marriage in no other light than as a civil contract*” made no room for the communal, altruist, institutional and social aspects of such relationships. Some intriguing examples of early family law and the results of its containment within the household structure can be offered here:

Marital Privacy

The strictly private nature of the marital relationship and the patriarchy that characterized relationships within this sphere is interestingly portrayed by the doctrine of marital privacy. Marital privacy was a direct result of the convoluted approach to family law resulting in it being left to its own devices meaning that patriarchy was allowed to take the place of state intervention in private relations. This is clearly exemplified by the authoritative case of *McGuire v McGuire*⁸⁸ that additionally permits us to preempt the effect the globalization of Classical Legal Thought had on the family which carried through to the second globalization – The Social. This will be dealt with in more detail below in Chapter II. For now, it suffices to illustrate the Court ruling in this case to the effect that Lydia McGuire was unable to secure a court order mandating her husband to provide her with additional subsistence support as long as the marriage relation between them was legally intact. This case, considered as nothing short of a horror story for feminists and divorce law reformers,⁸⁹ nicely illustrates the effects that the construction of marriage as a contract had on the rights and duties of parties to the contract – will was replaced by patriarchy which in turn was justified and protected by marital privacy. Once a marriage had been contracted, courts had no business considering the suitability of ‘*necessaries*’⁹⁰ as these decisions

⁸⁷ We can make reference here to a man’s promise to marry in exchange for the bride’s father’s marriage settlement on his daughter or dowry.

⁸⁸ *McGuire v McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953).

⁸⁹ Hartog, H. *Man and Wife in America: A History* (Harvard University Press, 2009).

⁹⁰ The common law generally held *necessary* to include food, clothing, medicine, legal services, and housing.

were the essence of the private domain. The Supreme Court concluded by pointing out that the living standards of a family were “*a matter of concern to the household, and not for the Courts to determine*”. In placing this in the overall legal structure, it would seem that the household – the semi-public space – provided a space in relation to the informal terms of the marital agreement created upon the formal bond of marriage. Marriage had moved from ecclesiastical to Blackstone’s civil contract but this shift did little to penetrate the strictly private nature of the rights and duties that ensued upon the formalization of bonds.

Breach of Promise

Breach of promise provides another field from which we can deduce the private nature of couplings. This is reflected in Court pronouncements in early nineteenth century breach of promise cases whereby actions for damages were open to those where one of the parties to an engagement wrongfully failed to implement the promise to marry the other.⁹¹ Damages were not only extended to cover the pecuniary losses suffered but also included losses incurred based on solatium or injury to feelings: “*for the unutterable anguish the pursuer must have suffered by the violation of such a contract as this*”.⁹² In fact, it was common to consider a person’s standing and reputation in the community and the negative consequences a broken engagement could have on the same. This was often referred to as “loss of market” in the sense that one’s chances of securing another marriage proposal would be diminished if he or she had once been rejected or cast aside for another. In the words of Lord Meadowbank in the case of *Hogg v. Gow*:

*Her heart is used; it is worn; she is less attractive to others.*⁹³

This approach dominated and the wrong remained actionable for longer than one might think. It was not until 1969 that the action came under the scrutiny of the English Law Commission which published a Report entitled Breach of Promise of

⁹¹ Scottish Law Commission, Scot. Law Com. No. 76, Family Law: Report on Outdated Rules in the Law of Husband and Wife, Laid before Parliament by the Lord Advocate under section 3(2) of the Law Commissions Act 1965, Ordered by The House of Commons to be printed 11th May, 1983, Edinburgh.

⁹² *Hogg v. Gow* May 27, 1812, F.C.

⁹³ *Ibid.*

Marriage.⁹⁴ In it the Commission made reference to the importance of stable marriages to society highlighting the undesirability of pushing parties to an engagement into formalizing their ties. It concluded: “*it can hardly be thought desirable to retain the contractual effects of an agreement to marry*”. In Ireland, it was not until 1981 that the Family Law Act,⁹⁵ after considerations from the Law Reform Commission in its report entitled *The Law Relating To Breach Of Promise Of Marriage 1980*,⁹⁶ abolished the legal action for breach of promise to marry.

The action for breach of promise not only illustrates the private nature of marriage to which Blackstone refers but it additionally here serves – via the recognition of non-pecuniary damages for the loss of solatium and injury to feelings – to preempt a change in the discourse, a recognition of the fact that there was something more to this institution, as was eventually pointed out by Bishop in consideration of Scots law to which we will come.

Liability for Adultery

Liability for adultery can also be mentioned here with a view to illustrating the effects of the household structure on family relations. This nuance conferred a legal right on a husband whose wife had committed adultery to recover damages from the third party i.e. the person with whom the adultery was committed: the paramour.⁹⁷ Interestingly, these statutory rights provided legal avenues to husbands exclusively since to do otherwise would essentially mean that a husband who had committed adultery would, in effect, have profited from his own wrong as a result of wives having to relinquish their legal personality upon marriage. Therefore, any damages would in

⁹⁴ Law Commission Report No. 26 Breach of Promise of Marriage

⁹⁵ The Family Law Act 1981: An act to abolish actions for criminal conversation, enticement and harbouring of a spouse and breach of promise of marriage, to make provision in relation to the property of, and gifts to and between, persons who have been engaged to be married and in relation to the validity of the consent of a minor spouse for the purposes of the Family Home Protection Act, 1976, and to provide for related matters.

⁹⁶ The Law Reform Commission, LRC 1 – 1980, First Report on Family Law concerning criminal conversation, enticement and harbouring of a spouse or child, loss of consortium, personal injury to a child, seduction of a child, matrimonial property and breach of promise of marriage.

⁹⁷ In Scotland, for instance, this was governed by Section 7 of the Conjugal Rights (Scotland) Amendment Act 1861.

any case have automatically been passed on to the husband.⁹⁸ The peculiar nature of the family coupled with an inability to decipher it leading to a strict patriarchal regime meant that its governance was confined to the logic espoused by Blackstone.

Action for Enticement

The enforceability of the marriage was another element of the formation of personal bonds that persisted for some time in the form, for example in Scots law, of the action for enticement of a spouse⁹⁹ not based on actual adultery but rather on the inducement of a spouse by a third party to abandon one's spouse. The nature of this scenario is reflected in actions for damages that arose as a result of such enticements. In the case of *Duncan v Cumming*¹⁰⁰ for instance, a husband claimed damages against his wife's father "on account of his instigating, and enticing and encouraging his daughter to desert and abandon the pursuer her husband and harbouring her in his house after she had deserted him".¹⁰¹ In a much later case from as recent as 1951, the court held, in reliance on English authority, that a wife was indeed entitled to damages from a woman who had enticed her husband to leave the family home and give up on the marriage.¹⁰²

These examples serve to highlight the patriarchal approach to the formation and dissolution of marital bonds that were housed within Blackstone's household structure. Bearing in mind the purpose of this investigation of the classical family espoused in the Introduction i.e. to decipher influencing elements on modern family law – we begin to understand the classical, patriarchal construction that persisted long after the dissolution of Classical Legal Thought.

⁹⁸ Scottish Law Reform Commission No 42 Family Law Report on Liability for Adultery and Enticement of a Spouse pp. 2 & 3.

⁹⁹ See Scot. Law Com. No. 42: *Report on Liability for Adultery and Enticement of a Spouse* (1976).

¹⁰⁰ *Duncan v Cumming* 1714 5 Broun's Supplement 104, see p. 15 *ibid*

¹⁰¹ *Ibid*

¹⁰² *Mc Geever v McFarlane* (1951) 67 Sh Ct Rep 48 see p. 15 and 16 *ibid*

B. Contracts: the “web and woof of actual life”¹⁰³

During this classical period, the imperialism of contract was a construct that held significant theoretical and practical weight. In this regard, it permitted a construction of the law of contract “as including, directly or indirectly, almost all the law administered in our courts”.¹⁰⁴ In essence, everything was considered in a contractual light and therefore reduced to elements of a transaction and, as we have noted, marriage provided no exception to this rule: offer and acceptance constituting the first of the constitutive elements and the act of marriage constituting the valuable consideration.¹⁰⁵ The importance of this construct is even reflected by the weight attached to secret marriages as illustrated by the case of *Cochrane v. Campbell*.¹⁰⁶ Here, a man had secretly contracted and married a woman – a contract that was heavily relied upon after the man’s death in the sense that his second marriage was deemed bigamous and void and his “widow” was in fact left penniless and her children illegitimate.

In fact, all activities conducted within the household – the semi-public space – were subject to rules, based on contract, pertaining to household actors as having “legally determined, hierarchically arranged relations”.¹⁰⁷ Market modernization and the onset of global capitalism however altered the notion of the household essentially leading to a reconstruction of the legal relationships once bundled in Blackstone’s law of the household. The private, intimate space of the home was no longer the most adequate legal space for, for instance, the master/servant relationship, as we will see.

Masters and their servants were included in Blackstone’s “private oeconomic relationships” therefore by default they were encompassed in the law that regulated

¹⁰³ Halley, “What Is Family Law?,” May 8, 2013. p. 16 citing T. Parsons, *The Law of Contracts*, vii, (Buffalo, William S. Hein, 1853).

¹⁰⁴ T. Parsons in *The Law of Contracts* who grandly suggested that “The Law of Contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the *basis of human society*. All social life presumes it, and rests upon it; for out of contracts, express or implied, declared or understood, grow all rights, all duties, all obligations, and all law. Almost the whole procedure of human life implies, or, rather, is, the conflictual fulfilment of contracts”. (see *Ibid.* p. 15).

¹⁰⁵ *Ibid.* p. 15.

¹⁰⁶ (1753) 1 Paton’s Cases 519 (HL Scot); and see also *Dalrymple v. Dalrymple* (1811) 2M Hag. Con.54, (1814) 2 Hag. Con. 137n.

¹⁰⁷ Halley and Rittich, “Critical Directions in Comparative Family Law.” p. 756.

the household. For Blackstone, there was no difference between the relationship between husband and wife on the one hand and master and servant on the other. Both relationships existed and survived within the confines of the household – the seat of what we might call mini-economies where private ordering and domestic affairs were carried out with a view to material production. It provided a space within which hierarchical structures dominated and rights and duties halted at the household door.

However, with the passing of time, and as noted with the changes in relation to the perception of marriage, the Rights of Persons in relation to the master servant relationship began to react to external forces and the influence of Classical Legal Thought. Essentially, the law of master and servant was migrating to contract law in line not only with the imperialism of contract law that dominated at the time - “the web and woof” notion - but also as a result of marriage shifting into another social sphere. Conveniently, the rise of paid labour bolstered by increased commercialism, trade and increased tendencies towards capitalism created a space or a new legal destination for the law of master and servant. To exemplify, under Blackstone’s Law of Persons, if a master, in avoidance of dying intestate, were to bequeath his property to two servants then the legal foundations would be in place to transfer the property in the same way as if he had bequeathed the property to a surviving wife, based on the comparable nature of their relationship. However, as the shifts in conception demanded, this same scenario was in fact treated very differently in 1843 in the case of *Chappell v Trent*¹⁰⁸ according to which:

The relations between Mr. Chappell [the decedent] and him [Ned Trent, one of the claimants] were those of employer and employé, or, more strictly speaking, that of principal and agent, or master and servant; nothing more, nothing less. Eliza Trent [the other claimant], on the death of her mother, succeeded to the duties and obligations of her housekeeper. She did, unaided, the milking, cooking, washing, and other drudgery

¹⁰⁸ *Chappell v. Trent*, 19 S.E. 314, 338 (1893).

*incident to housekeeping. Such were the social and domestic relations existing between Mr. Chappell, on the one hand, and Ned and Eliza Trent, on the other*¹⁰⁹

The creeping influence of contract law on master servant relations chipped away at the notion of the household as a hierarchical private sphere regulated by the patriarch leading to a reconceptualization of the rights and duties owed to the parties of various relationships. As the master servant relationship was pushed out of the household structure, the special nature of the husband wife relationship was recognized. This contributed to the recognition of it as more altruistic while the master servant relationship followed a different path.

In light of this, coupled with the marriage as status development,¹¹⁰ a clear conceptual shift began to emerge - private to public governance entailed an ideological shift from individualist to communal considerations. While the rise of paid labour pulled the master servant relationship into the field of contract law governed by the will of the parties and an individualist ethos, marriage as status pulled the governance of husband and wife away from the household.

Gradually, this shift took hold and marriage as forming part of the original contractual legal construction began to be questioned – perhaps not expressly but there certainly emerged a new line of thinking that laid the foundations for marriage as status. Evidence of this can be uncovered by Parsons’s discomfort in bundling wives with all other categories that were exceptionalized from the notion of capacity to contract such as “*infants, bankrupts, insolvents, idiots, aliens, slaves, outlaws and persons attainted and excommunicated*”.¹¹¹ In fact, we can pinpoint his revelations concerning the treatment of wives as the first major advances of feminist thinking.¹¹² Eventually Parsons openly stipulated that “*that marriage is not only a contract, but much more than a contract*” even though he failed to delineate what exactly he meant by “much more” and the consequences this would have on the legal construction of marriage as contract. That being said, the seeds were sown for a change in discourse – the

¹⁰⁹ See Halley, “What Is Family Law?,” May 8, 2013 p. 12.

¹¹⁰ See Part C “Marriage as Status” below.

¹¹¹ Halley, “What Is Family Law?,” May 8, 2013. p. 17.

¹¹² Ibid.

recognition of the ideological divergence between domestic labour and domestic love¹¹³ as previously noted.

Spring came and the seeds that had been planted germinated. The blossom came in the form of Joseph Story's input to Parsons's proclamation that marriage is much more than contract. Essentially he defined this "something more" in terms of treating marriage "*as a civil institution, the most interesting and important in its nature of any society. Upon it the sound morals, the domestic affections, and the delicate relations and duties of parents and children, essentially depend*".¹¹⁴ What we see here is a shift from Blackstone's marriage as Law of Persons, those relations bundled into the law of the household, to marriage being treated as an *institution* of society *founded* on contract. It should be recalled here that this reasoning was developing alongside the notion of contract as "the web and woof of actual life". Therefore, what emerged was the notion of contract as the rule with marriage being its exception. In attempting to put flesh on the skeletal, contractual, individualist, liberal bones of marriage, Story constructed contract as the modal law and marriage as its exception.

C. Marriage as Status

A definitive break away from marriage as contract can be exemplified via an illustration of the Scottish case of *Duntze v Levett*¹¹⁵ – a case centered on conflict of law rules arising as a result of Mr. Levett leaving his wife Mrs. Duntze (a marriage contracted in England) and relocating to Scotland where he proceeded to commit adultery. On discovery of this, Mrs. Levett proceeded to sue for divorce in Scotland since adultery was a well-settled avenue for divorce in Scotland and one which at that time was not available in England. In reasoning the case, it was clear that if the marriage were to be considered as a contract and only a contract, then the conflict of

¹¹³ Ibid. p. 12 commenting on the emergence of the mark of the modern legal family.

¹¹⁴ Story, J. Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions and Judgments 200 at 168. It is important to note at this point that some years previously the very same Story in the case of *Dartmouth College v Woodward* refused to accept that marriage was a civil institution and rather painstakingly stuck to the 'marriage as contract' construction. See also Ibid. p. 12.

¹¹⁵ *Duntze v. Levett*, Ferg. 385, 397.

law rules related to commercial disputes would apply and Mr. Levett would in fact succeed in securing jurisdiction in England based on *lex loci contractus*. With the avenue of divorce based on adultery closed in that jurisdiction, Mrs. Levett would not have obtained legal recourse. In avoidance of this, and ultimately “the barbarities of English marriage law”, Lord Robertson avoided the marriage as contract construction by contriving a broad distinction between marriage and contract essentially constructing it as a social institution connected to the well-being of the state. His interpretation is worth noting:

...marriage is a contract sui generis, and differing, in some respects, from all other contracts, so that the rules of law which are applicable in expounding and enforcing other contracts may not apply to this. The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The status of marriage is juris gentium, and the foundation of it, like that of all other contracts, rests on the consent of the parties. But it differs from other contracts in this, that the rights, obligations, or duties arising from it are not left entirely to be regulated by the agreement of the parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control, by any declaration of their will. It confers the status of legitimacy on children born in wedlock, with all the consequential rights, duties, and privileges, thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society. Unlike other contracts it cannot, in general, amongst civilized nations, be dissolved by mutual consent; and it subsists in full force, even although one of the parties should be forever rendered incapable, as in the case of incurable insanity, or the like, from performing his part of the mutual contract. No wonder that the rights, duties, and obligations, arising from so important a contract, should not be left to the discretion or caprice of the contracting parties, but should be regulated, in many important particulars, by the laws of every civilized country.¹¹⁶

A profound shift was emerging, the consequences of which bear on the whole nature of this thesis. Marriage was being extracted from the private contractual sphere and placed at the periphery; contract was being differentiated as the site of pleasure and

¹¹⁶ Ibid.

intentions - the expression of will - whereas marriage was being nominated as a civil institution; marriage was being depicted as fundamental to the social order so much so that it could not possibly be left to the discretion, caprice or the will of the parties; marriage, in becoming “something more than a mere contract”, became insulated from the emerging global market logic and essentially became attached to the national legal setting. Another set of seeds was sown that would eventually blossom into the family/market dichotomy creating a gulf set to determine the exceptional nature of family law for a long time to come.

A terminological issue necessarily ensued with the recognition of marriage as something social but still founded on the individualist principles of contract. Indeed the waters remained murky to say the least in terms of defining or classifying this peculiar relationship:

To term it [marriage], therefore, a contract, is as great a practical inconvenience as to call a certain well-known engine for propelling railroad cars “horse”, adding, “but it differs from other horses in several important particulars,” and then to explain the particulars. It would be more convenient to use at once the word locomotive¹¹⁷

In fact, marriage and the increasingly curious questions that surrounded this wayward, peculiar institution were perceived as an embarrassment due to the ambiguous nature and the very fact that classical legal thinkers found themselves in difficulty in conjuring a definitive opinion on what this “something more” entailed. Finally, Joel Prentiss Bishop set out to fathom the unfathomable and in doing so developed marriage as status:

The word marriage is used to signify the act of entering into the married condition, or the condition itself. In the latter and more frequent legal sense, it is a civil status, existing in one man and one woman, legally united for life for those civil and social purposes which are founded in the distinction of sex. Its source is the law of nature, whence it has flowed into the municipal laws of every civilized country, and into the general law of

¹¹⁷ Bishop, J.P., *Commentaries of the Law of Marriage and Divorce, and Evidence in Matrimonial Suits*, (1st Ed, Boston, Lettle, Brown, 1852).

nations...Marriage may be said to proceed from a civil contract between one man and one woman of the needful physical and civil capacity. While the contract remains executor, that is, an agreement to marry, it differs in no essential particulars from other civil contracts, and an action for damages for breach may be maintained on a violation of it. But when the contract becomes executed in what the law recognizes as a valid marriage, its nature as a contract is merged in the higher nature of the status. And, though the new relation may retain some similitudes to remind us of its origin, the contract does in truth no longer exist, but the parties are governed by the law of husband and wife¹¹⁸

Marriage was therefore pitted in opposition to contract. The wheels were set in motion as marriage as status was settled upon and considered the accepted notion that was to ride the wave of Classical Legal Thought.

III) The Family's National Roots

Legal turmoil prevailed before the turn of the twentieth century and calls were growing for a more general approach in dealing with the myriad of issues that were coming before the courts. The haphazard approach was feared and a search began for coherence. German legal thought was to be the savior based on the perception that “German scholarship became the most prestigious source of law...Everywhere, in the common law, in the civil law, and even in most western legal systems ‘the German systematic and dogmatic method and the concepts defined within it were spreading triumphantly’”.¹¹⁹ The desire for “general principles, elegance of analysis and exposition, and a philosophical style of analysis” and reasoning based on “deduction and analogy, working down from general principles” were to culminate into the global transplantation of Classical Legal Thought which brought with it the family/market dichotomy.

¹¹⁸ Ibid. p.25.

¹¹⁹ Mattei, U. “Why the wind changed: intellectual leadership in western law” 42 *Am J Comp L* 195 (1994) citing Sacco, R. “Legal Formants: A Dynamic Approach to Comparative Law” 37 *Am J Comp L* 1, 240 (1991)

A. The Foundations of Classical Legal Thought

Classical Legal Thought was characterized by a clear distinction between the public and the private; individualism; and, interpretive formalism. As we have noted, it was centered on the imperialism of contract law and “The Will Theory” which espoused that the private law rules of the “advanced” Western nation states provided a rational set of derivations from the notion that governments should protect the rights of legal persons.¹²⁰ The Will Theory was premised on the notion that restraint on a person’s will ought only be effectuated where it was necessary for others to do the same. The harm principle constituted a limit in terms of direct harm caused by X injuring Y. The characteristics of this globalization explicate the intricacies of this theory and set the basis for a discussion on the position of the family in relation to it.

Characteristics

As mentioned, during this timeframe – from approximately 1850 until 1914¹²¹ - the principle objective was economic development. Paramount to this was the private relationships that were being developed between market actors in view of individual self-realization. This first globalization was centred on the idea that law should be rules of conduct and the distributive consequences brought about by this ‘just rules of conduct’ approach would be fair and efficient. The market was the best distributive mechanism. Law was designed to further these goals by setting down rules that furthered transactions, as opposed to being used as a tool to effect perceived ‘socially just’ outcomes. It was essentially characterised by law without politics with a view to realizing economic development.

Essentially, this first globalization espoused a legal consciousness that viewed law as a system of spheres of autonomy. From this, the development of a private law of contract – and to a lesser extent tort – emanated based on the will of actors and

¹²⁰ Kennedy, Duncan. “The Three Globalizations of Law and Legal Thought”, p. 26; Kennedy, Duncan. “From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s Consideration and Form”, 100 *Colum. L. Rev.* 94 (2000)

¹²¹ Kennedy, “The Three Globalizations of Law and Legal Thought”, p. 25.

private autonomy.¹²² One might say that the underlying foundation of The Will Theory was built upon the following reasoning: I have private law rights and I owe no obligations save the harm principle. Therefore, it adopted a belief in the virtue of permitting individuals to pursue their interests through market transactions with minimal external interference. It centered on the liberty of the parties to the contract to freely create an agreement according to their own terms and conditions.

This ethos was even stipulated at the Constitutional level as illustrated by The Contracts Clause of the US Constitution which stipulates in its Article 1 section 10 clause 1:

*No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility*¹²³

An important distinguishing feature then revolved around the facilitative character of contract via the will theory as opposed to the natural, cultural and moral underpinnings of the family. This gave rise to a differentiation of the source of rules accorded to each specific field in the sense that *will* paved the way for infinite variations of contract law rules given the changing nature of the will of parties whereas family law rules derived from the *Volksgeist* - the spirit of each particular people/nation. This will be dealt with in more detail below. Suffice it to point out here by way of introducing the specifics of Classical Legal Thought and the family/market dichotomy that “*the matter of obligations is of an arbitrary nature for at one time this, at another time that, act may become the contents of an obligations; the matter of the family relations is determined by the organic nature of men, therefore bears in itself the character of necessity*”.¹²⁴ The effects are clearly illustrated by the Savignian pattern:¹²⁵

¹²² For a critique see Randy E. Barnett, “A Consent Theory of Contract”, 86 *Colum. L. Rev.* 269 (1986).

¹²³ US Constitution Article 1 section 10.

¹²⁴ Von Savigny, *System of the Modern Roman Law* (William Holloway trans., Hyperion Press 1979) (1867) p. 279.

¹²⁵ Halley and Rittich, “Critical Directions in Comparative Family Law.” P. 757

Family Law	Contract Law
Family Law as the Domain of Status	Contract Law as the Domain of Will
Family Law as Universal in the Sense that it is Fundamental Everywhere	Contract Law as Particular in the Sense that Every Contract is Unique
Family Law as Particular in the Sense that Each Nation's Family Law Expresses the Spirit of the People	Contract Law as Universal in the Sense that it is the Same Everywhere

Enforceability

According to The Will Theory, commitments made between parties to a contract were enforceable before courts because the parties freely chose to be bound by the contractual agreement. In fact, traditional contract law espouses, “*the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect*”.¹²⁶ This principle was upheld by case law and provided the basis of economic transactions during the second half of the nineteenth century:

*if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts, when entered freely and voluntarily, shall be held sacred and shall be enforced by the Courts of Justice*¹²⁷

¹²⁶ Cohen, M. “The Basis of Contract”, 46 *Harv. L. Rev.* 553, 575 (1933).

¹²⁷ Sir George Jessel MR *Printing and Numerical Registering Co. v Sampson* [EQUITY]. [L R] 19 Eq 462 (1875)

Therefore it is clear that private law or the law of obligations was considered as the legal core and it was characterized by a formalistic approach to legal reasoning. Positive enforceability before the courts was key. A current derogation from strict principles of contract law and autonomy, i.e. The Unfair Contract Terms Directive,¹²⁸ serves here to illustrate the formalistic classical approach. The Directive introduces a notion of good faith when it comes to the conclusion and execution of consumer contracts in Europe. The goal is to prevent significant imbalances when it comes to the rights and obligations of consumers on the one hand and sellers and suppliers on the other hand. It outlines a list of examples of specific terms that may be regarded as unfair and are therefore considered non-binding for consumers. This approach therefore recognizes a situation whereby parties to contractual relationships do not always come to the “bargaining table” as equals and in a sense one party’s inability to exercise “correct autonomy” gives rise to the need for certain protective measures. This example not only permits us to highlight the tensions that exist between party autonomy and social justice – a particularity of the third globalization to which we will come – and the balancing act that must be performed in relation to freedom of contract on the one hand and concerns related to justice and fairness on the other¹²⁹ but it also, in the scope of this chapter, permits us to reflect on the importance of the market-based, individualist, formalistic character of the will theory juxtaposed with a perceived, more recent notion of market fairness.

Ideological Foundations

The objectives and the scope of rules during this globalization were bolstered by the individualist ethos that characterized the Will Theory. The governance of relationships was not based on the nation-state but rather on the institution of *lex mercatoria*. With no nation state there was in fact no responsibility of the state to regulate or to protect its citizens which effectively enhanced the individualistic

¹²⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

¹²⁹ Collins, H. *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International, 2008).

character of rules during this period.¹³⁰ The social aspects were in a certain sense ignored or simply not considered leading to the dominance of a *laissez faire* ideology¹³¹ when it came to contract setting the scene for emerging modern capitalism and its market.¹³²

Contract law became a method of understanding. Everything – expressed and implied will – came under its scope of application. This, coupled with the rise of capital, constituted the driving forces that generalized contract law. It occupied the core position in legal systems.¹³³ So if contract law/will was the core everything else was pushed to the periphery and a process of subtraction from the core began.¹³⁴ Here we can pinpoint the emergence of the family/market dichotomy since marriage as status was subtracted from the core and marginalized.

B. Family Law in the *Corpus Juris*

As is already clear from the above, Friedrich Carl von Savigny has been nominated as “the hero figure of the first globalization”.¹³⁵ His writings reached far and wide¹³⁶ and legal scholars at the time, in their desire for a systemization of law, looked to him for inspiration. In fact, the influence of his work left many scholars feeling indebted:

It is nothing extravagant when I say that any praise which could be bestowed on the writings of Savigny and Thibout, by any man the most competent to judge, would not be exaggerated. They are characterized by a soundness of knowledge, clearness of expression, perspicuity of [argument] and subtlety and depth of thought, that seldom have been equaled by any writer on any subject, and cannot be surpassed¹³⁷

Savigny’s ‘system’ looked something like this:

¹³⁰ Farrar, John. & Atiyah, P.S. “The Rise and Fall of Freedom of Contract,” *British Journal of Law and Society* 8, no. 2 (1981): 277.

¹³¹ Nozick, Robert. *Anarchy, State, and Utopia* (Basic Books, 1974).

¹³² Halley, “What Is Family Law?,” May 8, 2013. p. 43

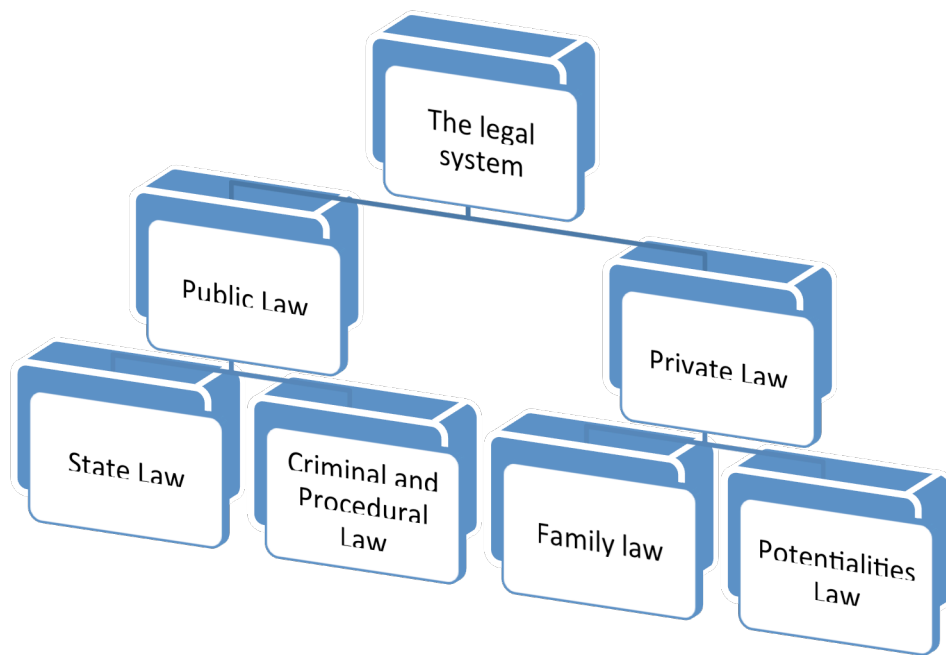
¹³³ Savigny and Holloway, *System of the Modern Roman Law*.

¹³⁴ Halley, “What Is Family Law?,” p. 64

¹³⁵ Kennedy, “The Three Globalizations of Law and Legal Thought”, p. 27

¹³⁶ Halley in her Genealogy Part I clearly illustrates the significant extent to which German Legal Thought, and particularly Savigny’s school, influenced legal thinking in North America at the time.

¹³⁷ Halley, “What Is Family Law?,” p. 61



138 139

As we can see, family law for him was essentially one of the constitutive elements of private law but was completely segregated from what he termed potentialities law. Let us be clear that at this time, during the first globalization, family law as a distinct legal discipline did not exist. The term itself did not come into circulation until the second globalization, as we will see. However, the point is that the governance of the family although exceptionalized from the core of private law due to its status-based underpinnings was included in the private side of Savigny’s overall system. From this simple illustration, we can clearly see that the regulation of the family was in direct opposition with potentialities law and from this distinction all regulation was deduced.

Why though was Savigny so steadfast in his insistence on a distinction? Kennedy purports that the crux lies in the different aspects of human nature that are addressed by the two legal fields:

¹³⁸ Kennedy, D. “Savigny’s Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought”, *58 American Journal of Comparative Law* 811 (2010) p. 824

¹³⁹ On this non-existence of family law – which will in any case be dealt with in Chapter II – see Muller-Freienfels, “The emergence of Droit de Famille and Familienrecht in Continental Europe and the Introduction of Family Law in England”, *28 J Fam Hist* 31, 32 (2003) where we are informed that “even during the long reign of Roman law in antiquity, there was never a specific family law as a systematic unit itself”.

Man is an “incomplete being”, because men need women to be complete and vice versa, and because men and women need children, and children need parental care, in order to overcome mortality and love forward in time...Family law governs the relations of husband and wife and parent and child (plus guardian and ward). By contrast, potentialities law governs the relations between independent individuals exercising their wills vis-à-vis one another: property deals with an individual will controlling an object (to the exclusion of other wills), obligations with one will controlling another¹⁴⁰

This provides us already with some inkling into what Savigny perceived when he talked of family law. It consisted of the rules that governed marriage, divorce, parenthood and the protection of fathers’ rights in relation to his wife and children. This results from his notion that man is simultaneously both complete and incomplete. In the former sense, we can make reference to men as individual wholes striving for self-sufficient existence. The latter however draws our attention to man’s inherent desire and even need for partnership in the race for survival. What we see emanating here is an expression of individualism and will on the one hand – which can be expressed through potentialities law – and the desire to be part of an organically connected group underpinning human nature on the other which could be expressed via familial relationships. Savigny sums up the distinction between the individualist nature of man and the simultaneous incompleteness of his existence as follows:

We regarded [the jural relations appertaining to the family] first as completions of the individuality in itself incomplete. Hence their proper nature consists in the place which the individual obtains in these relations, in his being not merely man in general but specially husband, father, son, therefore in a life-form firmly determined, independent of the individual will, grounded in a large natural coherence. The family relations therefore belong especially to the jus publicum i.e. to the absolute law...Hence also each family

¹⁴⁰ Kennedy, D. “Savigny’s Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought”, 56 *Am J Comp L* 811 (2010)

*relation of a man is called especially a status of that man, that is to say, his place or his existence in relation to other men determined*¹⁴¹

As a corollary to this, Savigny distinguished between that considered necessary and that deemed arbitrary or merely positive. The result of this distinction in terms of the family and its categorization quite simply gave rise to doubt in relation to the position of the real legal contents of familial relationships. He purported that the underlying source for this reservation stemmed from the intrinsic moral and cultural roots of the family. He makes reference to the morality of the family as an aspect of the *Volkgeist* necessarily beckoning considerations and essentially allowing room for deliberation related to local customs, traditions and peculiarities that touch upon family law.¹⁴² Standing in opposition is his potentialities law which is characterized not by customs, traditions or morals but rather by its facilitative nature in expressing one's will: "*The matter of obligations is of an arbitrary nature for at one time this, at another time that, act may become the contents of an obligation; the matter of the family relations is determined by the organic nature of men, therefore bears in itself the character of necessity*".¹⁴³

Characteristically speaking then, for Savigny family law was status based, universal in the sense that it exists everywhere but simultaneously it is particular since it expresses the spirit of each nation. It therefore differs from one nation to another.

¹⁴¹ Ibid p. 818.

¹⁴² Let us recall here attempts in Europe to harmonise private law and the many projects that have been initiated in this direction juxtaposed with resistance to similar attempts in the family law domain. See Kahn-Freund, O. "Common and Civil Law – Imaginary and Real Obstacles to Assimilation", in Cappelletti (ed.), *New Perspectives for a Common Law of Europe*, (1978) and Legrand, "European Legal Systems are not Converging", 45 *International and Comparative Law Quarterly* (1996), 52; Legrand, "Against a European Civil Code", 60 *Modern Law Review* (1997), 44. This is not to take away from the distinguished work of the Commission on European Family Law. For a discussion on the harmonisation of private law and the need, or not as the case may be, see J.M. Smits. "European Private Law: A Plea for a Spontaneous Legal Order", in Curtin, Deirdre M., Smits, Jan M., Klip, André. & McCahery, Joseph A. (eds.) *European Integration and Law: Four Contributions on the Interplay between European Integration and European and National Law*. (Antwerp-Oxford: Intersentia, 2006). 55-107. See also Smits, Jan M. "Law Making in the European Union: On Globalization and Contract Law in Divergent Legal Cultures" *Louisiana Law Review* 67.4 (2007): 1181-1203. For a general discussion see Antokolskaia, M., *Harmonisation of Family Law in Europe – A Historical Perspective*, European Family Law Series, No 13, (Intersentia, Antwerp, 2006); Martiny, D. "Is Unification of Family Law Feasible or Even Desirable", in Haartkamp, A. et al (eds), *Towards a European Civil Code*, 2004; Muller-Freienfels, W., "The Unification of Family Law", 16 *American Journal of Comparative Law*, 1968.

¹⁴³ Kennedy, D. "Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought", 56 *Am J Comp L* 811 (2010) p. 818.

Contract, on the other hand, was characterized by will. It was particular in the sense that every contract is unique but simultaneously universal in the sense that the guiding rules are the same everywhere.¹⁴⁴ The effects of these different characteristics will only really be understood on examination of the globalization of these notions via the vehicle of colonization highlighting the other constitutive characteristic of family regulation adumbrated via Montesquieu in the Introduction: the local nature of family regulation.

C. Colonization

Until now, we have seen that everything that could not fit within the “web and woof” contractual structure burdened the majority of legal thinkers during this time. Marriage as contract eventually evolved into marriage as status and Savigny firmly placed it in opposition to contract law. The globalization of Classical Legal Thought was to take place on the back of contract governing the individualism of liberalism whereas status was to provide shelter for particularized, increasingly deviant persons who could not be trusted with will-saturated freedom.¹⁴⁵ The effects of this become strikingly clear when one examines the principal vehicle of this globalization: colonialism.

The rise of the global market, the commercialization of trade, the *imperialism* of contract law, and the fact that it was guided by individualistic principles related to the exercise of one’s will meant that it was relatively easily received by the colonized countries. The family - or better, issues related to contract’s opposite now clearly encompassing status, traditions, customs, the will of the state as opposed to private actors and generally everything considered in opposition to the private will – was considered the “unruly teenager” that naturally resisted the imposition of global forces. In fact, it was so boisterous that global forces seemed comfortable with its exceptionalization. The practical outcome of this was a non-interventionist role based on the argument that the family as a unit would be “*corrupted or destroyed by judicial*

¹⁴⁴ Nicola, Fernanda G. “Family Law Exceptionalism in Comparative Law,” *Articles in Law Reviews & Other Academic Journals*, 2010, http://works.bepress.com/fernanda_nicola/9. p. 757

¹⁴⁵ Halley, “What Is Family Law?,” May 8, 2013. p. 71

intervention” and that “legal tools closely associated with the conflictual individualist ethos of market law” were inappropriate.¹⁴⁶ I have yet failed to find a more intriguing example illustrating the family/market dichotomy that was emerging than the ‘Six Widows Case’¹⁴⁷ already delineated in the Introduction. To recall, the case concerned a wealthy merchant named Choo who died intestate leading to legal proceedings concerning the distribution of his estate. Bizarrely, at least for the English Court of Appeal judges, no less than six women presented themselves claiming to be the wives of Mr. Choo and consequently a share in his estate. The crux of the case therefore balanced on which law was to be applied – global i.e. the imposition of colonial law, or local? The judges were provided with some guidance on this issue in the form of King George IV’s Charter that stipulated that issues should be decided according to ‘justice and right’. This had already been confirmed by another English judge in 1856 to mean:

[not] that vague thing called natural equity, or the law of nature...but the justice and right of which the sovereign [is] the source or dispenser...a direction in an English Charter to decide according to justice and right...is plainly a direction to decide according to the law of England¹⁴⁸

With this direction in place, it would, on first sight at least, seem that this colonial court would decide in one way and one way only given that the law of England did not provide for polygamous marriages and therefore the doctrine of precedent would support a negative finding for all but one of the wives. However paradoxical it may seem, the Straits Settlement additionally required not only that English statute law should be interpreted according to the condition and wants of the inhabitants but also that English law be applied only ‘as far as the religions, manners, and customs of the

¹⁴⁶ It is interesting to note already at this stage in the analysis of Kennedy’s theory that today, at the supranational European level, the CJEU is doing precisely this in resolving the ‘new’ types of family law issues that are increasingly coming before it. Anti-discrimination is a very instrumental tool that has been extensively developed by the case law of the CJEU but that emanates from primary community law establishing the internal market.

¹⁴⁷ *In the Matter of Choo Eng Choon, Deceased* (1908) 12 SSLR 120; extracted in Leong Wai Kum, *Family Law in Singapore: Cases and Commentary on the Women’s Charter and Family Law* (1990), 106, 275 and summarized in Harding, A., “Global Doctrine and Local Knowledge: Law in South East Asia” *The International and Comparative Law Quarterly*, Vol. 51, No. 1 (Jan., 2002), pp. 35- 53.

¹⁴⁸ *R v Willans* (1856) 3 Ky 16.

inhabitants admit' effectively meaning that the English law in place at the time had to be read in light of Chinese marriage customs and traditions. The court reasoned around this conundrum considering "reams of evidence...and gritting its teeth"¹⁴⁹ held that five of the six litigants – the sixth was found to be a fraud - could be legally considered Mr. Choo's wives and consequently obtained an equal share in his estate.

If this had of been a commercial law case would the judges have faced the same difficulties? Would the judges have given much credence to local law when it came to interpreting a contract? I think not. A likely interpretation would have been one based on a strict application of the will theory and freedom of contract principles. Why then did this case present such difficulties? The answer can only lie in what has been outlined thus far in deciphering the family/market dichotomy. The family was different: it was social; it was an institution; it was moral; it was religious; it was traditional; it was local; it was "something more". Not even colonial courts were prepared to apply what were considered to be ill-fitting, interventionist market-based tools to resolve such disputes in disregard of local law. The family was deviant - the unruly child of private law – and so was therefore left to develop in parallel all the while conscious of the dividing line that segregated it from the market.

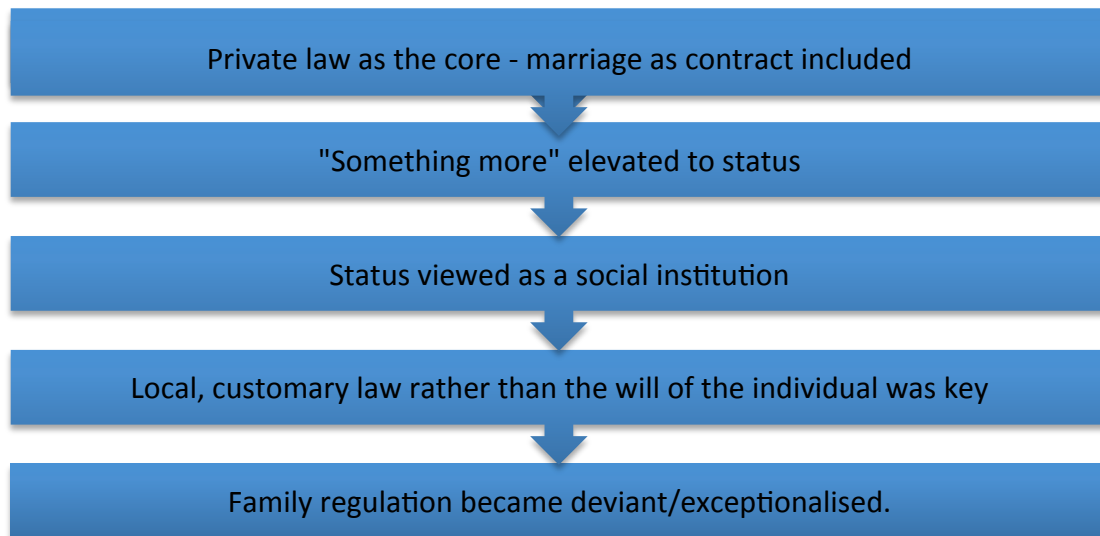
D. A Synopsis

Before further delineating how this period of legal thinking actually affected the family, its structure, the relationships it encompassed, its governance and so on, it might be useful at this point to summarize the actual position of it in comparison to other legal fields and also in terms of the significant ideological shifts it had experienced.

The figure below illustrates the shifts that took place that informed the regulation of the family. Essentially, the regulation of marriage was extracted from the core of private law to which it had been authoritatively attached according to Blackstone; upon extraction, it shifted to a status-based notion that held on to its

¹⁴⁹ Harding, A., "Global Doctrine and Local Knowledge: Law in South East Asia" *The International and Comparative Law Quarterly*, Vol. 51, No. 1 (Jan., 2002).

private law underpinnings but simultaneously assumed a social function; the fact that it resisted the globalization of the will theory and private law as the legal core necessarily meant that it became localized and was therefore deviant in consideration of the broader picture. It was pushed to the periphery of private law.



Essentially, this development led to a paradoxical situation: the regulation of family law was not considered a core function of private law, although an umbilical cord remained which tied it to private law via the marriage contract. How did this affect the internal and indeed external dynamics of family regulation then in terms of its initial isolation and subsequent regulation? Part IV aims to give an overarching answer to this question by examining in real terms the family/market dichotomy and the role of the state.

IV) The Classical Family

The premise of this thesis stems from the fact that in recent times we have witnessed an unparalleled upheaval in what we now term 'family law'. The areas of marriage and divorce have altered dramatically as have the intricate nature of parent child relationships, family support obligations, property and inheritance. In addition, other

fields of law not traditionally considered as constitutive elements have infiltrated the family sphere peppering the substantive family law regimes in place at the local level with, for instance, welfare regimes, labour law, social security and taxation, here referred to as peripheral family law issues. These shifts concerning substantive family law and the deconstruction/reconstruction processes concerned can only become clear subsequent to an analysis of the path the governance of familial relations has taken bearing in mind that the borders that once defined family relationships – both in their internal and external capacity - have dramatically shifted. This part aims to outline the effects the ‘original borders’ had on the governance of the family.

What we will surely note from the following analysis is that we, in consideration of today’s family, have witnessed a progressive retreat from the official regulation of family formation, dissolution and daily family life with more attention being focused on the economic functions of diverse family structures and how they are regulated at the hands of modern administrative states. The state-family relationship has altered dramatically. This is profoundly investigated in Part II of this thesis. For now, let us draw from the genealogical analysis conducted here with a view to constructing the framework within which the modern family and new regulatory patterns can be discerned.

A. Public/Private Divide

We have already noted that the impetus for the shift from marriage as contract to marriage as status was the social role attached to the institution of marriage. This led to a protectionist stance against foreign input when it came to regulating the family. Take for instance the opposition that the draft Civil Code 1888 met in Japan subsequent to the development of family law principles that were based on the Napoleonic Code¹⁵⁰ based on concerns that the rights espoused therein were incompatible with the Japanese *iyē* system.¹⁵¹ The family/market dichotomy therefore

¹⁵⁰ Nicola, Fernanda G. “Family Law Exceptionalism in Comparative Law,” *Articles in Law Reviews & Other Academic Journals*, 2010, http://works.bepress.com/fernanda_nicola/9.

¹⁵¹ *Ibid.* p.791. The Japanese system, in contrast to the French, expected full obedience of ‘inferior’ members of the family.

led to a nationalist centered regulation that still largely characterizes family law today especially evident when one considers efforts to harmonize private law in the European Union, for instance. We can also make reference here to the above-mentioned Six Widows case¹⁵² that highlights reluctance in relation to the imposition of foreign law on family situations compared to other fields of law connected to commercial transactions. From the social perspective, “*the family and the home were seen as safe repositories for the virtues and emotions that people believed were being banished from the world of commerce and industry*”.¹⁵³

The social aim for the family sphere then was not to further the market but to instill morality and retain a certain level of national custom and tradition in society. It was an institution upon which high expectations were thrust which all centered on the “something more than contract” underlying assumption. Something more than contract it was, but structurally, the act of marriage was highly important to the institution. Therefore, the social function of the family sphere demanded that the family be founded on marriage and governed by the morality of altruism.

The rights and obligations established by the morality of altruism that underpinned family law may seem far from what we know today but are informative in terms of the residual effects of the family market dichotomy. John Locke, already in his ‘Social Contract’, in an attempt to determine the true origin, extent and end of civil government¹⁵⁴ outlined that as a result of the marriage contract, parents had a duty to care for children, that children should be subject to their parents’ will until they were capable of fending for themselves, that the objective of parental domination was to render children “most useful to themselves and others” and that fathers should

¹⁵² *In the Matter of Choo Eng Choon, Deceased* (1908) 12 SSLR 120; extracted in Leong Wai Kum, *Family Law in Singapore: Cases and Commentary on the Women's Charter and Family Law* (1990), 106, 275 and summarized in Harding, A., “Global Doctrine and Local Knowledge: Law in South East Asia” *The International and Comparative Law Quarterly*, Vol. 51, No. 1 (Jan., 2002), pp. 35- 53.

¹⁵³ Olsen, F.E. “The Family and the Market: A Study of Ideology and Legal Reform”, 96 *Harvard Law Review* 1479 1982-1983. In this regard, she cites W. Houghton, *The Victorian Frame of Mind, 1830-1870*, p.343 (1957) (emphasis omitted) in stating that the home developed to provide a haven “a shelter for those moral and spiritual values which the commercial spirit and the critical spirit were threatening to destroy”.

¹⁵⁴ Locke, J. “An Essay Concerning the True Origin, Extent and End of Civil Government”, in Barker, E. (ed.) *Social Contract*, (1960). 33; Olsen, F.E. “The Family and the Market: A Study of Ideology and Legal Reform,” *Harvard Law Review* 96, no. 7 (May 1, 1983): 1497–1578, doi:10.2307/1340916.

be considered the final arbiter of all marital discrepancies.¹⁵⁵ From this we can decipher the dual function of the family in terms of its internal private governance and its role in terms of society and the functioning of the market. Let us examine these functions in turn.

B. The Family and the Social Dynamic

Imagine, if you will, Savigny's systematization from a different angle based on the premise that "*in families are embraced the germs of the state and the completely formed state has families, not individuals for its constituent parts*".¹⁵⁶ Or, to put it another way, families, during this time frame, were considered constitutive elements of the state - there to carry out the will of the state in disregard of the will of individual actors. Families, or households – the semi-public space functioning in the production wheel – paved the way for an expression of individual will – usually only by male members – which fed the private law sphere. The system was such that the horizontal, internal family relationships, as we will see below, were left to self-governance i.e. strictly private, so long as the social family cog was in good functioning order. It provided a dual function: to house that for which contract law was inappropriate or inadequate and to facilitate the free market. Let us take some concrete examples.

Institutional support of the free market

Recent research conducted at the University of Durham¹⁵⁷ reveals very telling quotes from so-called "improvement pamphlets" that were distributed in early C19th Ireland. One such pamphlet from 1811 narrates the story of two female friends. Rose warns her friend Nancy that:

¹⁵⁵ This will be dealt with in more detail below.

¹⁵⁶ Savigny at 279 cited by D. Kennedy, "Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought", 56 *Am J Comp L* 811 (2010) p. 825

¹⁵⁷ O'Connell, Helen (2012) "'A raking pot of tea': consumption and excess in early nineteenth-century Ireland.", *Literature and history.*, 21 (2). pp. 32-47.

must not every poor man's wife work in and out of doors, and do all she can to help her husband? And do you think you can afford tea, on thirteen pence a day? Put that out of your head entirely, Nancy; give up the tea for good and for all

In another pamphlet, Lady Seraphine, the improving landowner, comments on the absence of tea cups in the kitchen of a peasant cabin, to which the woman of the house replies:

We were never used to tea, and would not choose that our little girl should get a notion of any such thing. The hankering after a drop of tea keeps many poor all their lives, so I would not have any things in the cabin which would put us in mind of it

So, tea drinking by women was stifling economic growth. Women who partook in such an act were not only wasting their time and money but were being distracted from their duty to care for their hard working husbands! Who would have thought that the practice of tea drinking in early C19th Ireland would reveal so much about internal family dynamics on the one hand and the family's interaction with social structures on the other.

The principal notion to derive from these passages is the male-breadwinner family model which emanated at a time when it was believed that men were to bring home the bread as it were and women were to provide the care giving function.¹⁵⁸ This not only gives us some indications concerning the patriarchal system of governance within the family but it also allows us to note the importance of the household and its 'proper' function in supporting the market. This traditional conservative model reinforced the supremacy of men and the subordination of women in family and social structures. It rendered the division of labor heavily gendered and cultivated a societal ideal that it was inappropriate for women to join the workforce and that men should be the primary breadwinners for their wives and children. Indeed, this is the premise upon which most research was conducted until more

¹⁵⁸Lewis, J. "The Changing Context for the Obligation to Care and Earn", in Maclean, M. (ed.), *Family Law and Family Values*, (Hart Publishing, 2005).

modern times.¹⁵⁹ According to this model, the patriarch was charged with providing for the family in economic terms whereas unpaid work was charged to the wife/mothers. This normative basis underscored policy making and even fostered an internalization of this patriarchal structure as an ideal to be strived for.¹⁶⁰ This patriarchal basis and male breadwinner model was in fact supported by both private law and public policy. To exemplify, we can make reference here to the marriage ban that persisted in Ireland until the 1970s that stipulated that employed women upon marriage were banned from holding public office positions based on the premise that their place after marriage was the household and their function had shifted to a care-giving one. The effects of patriarchy will be dealt with more extensively below. Here though, we should note the importance of the family in terms of the market in the sense that the market was supported by male-breadwinners in the realm of contract law who were in turn supported by their female counterparts – their spouses. Therefore, based on the formation of formal ties of marriages, the wheels were set in motion so that the market could be fed with integral actors without which it could not function.

Procreation

With focus largely on the development of a free market and no social welfare structures in place during this time, caring for the aged was an issue that preoccupied the minds of many. In consideration of this, in addition to low infant survival rates, families tended to focus on significant scale procreation as one of the main objectives to be pursued post-matrimony and families tended to be large so as to increase the opportunity of one child at least being able and willing to take care of the elderly. Children were automatically assigned this responsibility by virtue of being born – it was a kind of pay back system, a moral duty owed by children to their parents in payment for the care and support that was given to them in the early years of their lives. This notion was indeed reflected in Ireland up until 1974 when legislation was

¹⁵⁹ This is the premise upon which most research was conducted until more modern times. See for example, Becker, G. A *Treatise on the Family*. (Cambridge, Mass: Harvard University Press, 1991) and Becker, G. & Lewis. H., “On the interaction between quantity and quality of children”. *Journal of Political Economy*, 81, 1973: 279-288

¹⁶⁰ Maclean, M. *Family Law and Family Values* (Hart Publishing, 2005). P. 59

finally introduced overturning the ban on contraceptives,¹⁶¹ introduced as a result of *McGee v. The Attorney General*. This case finally led to the recognition in Ireland that even within marital bonds, procreation is a choice and not a requirement of the marital relationship, emphasising the importance of autonomy and self-determination regarding procreation.

Not only this but also, the family was supposed to be self-sufficient in the sense that not only was food cooked within the household it was grown there, not only was cloth woven there but the thread was also spun there.¹⁶² In order for this semi-economic structure to work efficiently, actors were required and this mind-set contributed to procreation being one of the principal objectives.

This serves to illustrate the importance of the household structure in terms of assuming the functions that the market was not equipped for.

C. The Family and the Private Dynamic

As we have noted above, the private nature of the family dominated the approach to its regulation during the first globalization owing to the lip-service attitude of public intervention mainly focused on the institutionalization of marriage. In practice, this led to a patriarchal approach to the governance of family matters and the rights and duties to be fulfilled within the marital structure. This is clearly reflected in the myriad of examples illustrated below reflecting the horizontal dynamics within the family.

Patriarchy

As we have seen, it was thought that tea drinking was not only a concern in terms of its negative effects on the internal economics of the household but that it could even be seen as an express form of revolutionary feminism. In fact, as we mentioned above, Parson's discomfort in bundling wives with all other contract law deviants has been suggested as one of the first major advances in feminist thinking. The feminist attack

¹⁶¹ *McGee v. The Attorney General* (1974) I.R. 28.

¹⁶² Halley and Rittich p. 756

will be dealt with in more detail in Chapter II. Here, I use the delinquency of tea drinking to illustrate gender imbalances within the family structure as a result of and indeed fortifying the patriarchal system to which internal family relationships were subjected.

The ‘early modern’ system of family law, as described by Kennedy in reference to Blackstone, dictated that patriarchy in the family was equivalent to ‘will’ in contract in that “*the patriarch was legally obliged to support his wife and children, entitled to their obedience, which he could enforce through moderate physical punishment, had arbitrary power with respect to many aspects of their welfare and property and was protected against sexual and economic interference by third parties*”.¹⁶³ Will governed contracts whereas patriarchy (the will of the husband) and the natural obligations that came with the natural desire of men to complete themselves regulated the family. This system gave rise to a number of particularities that exemplify the private nature of the family even though it had been pushed to the periphery of the private law core. Take for instance former Article 213 of the French Civil Code of 1804 concerning the duty of obedience. It read:

*The wife is obliged to live with her husband, and to follow him wherever he judges appropriate to reside*¹⁶⁴

The duties of protection and obedience remained until 1938 and even until 1970 the Code stipulated that the husband was the head of the family which meant that until 1965 a wife in France had to seek her husband’s permission to work outside the home and until 1985 the husband retained the right to manage the couple’s communal property.¹⁶⁵ A similar situation can be noted in Ireland where, as we have already noted, women, until the late nineteenth century had no legal rights to hold property in their own name independent from husbands.

¹⁶³ Kennedy, D. “Three Globalizations of Law and Legal Thought”, p. 32.

¹⁶⁴ This provision was inserted at Napoleon’s insistence and he is even recorded as having exclaimed that “women ought to obey us. Nature has made women our slaves! A husband ought to be able to say to his wife: ‘Madam, you will not go to the theatre; Madam, you will not see such or such a person; Madam, you belong to me body and soul’”. See Glendon, M.A. *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* (University of Chicago Press, 1996). p. 89.

¹⁶⁵ Ibid. pp. 89 and 90

This patriarchal system established as the norm was further reflected in and in fact characterized much of the little regulation that existed at the time.

Domestic Violence

The very private nature of relationships that existed within the household structure meant that domestic violence was frequent and no laws were in existence that protected women from it. As Kennedy points out, the male was entitled to obedience as the patriarch which could be enforced through physical punishment. This is reflected in early Irish Brehon law, for example, in that a husband was legally permitted to hit his wife to “correct” her.¹⁶⁶ In fact, in Ireland, until the 1970s, a woman who was hospitalized after being beaten by her husband faced a choice of either returning home to her abuser or becoming homeless since there were no legal tools in place to order abusive spouses to stay away from the family home, leaving many women little choice but to seek refuge elsewhere or simply to endure the violent nature of their relationships.¹⁶⁷

Coverture

The system of coverture ensured that a woman’s legal rights were subsumed by her husband upon marriage. Therefore, women, upon marriage lost their self-determination and a husband was assumed to have the right to have sexual intercourse with his wife and consent was not, in the eyes of the law, legally relevant. This was first articulated in 1736 by English Chief Justice Matthew Hale in History of the Pleas of Crown:

[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this

¹⁶⁶ Kelly, F. *A Guide to Early Irish Law* (Dublin Institute for Advanced Studies, 1988).

¹⁶⁷ This private nature of family regulation was one of the principal issues that pushed the feminist reforms related to the family and in fact, today, is one of the major concerns in terms of what we might term the re-privatization of – at least - dispute resolution in the family. Conneely, S., “Researching the Irish Family Mediation Service: Women in Mediation”, 5(2) *IJFL* 10, 2002; Gerencser, A.E., “Family Mediation: Screening for Domestic Abuse”, 23 Fla St U L Rev 43, 1995; Mack, K., “Alternative Dispute Resolution and Access to Justice for Women”, 17 Adel LR 123, 1995.

*kind unto her husband which she cannot retract.... [I]n marriage she hath given up her body to her husband...*¹⁶⁸

Not only did a woman lose her autonomy in terms of sexual relations upon marriage as a result of the system of coverture but she also passed her autonomy in relation to most aspects of life onto her husband. This is illustrated nicely by considerations of women's presence in terms of buying and selling at the marketplace¹⁶⁹ in that their role is significant and, as commented, in fact predominant.¹⁷⁰ However, what is reflected here in reality is not the role of the wife in relation to her rights and duties in consideration of the external dynamics but rather the role of the wife in terms of the household and its relation with the external dynamics. For instance, any woman at the marketplace, who, for instance, overspent, would most certainly be refused credit, as she had no independent legal personality. She was, as we have seen, considered deviant in the sense that she was treated like a child, a slave or a lunatic incapable of entering legal relations due to her subordination entirely to the will of her husband coupled with her impaired ability to make rational choices. Therefore, the system of coverture not only restricted her autonomy in relation to her horizontal relationship i.e. towards her husband, but also in terms of her vertical relationship i.e. towards those beyond the private family bubble. In essence, despite the elevation of individual will during Classical Legal Thought, the property based subjugation of women remained intact meaning that the family remained at the periphery of private law, because apart from the marriage contract, it remained hermetically sealed from the restructuring/reconceptualization of the law that came about due to the rise of the will theory of contract.

¹⁶⁸ 1 Hale, Pleas of the crown, 628-29 (1736).

¹⁶⁹ Beattie, Cordelia. "Married Women, Contracts And Coverture In Late Medieval England", in *Married Women and the Law in Premodern Northwest Europe*, vol. 8 (Boydell Press, an imprint of Boydell & Brewer, 2013) where reference is made to John Fitzherbert's picture of women at the marketplace.

¹⁷⁰ Muldrew, C. "A Mutual Assent oÆ her Mind? Women, Debt, Litigation and Contract in Early Modern England", *History Workshop Journal* 55 (2003), 47-71, p. 49; Erickson, A.L. "Coverture and Capitalism", *History Workshop Journal* 59 (2005), 1-16, p. 9.

Adultery

At this point, we can clearly note the patriarchal pattern that emerges on examination of these selected examples. Adultery by women was another area where the norm was characterized by female subordination.¹⁷¹ Adultery was specifically penalized under the notorious tort of “criminal conversation” according to which a *man* had a right of action for damages against a person who had sexual relations with his wife. This indicates the notion – also inherent in the above example – that a woman, upon marriage became the property of her husband. Interestingly, damages were awarded in relation to the effort the husband made in seducing and enticing his wife to marry him in the first place. Case law substantiated that if it took a fortune to seduce a wife, it would indicate that she was not likely to be won over and would therefore indicate her greater value to a husband, as compared with a wife who yielded to the first suggestion or temptation.¹⁷²

Marital Breakdown

We have already seen that women, due to gender imbalances and the patriarchal structure to which the marital relationship was subjected, were viewed as the property of their husbands. In terms of real property however, we can additionally note that upon the failure of a marriage, where divorce was permitted, mothers were invariably entrusted with custody of any marital children whereas property rights remained with the husband. Indeed, under Irish law, until 1976¹⁷³ a married woman had no right to a share in her family home, even if she was the breadwinner. Her husband could sell the home without even gaining her consent.

V. Concluding Remarks

The above analysis approaches the family from a pre-classical and post-classical point of view. We have delineated some of the historical particularities that characterised the

¹⁷¹ Mill, John Stuart. *The Subjection of Women*, (1869).

¹⁷² Forster v. Forster (1864) 33 L.J.C.P. 150

¹⁷³ Family Home Protection Act 1976

family before the globalization of German legal thought and the systematization of law. From this, we are left with a clear impression of where exactly family regulation stood after the globalization of Classical Legal Thought. In sum, contract law was venerated “*as the legal space in which to maximise space for the will of the parties*” and family law was venerated “*as its opposite, the space for the untrammelled will of the state imposing ascriptive statuses saturated with duty*”.¹⁷⁴ Contract law therefore was universal according to the highly influential thoughts of Savigny while family law gave voice to the spirit of the people leading to a localisation of the foundations of family law. Contract law was characterised by a profound preference for individualism and supported a *laissez faire* ideology. In terms of equality, the equal autonomy of contract law did not extend to the family, in which patriarchal property-based subordination remained untouched. The construction of the family and the regulation of familial ties that was to ride the wave of the second globalization - The Social - was one characterised by the institution of marriage, the local nature of norms, customs and traditions that governed the family, and profound inequalities between the parties to the private marital bubble which Classical Legal Thought failed to penetrate as it marched towards accommodating capitalism and the rise in global trade, the fulfilment of will and the creation of an individualist, liberal approach that disregarded the family in all but its function as a cog, an aid mechanism for the proper functioning and support of industrialization.

The Social, to which we will now turn, set out to attack this dichotomy so firmly entrenched by the systematization of law.

¹⁷⁴ Halley, “What Is Family Law?,” May 8, 2013.

Chapter II: Attacking the Classical Family via Social Law

If you assume given stages of development in production, commerce or consumption, you will have a corresponding form of social constitution, a corresponding organization, whether of the family, of the estates or of the classes – in a word, a corresponding civil society.¹⁷⁵

I) Introduction

Thus far, we have learned that Classical Legal Thought entrenched the family/market dichotomy based on a veneration of contract law as the web and woof of life – a space within which the will theory could flourish – while pitting family law in complete opposite – the site of status leading to the development of certain familial duties within the private bubble that contained the family while simultaneously acknowledging the institutional public dynamic of the household. In short, contract and the family developed according to two parallel paths even though both remained within Savigny’s private law system. This chapter aims to take the Classical Family into the social sphere in an attempt to decipher how, if at all, the globalization of a social consciousness affected the regulation of the family on the back of developing states and their interplay with concurrent civil societies which occurred at the beginning of the C20th significantly influenced by a rise in capitalism and globalized markets.

¹⁷⁵ Marx made this point in a letter to Pavel Vasilyevich Annenkov on 28 December 1846. See K. Marx & F Engels, 1982, *Collected Works* vol. 38. London cited by Ginsborg, Paul. “Unchartered Territories, Individuals, Families, Civil Society and the Democratic State”, in Nautz, Jurgen, Ginsborg, Paul. & Nijhuis, Ton. *The Golden Chain: Family, Civil Society and the State* (New York: Berghahn Books, 2013). By way of clarification, I intend this citation, as will become clear, to convey how in fact the conditions that emerged on the back of the rise in capitalism and globalized markets were crucial in revolutionizing other areas of private law – as demonstrated below the master/servant relationship – but were insufficient to penetrate the dichotomy that isolated the family from the core of private law.

In order to delineate the effects of this change on domestic relations, we will firstly depict the particularities that characterized the globalization of what Kennedy terms The Social, including, for instance, the move from economic development as the overall goal to the idea of interdependence; from the individualism that characterized Classical Legal Thought to an increased demand for group rights and collective concerns; and the move from formal equality to social justice. We will note the shifts from contract as the web and woof of life in terms of regulation to social aspirations that emanated from the construction of societal spaces and the interaction between the state, the economy and the private sphere considering the new approach to collective concerns, values, interests and purposes.¹⁷⁶ Subsequently, we will place the family within these developments analyzing, as we previously did for Classical Legal Thought, characteristics and changes in regulation offset by the rise of the social and this new approach to regulation.

We will see that the family law exceptionalism established during the first globalization somehow managed to reinstate itself in the discourse notwithstanding socialization efforts and essentially family law remained at the periphery of the private law core reaffirming the establishment of legal duties based on the well-entrenched patriarchal structure of family relationships. In effect, the principal characteristics of the regulation of the family remained embedded in marriage as an institution on the one hand and the localization of family law regulation on the other as inferred from Montesquieu's *Spirit of the Laws* outlined in Chapter One.¹⁷⁷ The social aspirations that completely changed the face of contract law as we will see found no room for manoeuvre when it came to the peculiar, moralistic, and localized family sphere.

¹⁷⁶ Ibid. p. 3.

¹⁷⁷ Montesquieu, Charles de Secondat baron de. *Montesquieu: The Spirit of the Laws* (Cambridge University Press, 1989), which depicts the two underlying factors of family regulation, marriage being the first and its variable character influenced by tradition, culture, gender structures and the customs underpinning the society, where the act of marriage took place, being the second. See Chapter I, Introduction.

II) The Potential Of The Social

To recall here, the construction of the family/domestic relations that was to ride the wave of the social was characterized by both a private and social dynamic fundamentally based on traditional roles entrenched in patriarchy attributed to family members in terms of both their private (horizontal) relations within the family structure and, in terms of vertical regulation, a superficial lip-service approach in terms of the public institutional dynamic of the family and the state's approach to this apparent noble institution. We have already noted the results of this in that it effectively excluded women from the marketplace by way of offering them a role in the equally important domestic sphere; encouraged them to be generous and nurturing but discouraged them from being strong and self-reliant; and effectively insulated them from the world's corruption while simultaneously denying them from the world's stimulation.¹⁷⁸ In terms of children, their legal situation was also characterized by the formal bonds that existed between their parents on the one hand and on the other their role, in the absence of a welfare states, in caring for the aged and participating as sort of factors of production within the household in view of the efficient functioning of the market. This led, as we have deduced from the analysis of the classical family, to feudalist and oppressive legal provisions governing the internal/private dynamics while the social institutional function of the family espoused the goal of shielding the internal, private relationships from the individualism that characterized the rest of private law.

The globalization of a more socially inclined disposition in terms of the approach to law and regulation had the potential to alter this owing to the shift from formal equality that characterized the first globalization to a new conception of social justice that was taking hold during the second. Additionally, the replacement of right, will, and fault with social welfare and of morality with society provided stable foundations upon which the family/market dichotomy could be attacked.

¹⁷⁸ Olsen, "The Family and the Market." p. 67.

Importantly, for our purposes here, this new recognition of the importance of equality - equality capable of reformulating the foundations of civil society - was intended not only to infiltrate the internal, horizontal family dynamics but also the external vertical dynamics. Equality then constituted one of the principal concerns in the delineation of a proper functioning and inclusive civil society.

However, as we will see, still in the 1970s, taking Ireland as the example, women were still forced to renounce their jobs in the public service upon marriage; were not permitted to collect children's allowance since the 1944 legislation that introduced the payment of such benefit specified that it should be paid to the father; could not obtain a barring order against a violent partner; had no right to a share in the family home which could even be sold by husbands without the consent of the wife; could not refuse to have sexual intercourse with their husbands as it was assumed that a husband possessed the right to have sex with his wife; and were not entitled to the same hourly rate for employment as a male counterpart. From this we can already preempt the failure of the social to alter in any significant way the dynamics of internal, horizontal dynamics. Additionally, the notion that procreation was one of the principal goals of family formation persisted significantly, limiting autonomy between spouses in terms of, for example, contraception, exemplifying a persistent narrow approach on the part of the state to the purpose, structure and function of the family structure thereby exemplifying a constricted approach in terms of altering the regulation of the vertical dynamics.

What then did the globalization of the social do in terms of the internal and external dynamics of the family? In order to answer this question, let us first turn to the characteristics of this consciousness so as to decipher how it managed to infiltrate the private law sphere shifting the focus from individualism to collective interests, from formal justice to social justice, while at the same time firmly establishing the family market dichotomy that would eventually be tackled by the third globalization as we will see from the subsequent chapter.

III) The Impetus For The Social

The dissatisfaction that arose in revolt of Classical Legal Thought began to ferment in the late 1800s and provided a forum which allowed for the embrace of a new legal consciousness. Beginning in the early 1900s therefore and lasting until the end of World War II¹⁷⁹, a reconstruction process was set in motion based on fundamental shifts from the idea of economic development and individualism to the idea of interdependence and group rights, from formal equality to social justice and from private law as its core to social legislation. The concept that emanated from the second globalization reached beyond the goal of protecting David against Goliath and rather attempted to embed a collective element grounded on more than the protection of individuals but rather the protection of individuals as constitutive elements of particular groups of society. The social, in these terms, constituted an outright attack on the individualist nature of Classical Legal Thought and its tendency to abuse deduction in terms of the deductively watertight ideological basis attempting to instead instill social elements in the place of the will.

In terms of our scope, we understand the second globalization of legal thought as the development of a legal consciousness that bestrode private law, for example, with such categories as labour law within the framework of developing methods that potentially could reign-in the freedom of contract ideology and the regulation of private relations based solely on the will of the parties. The result of this, as we will see, was that freedom of contract remained intact. However, in certain circumstances further obligations were imposed on, for example, employers.¹⁸⁰ These obligations were essentially based on the recognition of social responsibilities and the development of the idea of social protection. In regulatory terms, the law of the free market – the web and wool idea that imperialized contract law - assumed the role of a new regulatory regime where market freedoms were balanced against radiating social concerns that aimed at protecting groups in society e.g. workers, women, the disabled - we may say those previously considered contrary to the idea of individual

¹⁷⁹ Kennedy, D. “Three Globalizations of Law and Legal Thought”, p. 37.

¹⁸⁰ Collins, Hugh. *Regulating Contracts* (Oxford: Oxford University Press, 2003).

freedom by Classical Legal Thought. Finally, the social has taken it upon itself to tackle that which did not fit nicely within the will theory and it provided a space for actors in shifting from individualism to collective concerns in consideration of the distributive and protective effects of the new social justice ideology. French scholars¹⁸¹ pioneered this movement with a view to saving liberalism from itself¹⁸² and once they set the discourse in motion it became clear that the role of judges, considered so critical to the classical period, was outflanked by agencies and legislative efforts during this globalization.

What did this mean for the classical status/contract distinction resulting from the marriage as “something more” debate and the locally entrenched regulation of the family? In short, the social reconstructed the debate replacing the will theory and individualism with social concerns and collective interests. It involved the recognition that law derives not from abstract principles but rather from the project of using law to address social needs.¹⁸³ It concerned a modernization of the language used to deal with legal relationships illustrated here via the fact that the master/servant relationship during the globalization of the social assumed a social form and began its transformation into labour law as depicted below.¹⁸⁴ It essentially was a reconstruction project that was premised on an outright attack on the deductive and apolitical nature of classical legal thought.

¹⁸¹ Kennedy notes that although German-speaking theorists instigated the social it was the French who took it upon themselves to globalize it. He makes reference to Raymond Saleilles, *De La Declaration de la Volonte*, (1901), Francois Geny, *Method of Interpretation and Sources of Private Positive Law* (Louisiana State Law Institute trans., 2ed. 1963) 1903, Leon Duguit, “Theory of Objective Law Anterior to the State”, in *Modern French Philosophy*, VII The Modern Legal Philosophy Series (1916), Edouard Lambert, *La Fonction du Droit Civile Compare*, (1903), Josseland, *De L’Esprit des Droit et de Leur Relative: Theorie Dite de L’Abus Des Droit* (1927, 1939), Emmanuel Gounod, *Le Principe de l’autonomie de la Volonté* (1912), and Georges Gurvitch, *L’idée du Droit Social* (1932).

¹⁸² Kennedy, D. p. 38 citing Wieacker, Franz, *History Of Private Law In Europe With Special Reference To Germany* (Tony Weir trans., Oxford Univ. Press 1995) (1967); White, G. Edward. “From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America”, 58 *VA. L. REV.* 999 (1972); Arnaud, André-Jean. *Les Juristes Face a la Société du XIXieme Siècle a Nos Jours* (1975); Horwitz, Morton J. *The Transformation Of American Law 1870-1960: The Crisis Of Legal Orthodoxy* (1992); Buen, Néstor De. *La Decadencia Del Contrato* (1965); Kennedy, Duncan. & Belleau, Marie Claire. “François Génys aux Etats Unis”, in Génys, Francois (ed.) *Mythes et Réalités* (2000); Kennedy, Duncan. “From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form”, 100 *COLUM. L. REV.* 94 (2000); Jamin, Christophe. Une Brève Histoire Politique des Interprétations de L’article 1134 du Code Civil, 1134 Du Code Civil, *Le Dalloz*, 901 (March 14, 2002).

¹⁸³ Halley, “What Is Family Law?,” May 8, 2013, p. 210.

¹⁸⁴ Deakin, Simon. “The Changing Concept of “Employer” in Labour Law” (2001) 30 *Indust.L.J.* 72.

The analysis of the social attack will be conducted here via examples of how the social consciousness gripped the market side of the dichotomy and flourished. From this scrutiny, it becomes clear that the family's exceptional nature resisted much of the new social condition and the dichotomy was again, even after several commendable attempts¹⁸⁵, firmly reinstated as the unruly child of private law.

Let us turn to the master-servant relationship to illustrate.

IV) Socializing The Market Side Of The Dichotomy

The master/servant relationship, as we have seen once housed in Blackstone's oeconomical structure, already during the first globalization migrated away from domestic relations and towards contract governed by will. We illustrated this significant shift in the previous chapter via the case of *Chappell v Trent* whereby two servants' claims to their master's property which had been bequeathed to them was decisively rejected based on the recognition that this relationship no longer fit within the evolving nature of domestic relations. Therefore, it evolved from the household master/servant construction to a contractual construction based on will.

The conditions defining late-C19th social structures took this evolution one step further. According to Kennedy, a social transformation was unfolding "*consisting of urbanization, industrialization, organizational society, globalization of markets, all summarized in the idea of interdependence*"¹⁸⁶ paving the way for a new conception of the web and woof idea that would eventually lead, as we will illustrate here, to modern employment law.

¹⁸⁵ Halley describes how the dichotomy was intentionally and collectively attacked by sociological jurisprudence in an attempt to change the focus of domestic relations law, by legal realists, in an attempt to understand the economic functions of family law, and eventually by the feminist movement in its critique of the public/private distinction. See Halley, "What Is Family Law?", May 8, 2013. pp. 194-195.

¹⁸⁶ Kennedy, Duncan. "The Three Globalizations of Law and Legal Thought", p. 38.

A. From Master/Servant to Modern Employment: An Interdependent Approach

During classical legal thought, the goal was economic development and the expression of free will in conducting one's private affairs. The core idea that emanated from the social however was the idea of interdependence. As noted, it drew from urbanization, industrialization, organizational society and the globalization of markets¹⁸⁷ in formulating a critique of the will theory for being individualist and ill-equipped to deal with the new social condition. It was argued that the idea of interdependence could not be satisfied by the will theory and the imperialism of contract law that had, until this point, legally speaking, supported the market. The web and woof market structure therefore was in a state of failure – it was struggling to produce appropriate results given the new, modern conditions of interdependence. The search therefore was well underway for new regulatory techniques which would eventually lead to a shift from adjudication - in avoidance of the highly criticized abusive deduction that characterized the first globalization - to administration:

After a brief flirtation with the judge...the hero figures of the social current became, in principal, the legislators who drafted the multiplicity of special laws that constituted the new order, along with the administrator who produced and enforced the detailed regulations that put legislative regimes into effect¹⁸⁸

This new approach had significant effects on the master/servant relationship. In effect, the contract law field was socialized by way of administrative law and input from the developing nation state. Let us take here, by way of example, workplace accidents and legislative attempts to recognize and correct the inadequacy of leaving employment relations solely to strict, classical contract law.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid. p.43

i. Workplace Accidents

The origins of legislative attempts in this field stemmed from the industrial revolution and the socialization of employment relations pioneered by the very active Marxist and socialist movement that pushed for social protection for workers in Germany. Although the socialists in the end were oppressed, key features of the left's agenda were cleverly adopted including Employers' Liability Law in 1871¹⁸⁹ and Workers' Accident Insurance in 1884. This new path to socialization eventually swept through Europe - albeit at different rates - and took a firm grip in the industrialization processes that were already underway, altering employment relations to a degree that could not even have been perceived during the first globalization in terms of the master/servant relationship.

The advance of workplace accidents legislation lucidly illustrates the social bridging mechanism between the increasing complexities of modern business on the one hand and the development of the nation state on the other. The measured acceptance that the modern industrial society required social protection gradually spread and in 1880 the British Prime Minister William Gladstone pushed through the Employers' Liability Act. His attempts were furthered in 1897 with the passing of the Workmen's Compensation Act that essentially considered the already developed German model by establishing a "no-fault" doctrine of compensation and extended the scope of compensation to accidents occurring connected to railways, mining and quarrying, factory and laundry work. Prior to the passing of the 1880 Act - i.e. the law as it was according to a more classical conception of employment relations - a workman injured by an accident while engaged in employment activities could base his legal action for damages against his master only in cases where the master knowingly employed an incompetent servant or in cases where the master prohibited plant or machinery in the knowledge that it was unsafe and dangerous. Therefore, the legal situation of injured employees was quite limited, formalistic and narrow in terms

¹⁸⁹ For an overview, see Timothy G.W. and Jochen S., Incentives that Saved Lives: Government Regulation of Accident Insurance Associations in Germany, 1884-1914 (August 9, 2012). *Yale University Economic Growth Center Discussion Paper* No. 1013; *Yale Economics Department Working Paper* No. 104.

of its approach to protection of injured parties and the assumption of risk doctrine. Recognition however of the shortcomings of this situation, for instance the results of the Doctrine of Common Employment according to which a workman could not recover compensation for any injuries caused by a fellow servant, led to the passing of the Employers' Liability Act 1880. This act extended the scope of protection for employees in recognition of the increase of workplace accidents inevitably caused by increased industrial activities and the mechanization of production by rendering employers liable for damages caused:

- i. By some defect in the machinery or plant which ought to have been put right by the master or his foreman;
- ii. By the carelessness of a foreman;
- iii. Through obeying an order which caused the injury;
- iv. Through a fellow workman obeying a rule or order of his master, or;
- v. By the carelessness of a man in charge of any engine, points, or signal on a railway.

In sum, what we can note from this illustration is the change in approach to what was once a simple construction of a master/servant relationship: during the globalization of classical legal thought it was strictly private and based on will characterized by a *laissez faire* ideology. The social crisis however, especially in terms of the emergence of workplace disputes as a result of industrialization, reformulated not only the linguistic approach to the actors equating the master with the capitalist employer and the servant with organized labour but it also reformulated the governance of this relationship by way of statutory and administrative innovations.¹⁹⁰ This fresh approach gradually led to a metamorphosis of the master/servant relationship as we can discern the birth of a thoroughly modern field of law leading to what would become known as labour law.¹⁹¹

¹⁹⁰ Halley, "What Is Family Law?," May 8, 2013 p. 201

¹⁹¹ Ibid. p. 203

ii. Medical Accidents

Additionally, with a view to illustrating the change in approach resulting from the development of a social consciousness in terms of nation state-building, we can make reference to medical accidents which not only turned the regulation of the medical profession i.e. the vertical dynamic on its head but also assisted in instigating a complete reform of tort law in terms of the private relationships between medical practitioners and their patients. Prior to the nationalisation of health care systems, the doctor/patient relationship was a contractual one in which the patient sought help and assistance from the medical professional. Health care systems in Europe were largely mosaics of private, municipal and charity schemes¹⁹² with doctors retaining their professional autonomy¹⁹³ and consequently liability for any harm caused. This containment of the doctor/patient relationship within a contractual sphere did not give rise to many medical negligence claims. Indeed, just over one hundred years ago it was stated in the case of *Farquar v Murray*¹⁹⁴ that the action before the court was particularly unusual, the judge stating “*it is an action of damages against a medical man. In my somewhat long experience I cannot remember having seen a similar case before*”.¹⁹⁵

The nationalisation of health care, which occurred post World War II or thereabouts in most European countries however brought major alterations to the landscape of health care and its delivery. The private, contractual relationship that existed between the doctor and the patient was infiltrated by a third party: the state. As a result of this, the principle of collective responsibility permeated the delivery of health care and a shift in responsibility resulted. For example, the establishment of the *National Health Service* (NHS) in 1948 in the UK was based on the principle of equality with the state assuming the obligation to provide free health care to the entire population.¹⁹⁶ This in turn led to a shift in liability for medical accidents as the

¹⁹² Lo Scalzo, A., Donatini, A., Orzella, L., Cicchetti, A., Profili, S., & Maresso, A. *Italy: Health system review. Health Systems in Transition*, (2009) p. 13.

¹⁹³ In fact, this was one of the major hurdles to the nationalization of health care in the UK and France in that doctors were fearful of giving up their professional autonomy.

¹⁹⁴ *Farquar v Murray*, 3F, 859-64, cited in HURWITZ, B. “Learning from primary care malpractice: past, present and future”, *Qual Saf Health Care*, 2004; 13; 90-91.

¹⁹⁵ *Ibid.*

¹⁹⁶ Health Care systems in transition: UK p. 5.

doctor/patient relationship was catapulted from the private sphere to the public assuming a necessary shift in terms of regulation and adjudication.

In summary, what we can deduce here is that the rise of social legislation explicitly contradicted the classical, *laissez faire* ideology that the private relationships were restricted to the will of the parties. In noting the fermentation of the social in terms of the master/servant relationship, we can discern that contract law, as we know it from the previous chapter, was progressing rapidly and embracing social aspirations influenced, for example, by social insurance against industrialist accidents as a compulsory element of the wage bargain, the rise of the labour union as an involuntary association, and the recognition by the state of collective interests. This, in effect, justified “jettisoning individualist and formalist notions”¹⁹⁷ and paved the way for inroads linking the once strictly private nature of relationships with considerations pertaining to group rights, social rights, social justice, social welfare and a regulatory sphere somewhat alternative to the free market that monopolized legal thinking during the first globalization.

V) Socialising The Family Side Of The Dichotomy

The general consensus from existing literature with regard to the impact of the social consciousness is that while contract law progressed and flourished in its new social environment, status – the family as “something more” - lagged behind.¹⁹⁸ Halley, in reference to Baily and Labatt’s structural overhaul of master/servant notes that

*they opened the floodgates of the social and reconstructed the ancient topic by an open-eyes recognition of social legislation. Domestic relations meanwhile, sailed placidly on, adding chapters about Married Women’s Property Acts but manifesting no felt need to reframe the field because of them*¹⁹⁹

¹⁹⁷ Kennedy, “The Three Globalizations of Law and Legal Thought”, p. 42

¹⁹⁸ In fact, this had been predicted by Henry Sumner Maine in his work, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* 168-69 (Frederick Pollock ed., London, John Murray 1912) 1861. For a summary see Halley, “What Is Family Law?”, May 8, 2013 pp. 71-74.

¹⁹⁹ Halley, “What Is Family Law?,” May 8, 2013, p. 201.

In fact, in terms of the development of family law as a recognised independent legal discipline, it was only in the 1960s that the battle was finally won in establishing the field.²⁰⁰ The fundamental issue was that, despite efforts, nobody could get to grips with family regulation and its relation to expanding markets, interdependence and the new influences of globalization. As we have noted, the relationship between master and servant easily embraced the social language and transformed into what would eventually become known as labour law. The web and woof idea of contract lost its relevance leading to the demotion of the will theory. However, this reconstruction process had little effect on contract's other – status. Whereas will was pushed out of the contract side and replaced by social legislation it was firmly reinstated on the side of status by way of a crisp preservation of the will of the state in terms of the role of the household against the will of individual parties²⁰¹ resulting in a preservation of the classical family market dichotomy characterized by embedding the regulation of the family in the local dimension on the one hand and marriage that housed the institution of the family on the other.

As explained by Kennedy, the reconstruction process became dramatically ambiguous when it came to the family and sexual relations²⁰² in that the institutional side of the family structure leant itself well to the social ideology on the whole, based on the far-reaching consequences that the role of the family had in terms of interdependence. That stated, however, the private nature of the relationships within the family structure and the fact that regulation stemmed from local custom, tradition and religion meant that attempts to break down the dichotomy largely failed and the traditional patriarchal structure remained in place despite welfare state attempts to socialize the institution.

This stated, some socially inclined indents – indeed, indents that are in theory quite significant – were made into the fortress that has long “protected” the family

²⁰⁰As O. Kahn-Freund stated in his opening address to the first Family Law Workshop in 1966, “*A battle has been necessary to introduce it in England.*”, cited in Mueller-Freienfels, “The Emergence of Droit de Famille and Familienrecht in Continental Europe and the Introduction of Family Law in England” *Journal of Family History*, Vol. 28, No. 1, (2003).

²⁰¹ Halley, “What Is Family Law?,” May 8, 2013 p. 209.

²⁰² Kennedy, “Three Globalizations of Law and Legal Thought”, p. 50.

from the market. However, as pointed out by Kennedy, the agenda largely concentrated on reinforcing the traditional family and aiding the enterprise of child rearing with the goal of strengthening the nation against its enemies.²⁰³ Preemptively then, these indents which we will discuss below had little effect in terms of unshackling the family from the market/family straightjacket.

A. UK

As noted in Chapter I, the household was an integral element of the proper functioning of the market. In Britain, the welfare state that was developed, in terms of the family at least, was based on a robust gender differentiated model of family life founded in the male-breadwinner ethos. The social consciousness that developed at the time revolved around a social citizenship – the crux of which was opportunity in terms of paid labour which in turn provided access to economic welfare and security. Considering the male breadwinner model of family life that was entrenched at the time however, the provision of care – a function largely reserved to women and, as already mentioned, one which effectively excluded them from the marketplace by way of offering them a role in the equally important domestic sphere encouraging them to be generous and nurturing but discouraged them from being strong and self-reliant and effectively insulated them from the world’s corruption while simultaneously denied them the world’s stimulation – was not included in the concept of paid labour. In pitting care in the home against employment the male was reinstated as the “normal” citizen and their dependents – women and children were excluded from this Marshallian concept of citizenship, participation in the market, and social welfare benefits.²⁰⁴

²⁰³ Kennedy, “Three Globalizations of Law and Legal Thought”, p. 52

²⁰⁴ With regards to this Marshallian concept of citizenship, see Naomi Finch, “Family Policy in the UK, Welfare Policy And Employment In The Context Of Family Change”, Social Policy Research Unit, University of York. We can also make reference here to the Beveridge Report which became a blueprint for a new welfare state in Britain. See O’Brien, Marese. “The Beveridge Report: its impact on women and migrants”, *Socheolas: Limerick Student Journal of Sociology*. Vol. 2(2), April 2010.

B. IRELAND

A similar situation can be extracted from evidence in Ireland as we have alluded to by way of reference to examples outlined above of the exclusionary position of women in terms of both the private and the social dynamics of family regulation. The model of family life incorporated into the Irish Constitution is one in which the woman cares for home and children. This reflected the social reality of the time where, at the risk of repetition, women had to renounce their jobs in the public service upon marriage; were not permitted to collect the children's allowance since the 1944 legislation that introduced the payment of such benefit specified that it should be paid to the father; could not obtain a barring order against a violent partner; had no right to a share in the family home which could even be sold by husbands without the consent of the wife; could not refuse to have sexual intercourse with their husbands pursuant to the assumption that husbands were assumed to possess the right to have intercourse with wives; and were not entitled to the same hourly rate for employment as a male counterpart. Additionally, it is interesting to note that Ireland²⁰⁵ established a significant for-profit childcare provision sector as opposed to a state non-profit sector which is more common in other European countries. Other family allowances typically associated with a more social approach to family regulation and the labour market were slow to take hold.

C. ITALY

Similarities concerning the impermeability of the family market dichotomy can also be discerned from the situation during The Social in Italy. Evidence suggests that the family, in its role in terms of the proper functioning of the market, assumed an important function in relation to the understanding of the family or the household as a market facilitating institution. In this sense, families, or better, households – the semi-

²⁰⁵ A similar situation exists in the UK where in the mid 1990s, only 2% of childcare for children under 3 years of age was publicly funded. This approach was largely influenced by consecutive Conservative governments with little change until the appointment of the Labour government in 1997. See Finch, Naomi. *ibid*; Skinner, C. (2002) "Childcare Provision" in Bradshaw, J. (ed.) *The Well-being of Children in the UK, The Save the Children Fund*; Skevik, A. "Children of the Welfare State: Individuals with Entitlements, or Hidden in the Family?" *Jnl Soc. Pol.*, 32, 3, (2003) 423–440 Cambridge University Press.

economic cog in the wheel of production – increasingly served the expression of individuals within the unit. However, this was largely an avenue only open to male members of the structure as a result of the persistence of the male breadwinner model.

The most salient commonality we can discern here is the allocation of market functions to men and care functions to women indicating that the era of rights and the hopes of socializing the family both in terms of its internal and external dynamics were doomed to failure due to nation states feverously clinging onto their traditional conceptions and definitions of what exactly constitutes a family on the one hand and the belief that the family as a unit was better served by local law on the other.

That stated, although the social and its underlying commitment to equality and social justice did not entirely overcome the male breadwinner ethos, it did concentrate more on the family as a whole reflecting perhaps an increased recognition of the relevance of the external/institutional dynamics of family regulation. Take for example male trade unionists' claims to a family wage.²⁰⁶ Interestingly, however, the rise of this social demand in fact leant itself well to further embedding gender inequalities as pointed out by Coote and Campbell:

*As long as the myth of the family wage persists, there is bound to be a conflict between women and men in the trade union movement. For if men see themselves and breadwinners-in-chief, how are they to view the prospect of women gaining equal opportunity and equal access to all jobs?*²⁰⁷

That stated, in Italy certain socialization efforts into the dichotomy can be discerned from – for instance - Italian case *Cass.* 13329/2001²⁰⁸ which held that where an employee's salary is not sufficient to guarantee a free and dignified existence for

²⁰⁶ Lewis, J. "The Changing Context for the Obligation to Care and Earn", in Maclean, M. (ed.), *Family Law and Family Values*, (Hart Publishing, 2005).

²⁰⁷ Coote and Campbell, *Sweet Freedom: Struggle for Women's Liberation*, (Picador Books, 1982).

²⁰⁸ *Cass.* 26 Oct. 2001, n. 13329, (2001) 41.

him/her and his/her family, then that same employee may take up employment with another company.²⁰⁹

In summary, from the above examples we can discern that although the social made some progress in terms of the family, it was not significant enough to dissolve the dichotomy. In fact, the efforts made further entrenched gender imbalances and, as one can imagine, did little to accommodate non-traditional family structures that, during this time, were placed on a constitutional pedestal. In fact, the veneration of the traditional family in national constitutions continued to exceptionalize the family from the rest of private law as we will see and the instillation of the family founded on marriage and the local character of family law rules reinforcing the dichotomy and as can be discerned from national case law left the family in a quarantined position that would eventually be tackled only by the third globalization.

VI) The Constitutionalization Of Private Law

The constitutionalization of private law is a phenomenon that took hold towards the end of the social and in the post-war period in Europe.²¹⁰ It represents an infusion of legal ideas resulting from the rise of modernity, civil society and the nation state on the one hand and their clash with legal principles established in conjunction with individualism and the *laissez faire* ideology that had dominated on the other. Its potency is one which has shook traditional private law frameworks changing the landscape of private law relationships indeed to an extent yet unclear and much debated amongst private law legal scholars in moving well beyond the vertical dimension of fundamental rights and their role in protecting citizens against the state as the *puissance absolute et perpétuelle*.²¹¹

²⁰⁹ See Mak, C., Sanchez, Galera., M.D., & Wunsch, S., “The Italian Report”, in G. Brüggemeier, A. Colombi Ciacchi & G. Comandé (eds.) *Fundamental Rights and Private Law in Europe* Vol. I (Cambridge: Cambridge University Press, 2010).

²¹⁰ Therefore, in terms of Kennedy’s template, there is a sort of overlap which cannot be avoided since, we may argue, the social consciousness set the tone and instigated the process which will be investigated in more depth in Chapter III and in part II.

²¹¹ Bodin, J. *Les six livres de la République*, (Lyon, 1576)

Prior to the constitutionalization at the EU level however, a similar process took place at the national level. Here, we specifically refer to the process whereby the family was constitutionalized, thereby further insulating it from contract and indeed the social. In fact, the influence of national constitutions has shaped the relationship between fundamental rights and the development – or stagnation – of national family law. With this in the background, and of course our analysis in terms of the flourishing of the market side of the dichotomy, we will proceed to examine how the differing national contexts influenced family law and how they, during the second globalization, maintained family law exceptionalism via the rejection of the social within the private structure of the family and rejection via the constitutionalization of the institutional structure of family regulation.

A. IRELAND

In 1937, the fundamental laws of Ireland were enshrined in *Bunreacht na hEireann*. It was a reflection of the time, stemming from the economic and social reality of a largely rural society where agriculture provided the basis for the economic structure. 50% of those in employment in 1937 were in agriculture, 33% were employed in services and 17% in industry.²¹² Net emigration was beginning to rise, mortality was high and the overall standard of living in Ireland at the time was inconceivably different to what can be discerned today, despite the recent economic turmoil.

The prevailing opinion at the time in relation to the family was rooted in tradition. A family was founded on marriage between one man and one woman, the principal scope was procreation and it largely functioned on the male breadwinner model. The drafters of the Constitution therefore were inveigled into drafting a document that left little room for broader horizons when it came to the protection of the myriad of family types and structures in Ireland today, many of which are not welcomed or even accepted when trying to attain equal treatment in the law.²¹³ It is argued here that this persistent rejection has its origins in the recapitulation of the

²¹² The All Party Oireachtas Committee on the Constitution: Tenth Progress Report: The Family, p19.

²¹³ The family in the Irish constitution is basically an arrogation of civil authority to the Church. The provisions of the Constitution were, more or less, penned in CS McQuaid's office as he advocated enshrining the absolute claims of the Catholic Church in the Constitution.

classical characteristics of the family in that it is a social institution founded on marriage and one that should reflect local law in terms of what was considered positive isolation from the market.

The principal constitutional article dealing with the family is Article 41 which states the following:

1. *1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

2. *1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.*

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3. *1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.*²¹⁴

On a first reading, it is already clear that the traditional conception of the family i.e. that it is a moral institution; based on marriage; it should protect the family

²¹⁴ Eventually, the provision pertaining to divorce was introduced reading :*2° A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the five years there is no reasonable prospect of a reconciliation between the spouses such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and any further conditions prescribed by law are complied with.*

3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.

against the market; it is characterised by gender inequality; and based on the male breadwinner model, permeated the social consciousness in terms of the family. In fact, the State's pledge to guard "*with special care the institution of marriage on which the family is founded*"²¹⁵, certainly affirms Shatter's pronouncement that "*since 1937 the family has been placed on a Constitutional pedestal*"²¹⁶. The continuation of a classical interpretation of the family has subsequently been shaped and further instilled by judicial interpretation of the constitutional provisions. *The State (Nicolaou) v An Bord Uchtala*²¹⁷ - the leading case that proscribed any sort of liberal interpretation - clarified that the family referred to in the Constitution is one based on marriage and the formal bonds created through marital unions. Furthermore, O'Higgins CJ, in the case of *G v An Bord Uchtala*, reaffirmed this concept stating that Article 41 "*refers exclusively to the family founded on marriage*".²¹⁸ In fact, as recently as 2006, the All Party Oireachtas (Parliamentary) Committee on the Constitution in contemplation of family reform described the family as follows:

*The traditional family enshrined in the Constitution is the nuclear family consisting of a married couple, a man (the breadwinner) and his wife (a mother concerned with household duties) and their dependent children whose physical and moral development is based on the stable lifelong commitment of the parents and the values they transmit to their children. The traditional model is built on the lifelong union of a man and a woman, formalised in a marriage ceremony; in its primary form the man assumed the role of the head of the family while the wife, dependent upon him for physical maintenance, established primacy in the care and upbringing of the children; the children were expected to absorb the values of their parents and be subservient to them.*²¹⁹

²¹⁵ Bunreacht na hEireann, Article 41.3.1.

²¹⁶ Shatter, A. *Shatters Family Law*, (Butterworth, 1997), Ch. 1.

²¹⁷ *The State (Nicolaou) v An Bord Uchtala* (1966) IR 567.

²¹⁸ *G v An Bord Uchtala* (1980) IR 32.

²¹⁹ See The All Party Oireachtas Committee on the Constitution: Tenth Progress Report: The Family, (2006) p. 55-56. See also, KIERNAN, K. "The Diversity Initiative – Welcoming the Diversity of Family Life in Ireland", available online at: www.equality.ie/index.asp?LocID=90&docID=197; Ryan, F.W. "Marriage at the Boundaries of Gender: The Transsexual Dilemma Resolved?" 1, *Irish Journal of Family Law*, 2004; Mee, J. & Ronayne, K., Report on the "Partnership Rights of Same Sex Couples", The Equality Authority (2000); Ryan, F. "Sexuality, Ideology and the Legal Construction of Family: Fitzpatrick v Sterling Housing Association", 3, *Irish Journal of Family Law*, (2000).

This is the type of family that the Constitution identifies as the “*natural primary, fundamental unit group of society*” and as the “*moral institution possessing certain inalienable and imprescriptible rights*” which are “*antecedent and superior to all positive law*”. It is also the type of family that Article 42 applies to in stating that:

1. *The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.*
2. *Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.*
3. *1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.*
2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.
4. *The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.*
5. *In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*

Here, finally, we can note a constitutionally based indent on the conception of the classical family in terms of the intricacies of the coexisting private dynamic on the one hand and social/institutional dynamics on the other. Indeed, it is from this constitutionalization of the family that some of the administrative efforts mentioned above, for example, free education²²⁰, came to be. Article 42 in effect nominates the family as the educator of the child and imposes a parental duty to provide such education. It also gives to every child the right to free primary education provided for by the State so that every child receives a certain minimum education. O'Dalaigh CJ in the Supreme Court decision in *Ryan v The Attorney General* defined education in the following way, “education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral”.²²¹ O’Higgins CJ laid down some other rights in his judgement in *G v An Bord Uchtala*, to live and be fed; to be reared and educated; to have the opportunity of working and of realising his or her full potential as a human being.²²²

Although we have noted above a certain upshot of the constitutionalization of the family on the dichotomy, particularly with reference to the legal relationship between marital parents and their children, the limitations stemming from the insistence on a classical interpretation of the family and its exceptionalization persisted. In fact, as we will note from the following Irish case law examples classical notions of the family remained entrenched and guided the development of family regulation for some time reinstating over and over again the dichotomy. Not even the social – which permitted contract to take significant strides – shook the exceptionalization of family law in Ireland and it remained quarantined with morals, tradition, religion and local custom.

For example, it was not until 1974 that the right to marital privacy in terms of procreation was finally recognised in the case of *McGee v The Attorney General*²²³ decisively concluding that even within marital bonds, procreation is a choice and not

²²⁰ For example, free second level education was introduced in Ireland in 1968.

²²¹ *Ryan v The Attorney General* (1965) IR, 294, p. 350.

²²² *G v An Bord Uchtala*, (1980) IR 32.

²²³ *McGee v The Attorney General* (1974) IR 284.

a requirement of the marital relationship, finally emphasising the importance of autonomy and self-determination regarding procreation.

Furthermore, it was not until 1996 that Murphy J. in the case of *WO'R & EH v An Bord Uchtala*²²⁴ stressed that the subject of people living together outside of wedlock is no longer a fount of “grave embarrassment” and since, at least for a noteworthy portion of the population, the traditional marital family does not provide an apt model on which to base plans for current and future social needs, calls were eventually made for change. The fact that it took until 1996 for the Irish Courts to pronounce that cohabitation was not an embarrassing problem indicated that the social had little effect on the classical definition of the family that had been enshrined in the Constitution in 1937. In fact, as we will see, it was not until the third globalization – more specifically concerned with balancing difference - that the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 was finally enacted in Ireland.

More evidence of the failure of the Social in breaking down the dichotomy can be found in The Law Reform Commission’s 2004 consultation paper on the Rights and Duties of Cohabitees.²²⁵ It pointed out the real effects of such an exclusionary stance. For instance, cohabitees until 2010 were not afforded the same property rights as spouses. Prior to the enactment of the 2010 Act, when an unmarried couple split up, unless the other party could prove a resulting trust over the property, the family home and other assets would go to the person who was in possession of the legal title to the assets in question. To claim any rights, the other party had to establish that he/she made a contribution to the purchase price of the property with an intention of gaining a share in the title. Other contributions were considered but of course were difficult to prove generally placing women in a disadvantageous position directly resulting from the Constitution, as we will see. Say, for instance, a mother involved in a non-marital relationship decided to stay at home for the purposes of rearing the children (as is perfectly acceptable for a mother of a marital family as per the

²²⁴ *WO'R & EH v An Bord Uchtala* (1996) 2 IR 248, p. 286.

²²⁵ Law Reform Commission, Consultation Paper on the Rights and Duties of Cohabitees, LRC CP 32-2004.

Constitution²²⁶), she would gain no beneficial interest in the property in the event of a separation for the work she carried out. Additionally, we can refer to the Family Home Protection Act 1976 which excluded cohabitants from its scope of protection since they did not fall under the Constitutional definition of the family.

Another more contentious family construction in Ireland and a field significantly affected by the dichotomy and failure of national family law to consider peripheral family law issues is that of same-sex couples. It is clear from the above that “a wide range of legal privileges and obligations are triggered by the status of marriage”²²⁷ and therefore since this door was shut to same sex couples, they were discriminated against in many areas including paying higher income tax; paying higher capital gains tax; paying higher stamp duty; paying higher inheritance and gift tax if they make gifts or bequests to each other; facing difficulties in situations where a non-Irish spouse cannot easily work and live in Ireland; discrimination in pension benefits; in cases of domestic violence they are less protected by the law because they cannot claim barring orders under the Domestic Violence Act 1996; they may not be recognised as next of kin if their partner is hospitalised; the partner of a deceased gay person will have no entitlement equivalent to that of a spouse to a share in the estate of the deceased; in the case of pregnancy, the partner of the pregnant person will not be entitled to parental leave; they can adopt but only as a single person; the child of a gay couple is disadvantaged because he or she cannot legally be recognised as a child of both parents. Again, the social and its potential to deconstruct the barriers enforced by the family/market dichotomy failed to infiltrate due to the delicate, moral, traditional characteristics that were attributed to the family in Ireland. The classical definition along with the classical treatment of cases persisted.

B. UK

The UK has no written constitution and therefore the legal position of the family and the development of regulation and the socialization of it followed a slightly different

²²⁶ Article 41.2.2. The State shall, therefore endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of her duties at home.

²²⁷ Mee, John. & Ronayne, Kaye. Report on the “Partnership Rights of Same Sex Couples”, The Equality Authority, June 2000.

path. The results however, at least during the second globalization are largely the same in that, as we have already noted, until the 1960s family law as a discipline did not even exist in the UK.²²⁸ In a sense, we are dealing here with a country that seemed to embrace the philosophy of the welfare state but adopted a very cautious and slow approach to regulating and indeed establishing the family as a unit and developing a legal discipline to go along with it. It would seem that consecutive governments were reluctant to interfere with traditional family values while simultaneously eager to deal with the social effects of industrialization in constructing the welfare state. Eventually, however, the idea that the development of a welfare state and a welfare society required a coherent approach to modeling conjugal and parental relationships²²⁹ took hold and the dam was breached facilitated by the sexual revolution which, among other factors, swept away much of what was left of the classical system of domestic relations.

In terms of the constitutionalization of the family in the terms described above in relation to developments in Ireland, the absence of any human rights or constitutional charter significantly obstructed any similar development. In fact, it was not until the enactment of the Human Rights Act, modeled on the European Convention on Human Rights that the family assumed its constitutional position. This, however, is more precisely attributable to the Third Globalization to which we will come.

C. ITALY

In Italy, a particular mesh of private and public concerns similarly characterizes the family. As stipulated by C. A. Jemolo, the family constitutes “*un’isola che il mare del diritto*

²²⁸As O. Kahn-Freund stated in his opening address to the first Family Law Workshop in 1966, “*A battle has been necessary to introduce it in England.*”, cited in Mueller-Freienfels, “The Emergence of Droit de Famille and Familienrecht in Continental Europe and the Introduction of Family Law in England” *Journal of Family History*, Vol. 28, No. 1, (2003).

²²⁹Bernini, Stefania. “The Foundation of Civilised Society: Family and Social Policy in Britain and Italy between 1946 and 1960”, in Nautz, J., Ginsborg, P., & Nijhis, T. *The Golden Chain, Family, Civil Society and the State*, pp. 145/146.

può lambire, ma lambire soltanto".²³⁰ This is again due to the special dynamics of the family already recognized during the first globalization and the very local character grounded in culture and tradition of family regulation that, as we will see, persisted during the second globalization in Italy.

The principles governing the family were enshrined in the Italian Constitution in 1948 and have remained unchanged since then. Article 29 states that:

*The Republic recognizes the rights of the family as a natural society founded on matrimony. Matrimony is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family.*²³¹

Article 30 goes on to purport that:

*It is the duty and right of parents to support, instruct and educate their children, even those born outside of matrimony. In cases of the incapacity of the parents, the law provides for the fulfillment of their duties. The law ensures to children born outside of marriage full legal and social protection, compatible with the rights of members of the legitimate family. The law lays down the rules and limitations for ascertaining paternity.*²³²

Finally, Article 31 concludes by asserting that:

The Republic assists through economic measures and other provisions the formation of the family and the fulfillment of its duties, with particular consideration for large

²³⁰ (The family constitutes an island that the sea of law can lap, but lap only) See Jemolo, C.A. *La famiglia e il diritto*, in Ann. Sen. Giur. (Università di Catania, 1948), III. Additionally, we can make reference to F.D. Busnelli, *Famiglia e arcipelago familiare*, in *Riv. Dir. civ.*, 2002, 509 e ss.; Ang. D'Angelo, *Il bambino nella famiglia ricomposta. Percorsi di riscoperta della solidarietà familiare*, PhD Thesis, on file with the author.

²³¹ "La Repubblica riconosce i diritti della famiglia come società naturale fondata sul matrimonio. Il matrimonio è ordinato sull'eguaglianza morale e giuridica dei coniugi, con i limiti stabiliti dalla legge a garanzia dell'unità familiare."

²³² "E' dovere e diritto dei genitori, mantenere, istruire ed educare i figli, anche se nati fuori del matrimonio. Nei casi di incapacità dei genitori, la legge provvede a che siano assolti i loro compiti. La legge assicura ai figli nati fuori dal matrimonio ogni tutela giuridica e sociale, compatibile con i diritti dei membri della famiglia legittima. La legge detta le norme e i limiti per la ricerca della paternità."

*families. It protects maternity, infancy and youth, promoting the institutions necessary thereto.*²³³

We can deduce some interesting effects of the social consciousness from the Italian Constitution analogous to the social indents highlighted above in reference to the Irish Constitution. Most particularly, we can make reference to the State's pledge to assist through economic measures and other provisions the formation of the family and the fulfillment of its duties, with particular consideration for large families indicating increased attention to the vertical dynamics of the state/family relationship. Additionally, the stipulation at the Constitutional level in relation to the duty and right of parents to support, instruct and educate their children certainly goes some way to constitutionalizing this horizontal dimension of the private relations within the family.

That stated, let us parallel Article 29 of the Italian Constitution with Article 41 of the Irish Constitution which corresponds to a similar legal situation: the family at the receiving end of constitutional protection in Italy is that based on the marriage of a man and a woman. It is a fundamental condition that must be fulfilled before protection can be granted to spouses.

As a result of this, reluctance has been expressed in extending protection to 'new' family types, especially civil unions or same sex marriages which has indeed led to some inequalities for civil partners and for same sex couples, not only in terms of private relationships and the rights and duties normally attributed to the marital couple but also in terms of other aspects of daily life. For example, in Italy, adoption is to a large extent reserved for married couples, the only exception being that of "particular cases".²³⁴ This is substantially the result of the traditional, constitutional

²³³ "La Repubblica agevola con misure economiche e altre provvidenze la formazione della famiglia e l'adempimento dei compiti relativi, con particolare riguardo alle famiglie numerose. Protegge la maternità e l'infanzia e la gioventù, favorendo gli istituti necessari a tale scopo."

²³⁴ Art 44 l. Law No. 184/1983.

interpretation of the family rooted in the bonds of marriage²³⁵ as stipulated by Article 29.²³⁶

An interesting case was recently heard before the *Corte Costituzionale*²³⁷ in Italy. The case concerned the refusal of the local administration in Venice to recognise a same sex marriage and was referred to the Constitutional Court on the three points of law to be considered i.e. whether the recognition of a same sex marriage would be in conflict with the civil code, whether Article 3 of the Italian Constitution prohibits discrimination based on sexual orientation in cases of same sex marriage and also, the court sought guidance from the Constitutional Court regarding the gender neutral marriage stipulation in Article 29 of the Constitution. The case was declared inadmissible, citing the inappropriateness of deciding this issue in the courts and inferring that the matter is one for the discretion of Parliament reflecting the institutional choices²³⁸ that are being made by Member States. Thus, it is clear that The Social in terms of regulating the family changed very little in terms of the fundamentals of family law.

On the back of this analysis of the constitutionalisation of the family, a very significant development in terms of the external dynamics of the family and the relationship between the family and states, we can conclude that however significant, it did little to dis-embed the dichotomy save for the few examples concerning the socialization of the regulation of the family mentioned above.

²³⁵ For a discussion on the divide between de facto families and marriage see F.D. Busnelli, (2002) “La famiglia e l’arcipelago familiare”, *Rivista di diritto civile*, p. 509; F.D. Busnelli & M. Santilli, (1993) “La famiglia di fatto”, in G. Oppo, G. Cian & A. Trabucchi (eds.), *Commentario al diritto italiano della famiglia*, VI, 1, p. 757.

²³⁶ For a discussion of the constitutional family in Italy see F.D. Busnelli, (2002) “La famiglia e l’arcipelago familiare”, *Rivista di diritto civile*, p. 509; C. Grassetti, (1950) “I principi costituzionali relativi al diritto familiare”, in P. Calamandrei & A. Levi (eds.), *Commentario sistematico alla Costituzione italiana*; A.M. Sandulli, (1992) “Rapporti etico-sociali, art. 29”, in G. Cian, G. Oppo, A. Trabucchi (eds.), *Commentario al diritto italiano della famiglia*, I; M. Bessone, G. Alpa, A. D’Angelo, G. Ferrando, M.R. Spallarossa, (2002) *La famiglia nel nuovo diritto*; M. Fortino, (2004) *Diritto di famiglia. I valori, I principi, le regole*.

²³⁷ *Corte Costituzionale*, ord. 15 April 2010, n. 138.

²³⁸ Komesar, N. *Law’s Limits: The Rule of Law and the Supply and Demand of Rights*, (Cambridge University Press, 2001).

VII) Preempting The Potential Of Europe's Role

The titles above refer to the failed attempts of The Social due to the fact that it was the classical notion of the family that was constitutionalized which in fact further embedded the family/market dichotomy intensifying the family's quarantined position. That stated, through the shift from formal equality which characterized classical legal thought to social equality and moreover, via the infiltration of EU law,²³⁹ the scope of law began to shift in terms of using law to meet social needs. This can be noted as the very early stages of the third globalization that further developed into balancing and managing difference. Let us for now though, limit our analysis to the national setting and the effects of equality on family regulation.

A. IRELAND

In Ireland, it was not until legislation on equal pay was introduced in 1974 and employment equality legislation followed in 1977, both as a result of European directives, that remuneration rates between men and women were formally equalized. This, considering the male breadwinner model of the family that had been entrenched since even before the first globalization, finally began to break down the walls of the exceptionalized family in terms of equal treatment of the constitutive adult members. Moreover, the recognition of the need for equal treatment at the European level finally paved a way for the social revolution to take hold within the family in terms of both its private and institutional dynamics, catapulting peripheral family law issues to the supranational level which we will see in Part II.

The EU influence on national conceptions of equality came with anti-discrimination legislation. Anti-discrimination in itself is a very powerful tool and one that has developed into what might be referred to by now as a separate legal discipline.²⁴⁰ Moreover, it has repeatedly been referred to by the CJEU, which has

²³⁹ Which, as we will see in Part II, provided the necessary legitimizing links in terms of EU involvement in the peripheral cases which are analysed in Chapter IV.

²⁴⁰ See for example the extensive work of Schiek, D., Waddington, L., and Bell, M., (eds.) with the collaboration of Choudhury, T., De Schutter, O., Gerards, J., McColgan, A., and Moon,

played an integral role in developing the principle of non-discrimination, as a general principle of EU law by which²⁴¹ all discrimination based on nationality is prohibited by the European Union Treaties.²⁴² This was considered as a fundamental stepping-stone in removing barriers to free movement within the internal market²⁴³ and has also played a key role in Union citizenship. Initially the principle of non-discrimination was limited to sex discrimination in employment.²⁴⁴ However, this principle was gradually extended in both primary and secondary law based on the general principle of non-discrimination that the CJEU derived from the general principles of law, fundamental rights and indeed taking into consideration the common constitutional traditions of the Member States.

On the basis of this, the Treaty of Amsterdam reinforced existing provisions in the EC Treaty on preventing pay-related discrimination between men and women contained in Article 141.²⁴⁵ In fact, it went beyond this by delineating a new role for the EU in promoting equality between men and women in general in Articles 2 and

G., *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford, Hart Publishing, 2007).

²⁴¹ See Maduro, M.P., “The European court of Justice and Anti-Discrimination Law”, *European Anti-Discrimination Law Review*, Issue No. 2, Oct 2005. And also Micklitz, H-M. *The Politics of Judicial Co-operation in the EU – Sunday Trading, Equal Treatment and Good Faith* (Cambridge University Press, 2005), where the analysis in relation to non discrimination and gender equality in the UK demonstrates that the British courts have, more or less, followed the rulings of the CJEU, shaping equality developments in the UK. See also Micklitz, H-M. “Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law”, on file with the author.

²⁴² Article 12 EC. This article directly prohibits any discrimination on the grounds of nationality. It concerns the equal treatment of all citizens of member states of the EC in any member state.

²⁴³ The principle of non-discrimination applies also therefore to the free movement of goods in Article 90 EC.

²⁴⁴ *Ibid.*

²⁴⁵ The basic provision in the EC Treaty is that “Each Member State shall . . . ensure and . . . maintain the application the principle that men and women should receive equal pay for equal work”(Treaty of Rome Article 141). Following this The Equal Pay Directive (75/117/EEC) provides that “the principle of equal pay for men and women outlined in Article [141] means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration” (Article 1) and the The Equal Treatment directive (76/207/EEC) is designed to put into effect “the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training”. Further, a new amending equal treatment directive 2002/73/EC was made on 23rd September 2002 designed to modernise the Equal Treatment directive (76/207/EEC)

3²⁴⁶. In a ground-breaking new Article, Article 13, the Treaty empowered the EU to combat all discrimination based on sex, racial or ethnic origin, religion, disability, age and sexual orientation. On the basis of Article 13 of the EC Treaty, the Council adopted a directive designed to combat discrimination based on racial or ethnic origin (Directive 2000/43/EC) and a directive banning discrimination in employment on the grounds mentioned in Article 13 with the exception of sex (Directive 2000/78/EC). Protection therefore at the supranational level is quite extensive.²⁴⁷

From the national end of the spectrum, we can identify that the comprehensiveness of non-discrimination legislation in the Member States is beginning to concretise and indeed we can note more emphasis on managing difference. In Ireland,²⁴⁸ the Constitution enshrines a guarantee of equality in Article 40.1:²⁴⁹

All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

However, in the past, the Irish judiciary have been reluctant to realise the potential of this provision exemplified by the case of *Murphy v. Attorney General*²⁵⁰. In fact, many early advances in equality law have in fact seeped into the Irish legal system via cases brought before the European Court of Human Rights, and, as noted, more recently by the anti-discrimination principles emanating from the both the primary and secondary law of the European Union and case law of the CJEU. This is evident from

²⁴⁶ Article 2 EC Treaty requires Member States to promote equality between men and women. Article 3 paragraph 2 EC Treaty demands that the EC shall aim to eliminate inequalities, and promote equality, between men and women in all its activities.

²⁴⁷ We can make reference here also to the Employment Equality Act 1996.

²⁴⁸ For a comprehensive report on non discrimination in Ireland and its development, please see O'Farrell, O., Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC, Country Report, Ireland, 2008, European Network of Legal Experts in the Non Discrimination Field.

²⁴⁹ All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

²⁵⁰ *Murphy v. Attorney General* [1982] IR 241.

the domestic, secondary legislation in Ireland which consists of the Equality Acts²⁵¹, prohibiting discrimination across nine grounds, including direct and indirect discrimination,²⁵² by victimisation, harassment, instructions to discriminate, the procurement of discrimination on the grounds of race, religion, gender, age, disability, sexual orientation, marital status, family status and membership of the Traveller Community.

B. UK

In relation to the UK, it is hardly surprising given its history and the fact that it is considered the most multi-cultured²⁵³ of the Member States, that anti-discrimination legislation was introduced quite early as opposed to what we have seen in Ireland and since the UK has no written constitution²⁵⁴ it is reliant on legislation to make up the body of equality law. The Race Relations Act 1976²⁵⁵ (with subsequent amending legislation) prohibits direct and indirect discrimination on the grounds of ethnicity, colour, race, national origin and nationality in employment and occupation, access to goods and services, education, housing and the performance of public functions. The Disability Discrimination Act 1995²⁵⁶ (with subsequent amending legislation) prohibits direct discrimination and unjustified less favourable treatment on the grounds of being disabled in employment and occupation, access to goods and services, education, housing and the performance of public functions. It also requires reasonable accommodation to be made for disabled persons across these areas.

Regulations were also introduced in 2003 to give effect to the Equality Framework Directive 2000²⁵⁷ by prohibiting discrimination in employment and

²⁵¹ The Equal Status Acts 2000 and 2004 available online at:

<http://193.178.1.9/index.asp?locID=106&docID=226>

²⁵² In fact the notion of indirect discrimination was unknown in Ireland, and indeed in all Member States apart from the UK, until the supranational development.

²⁵³ The 2001 National Census highlighted that 7.9% of the total population is made up of ethnic groups.

²⁵⁴ However it has enacted the Human Rights Act 1998 incorporating the ECHR into UK law.

²⁵⁵ The Race Relations Act 1976 (RRA 1976). It applies in England, Scotland and Wales.

²⁵⁶ The Disability Discrimination Act 1995 (DDA 1995). It applies in England, Scotland, Wales and Northern Ireland (in relation to employment).

²⁵⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

occupation on the basis of religious belief or sexual orientation. Previously, discrimination on the grounds of religious belief was only prohibited if it constituted indirect race discrimination. The subsequent Equality Act 2006²⁵⁸ has extended protection against discrimination on the grounds of religious belief to education, housing, the provision of goods and services and to the performance of public functions. The Equality Act 2010²⁵⁹ has recently been passed. Its aim is to combine all of the equality enactments within Great Britain and provide comparable protections across all equality strands.

C. ITALY

In Italy²⁶⁰, the 1948 Constitution²⁶¹ includes a general principle of equality requiring equal treatment irrespective of, among other things, race and religion, and in general irrespective of “personal and social conditions”.

The first legislative enactment of advanced anti-discrimination law came in 1998 with the enactment of the Immigration Act.²⁶² This law provides for a comprehensive set of remedies against racial, ethnic and religious discrimination by forbidding direct and indirect discrimination by individuals and public authorities. The protection afforded by the act extends to discrimination on the ground of nationality.

²⁵⁸ Equality Act 2006.

²⁵⁹ Equality Act 2010.

²⁶⁰ For a comprehensive report on non-discrimination in Italy and its development, please see Simoni, A., Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC, Country Report, Italy, 2008, European Network of Legal Experts in the Non Discrimination Field.

²⁶¹ Article 3 provides that: (1) All citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions. (2) It is the duty of the republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country.

²⁶² Decreto legislativo 25 luglio 1998, n. 286 Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero.

In order to transpose Directives 2000/43/EC²⁶³ and 2000/78/EC²⁶⁴, in July 2003 two decrees, legislative decree 215/2003 and legislative decree 216/2003 were approved by the Italian government.²⁶⁵ They practically reproduce the text of each Directive. Decree 215/2003 is thus applicable, within all fields mentioned in Directive 43/2000 in relation to discrimination on ground of race and ethnic origin, while decree 216/2003 applies within the field of employment to discrimination based on religion and belief, sexual orientation, disability and age.

From this outline of relevant equality provisions in the national systems, we can see a clear shift from the formal, contract equality that characterised the first globalization to the emergence of legislation aimed at protecting certain vulnerable groups in society – generally those that had been considered deviant according to classical ideology. As we will see from national case law examples however, not even the rhetoric of equality, which, as we will see gained much momentum during the third globalization, could disconnect the family from marriage and local law.

VIII) Continued Discontent

Although attempts to infiltrate the family were made by the social, discontent with the legal situation of many “patchwork” families in relation to new structures and ideological underpinnings can be evidenced via some interesting cases that have come before national courts in recent times – some of which stem directly from migration and the cross pollination of legal traditions, religion and culture and others which already existed at the national level but have been exacerbated by migration.

²⁶³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

²⁶⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

²⁶⁵ Decreto legislativo 9 luglio 2003, n. 215 Attuazione della direttiva 2000/43/CE per la parità di trattamento tra le persone indipendentemente dalla razza e dall'origine etnica (published in Gazzetta Ufficiale n. 186 of August 12, 2003). Decreto legislativo 9 luglio 2003, n. 216 Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro (published in Gazzetta Ufficiale n. 187 of August 13, 2003).

In 2006 the High Court of Ireland, in the case of *Mc D. v L. & Anor*,²⁶⁶ found that a lesbian couple and their child, conceived via sperm donation, were a “de facto family”, opening up the possibility of expanding upon the Irish definition of the family, one that might concentrate on the substance of the family rather than its constitutional form. Shortly after this revolutionary pronouncement though, the same case was appealed to the Supreme Court of Ireland²⁶⁷ which categorically rejected the notion that there exists an institution of a de facto family in Ireland, maintaining the exclusionary ethos of Irish law.

Another interesting case that has been presented to the German Federal Constitutional Court²⁶⁸ concerned the constitutionality of a provision which allowed for “stepchild-adoption” in registered same-sex partnerships. Interestingly, the court in this case did not make reference to the sex of the parents, illustrating a significant advance with the Court basing its reasoning on the substance of the relationship within the family and by so doing untying the constitutional straightjacket within which family law is normally bound.²⁶⁹

In a similar vein, the *Corte Costituzionale*²⁷⁰ in Italy heard a case concerning the refusal of the local administration in Venice to recognise a same sex marriage. Three points of law to be considered i.e. whether the recognition of a same sex marriage would be in conflict with the civil code, whether Article 3 of the Italian Constitution prohibits discrimination based on sexual orientation in cases of same sex marriage and also, the court sought guidance from the Constitutional Court regarding the gender neutral marriage stipulation in Article 29 of the Constitution. The case was declared inadmissible, citing the inappropriateness of deciding this issue in the courts and

²⁶⁶ *Mc D. v L. & Anor* (2008) IEHC 96.

²⁶⁷ *Mc D. v L. & Anor* (2009) IESC 81.

²⁶⁸ Constitutional Court Decision, No. 1 BvL 15/09 of 10.08.2009. For a summary of the case in English, please see <http://www.non-discrimination.net/content/media/DE-17-FlashRep-BVefGzuAdop.pdf>.

²⁶⁹ On the issue of stepchild adoption, recent calls for reform of the field in Ireland are very telling in that the legislation in force currently requires mothers to adopt their own children when their new partners apply to adopt them, meaning that if a husband wishes to adopt his wife’s child from a previous relationship, the woman must give up her legal rights and adopt her own child as part of what is known as the “step-family” process.

²⁷⁰ *Corte Costituzionale*, ord. 15 April 2010, n. 138.

rather inferring that the matter is one for the discretion of Parliament reflecting the institutional choices²⁷¹ that are being made by Member States.

In addition, the mutable and immutable characteristics of the family caused by the cross pollination of diverse cultures, religions, definitions and traditions have given rise to other interesting debates. This cross fertilisation can especially be noted in relation to religion and education. One need only mention the very controversial issues of religious symbols and religious dress that have been highly publicised and reported by the media in recent times.²⁷² One particular case however deserves attention here since it involves the intricacies of religion, education, and the role of the family both in terms of its public and private dynamics. The *Jews' Free School* case²⁷³ in the UK reached the Supreme Court in 2009. It concerned a test of 'Jewishness' conducted by the admissions board of the Jews' Free School. The Chief Rabbi applied a test based on maternal descent which resulted in a boy, who was a practicing Orthodox Jew, being refused admission to a Jewish school because his mother had converted to Judaism in a ceremony not recognised by the Chief Rabbi. The majority of the Supreme Court concluded however that the JFS admission policy discriminated on the grounds of ethnic origin and was, in consequence, unlawful. We can make reference here to another similar case which came before the Dutch Supreme Court, the *Maimonides* case²⁷⁴ concerning the right to education. Similarly in this case, the admission of the young boy to the particular school was based on a test measuring the 'Jewishness' of the applicant. The school in question here, a Jewish-oriented

²⁷¹ Komesar, N., *Law's Limits: The Rule of Law and the Supply and Demand of Rights*, (Cambridge University Press, 2001).

²⁷² A very recent and interesting case can be noted here. It concerns a decision of the Administrative Court of Amsterdam which allowed for a penal deduction of welfare allowances for a Muslim man who refused to cut his beard to a maximum length of 3-5 centimeters and in a second case concerning the same man, refused to shake hands with women. The case can be found by following this link:

http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ijn&ijn=BK7175&u_ijn=BK7175 and a summary in English here:

<http://www.non-discrimination.net/content/media/NL-24-Flash%20Report%20NL-02%20Welfare%20benefits%20Muslim%20man.pdf>.

²⁷³ *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others (United Synagogue) (Appellants)*, [2009] UKSC 15.

²⁷⁴ See De Vosg, B.J. "The Netherlands Report" in Brüggemeier, A., Colombi Ciacchi & G Comandé (eds.) *Fundamental Rights and Private Law in Europe* Vol. I (Cambridge: Cambridge University Press, 2010).

Maimonides school, refused to admit the student because the student's mother was not an orthodox Jew. The court inferred from this that neither was the boy. The Dutch Supreme Court held that, although the State is obliged to respect the parents' choice of religiously or philosophically inspired educational system, the school was not in the same way obliged.

These cases highlight the phenomenon of what has already been referred to as 'intercultural' or 'international' families, in the sense that as a result of global migration, family relationships are experiencing the interminglement of religions, traditions and cultures, and difficult legal questions are arising there from. Further, we can note the case that came before the *Corte di Cassazione*²⁷⁵ in 2008 in Italy concerning the Islamic legal tradition of the Kafalah. Specifically, the question in this case contemplated whether or not the Kafalah tradition could be recognised in deciding on family reunification notwithstanding its exclusive contractual nature and the problems arising from the impossibility of judicial intervention concerning the factual situation of the wellbeing of the child and/or the capability of the guardian. In addition to illustrating issues of migration, this case also serves to highlight the intricate problems that have arisen as a result of socializing attempts.

These cases not only serve to highlight a certain restlessness in terms of national, political processes and debates on advancing family law but they also highlight the failure of the social in that the issues coming before the courts are considerably different from those that were contemplated one hundred years ago however little advance has been made either at the legislative level or the adjudication level to provide legal protection.

IX) Concluding Remarks

We began this chapter by highlighting the potential of the social in breaking down the family/market dichotomy. We conclude by highlighting its failure in that the

²⁷⁵ Sezione Prima Civile, 20 March 2008 n. 7472. In this case the *Cassazione* accepted the Kafalah tradition with a view to meeting the ends of family reunification and reversed the decision of the Ministero degli Affari Esteri.

conception of the family established by the first globalization was enshrined by national constitutions i.e. the family based on marriage, regulated locally, quarantined from the market ideology, based on tradition, custom, values, and morals. Because of this constitutionalisation, there was little room to break the dichotomy and, as we have seen, judicial interpretation of the constitutional family did little to change this. The internal dynamics remained entrenched in the sense that the male-breadwinner model remained the central focus, relationships within the family were tainted by the patriarchal approach that became internalized by Classical Legal Thought resulting in the oppression of women that was even constitutionalized as we noted in the case of Ireland. The family therefore and its members remained in the constitutional straight jacket.

However, as we noted in the end, social justice i.e. the social justice concept that was being developed at the EU level in terms of equality was beginning to take shape towards the end of Social and beginning of the Neo-formalist period in Member States. We will argue that it was not until this neo-formalist approach took hold that certain real and constructive indents were made finally attacking the impasse we have described until now.

Chapter III: Deconstructing The Classical Family

Duncan Kennedy's third globalization of legal thought embraced two contradictory trends. It maintained the social, but now without the rationalist assumption that social interests would eventually be correctly subserved by the emergence of legal rules that would optimally adjust them: they were now politicized as conflicting social interests, and the best that law could do would be to balance them in the least bad way that lawmakers could ascertain²⁷⁶

I) Introduction

Thus far, we have delineated the particular development of domestic relations from originally being housed in Blackstone's oeconomic relations to the subsequent shift in legal thinking caused by the classical theorists, particularly Savigny, leading to the notorious status/contract distinction and finally the successive transformations that occurred during the twentieth century, which, as argued here, were not enough to unshackle the family from its straightjacket therefore leading to a persistent isolation in terms of law-making and adjudication based on the firmly entrenched dichotomy that had been established by classical legal thought. We can say that the family, even after the social attack, retained its impermeable character and its quarantined position in terms of the overall structure of private law not only at the national level but also supranationally as noted in the previous chapter when family regulation was juxtaposed with the development of the master/servant relationship into labour law.

In this chapter, it is argued, as can be anticipated from the preceding chapter, that the third globalization, coined by Kennedy as neo-formalism, has the potential to break down the fortress that isolates family law and in doing so develop an understanding of the family as more than just the traditional family based on marriage but rather as a field that should take note and be regulated in accordance with the

²⁷⁶ Halley, "What Is Family Law?," May 8, 2013. p. 263.

peripheral issues that necessarily affect both the internal and external dynamics of family relations. Essentially, what we are concerned with is the possibility of dismantling the dichotomy with a view to reconstructing a more inclusive approach to family regulation and adjudication. This attempt will be conducted via the four key innovations that Halley points to in reference to the shifts that characterise the third globalization: the focus on rights; specifically rights to equality; preferably based on the Constitution; to be realised through adjudication.²⁷⁷

Bearing this in mind, in order to set the scene for Part II of this research, this chapter aims to delineate the ingredients proposed as possessing this potential we talk of. In following the format of the previous two chapters, we will firstly refine what is meant by what Kennedy terms neo-formalism, redubbed by Halley as the '*the concon consciousness*'²⁷⁸ with a view to constructing the framework within which the case law of the European Union Court of Justice can be analysed in reference to peripheral family law cases. Subsequently, we will analyse what is proposed as the EU's move towards a new version of the Social in terms of integrating anti-discrimination and fundamental rights into legal reasoning providing a new version of the social ideal. We will discuss, through some case law examples, the developing rights rhetoric. In doing so, we will precisely note where this thesis goes beyond Kennedy's neo-formalism through noting, in an introductory manner, the potential of EU citizenship as a basis for a new societal ideal and the process of identity building.

II) Neo-Formalism

Neo-formalism centres on an increased importance weighted on human and democratic rights, the rule of law, and pragmatism as the legal ideal.²⁷⁹ This third globalization, what Kennedy refers to as the contemporary period, is more concerned with recognising and managing difference.²⁸⁰ In Kennedy's own words:

²⁷⁷ Ibid. p. 264.

²⁷⁸ Ibid. p. 3.

²⁷⁹ Kennedy, "The Three Globalizations of Law and Legal Thought", p. 63.

²⁸⁰ Ibid. p. 65.

Between 1945 and 2000, one trend was to think about legal technique, in the aftermath of the critiques of CLT and the social, as the pragmatic balancing of conflicting considerations in administering the system created by the social jurists. At the same time, there was a seemingly contrary trend to envisage law as the guarantor of human and property rights and of intergovernmental order through the gradual extension of the rule of law, understood as judicial supremacy²⁸¹

In terms of rights, this period sees a shift from individual rights and property rights that characterized the first globalization, and from group rights and social rights that marked the globalization of the social consciousness to an increased focus on human rights in terms of policy analysis, policy making and, more importantly for our scope here, adjudication. Inherently linked is the transformation in terms of the notion of equality. As discernable from the preceding chapters, classical legal thought was more focused on personal freedom and the systemization of law leaving little room for notions of equality, which, in turn, was very formalistic. This evolved, however, with the rise of social law and a more socially orientated view of justice underpinned the equality ideal. In this third globalization, what we witness is the rise of equality based on anti-discrimination, born from the original EU Treaty agreement and its prohibition of discrimination based on nationality, growing into a more extensive body of non-discrimination legislation covering not only nationality but additionally sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.²⁸² The details of this development will be discussed in more detail below and will of course be illustrated in Part II via the case law of the CJEU. For now, in terms of highlighting the characteristics of this neo-formalist/concon consciousness, suffice it to say that not only has anti-discrimination provided a supranational basis for the development of new approach to equality, it

²⁸¹ Ibid. p. 22.

²⁸² Charter of Fundamental Rights Article 21: 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

has in fact been acknowledged as a field of law in its own right²⁸³ paving the way for a legal framework based on equality in consideration of social reality.

The fundamental basis then in terms of balancing and managing difference emanates as rights. Rights cut across the previous division between the social and classical legal thought because they possess the potential to give rise to more satisfactory solutions when juxtaposed with earlier outcomes pertaining to the classical period and the social. For example, we can rely on our market rights at the CJEU level to undermine or reduce the scope of social regulation - think here of the Sunday Trading case or the general critique of CJEU as undermining national social policy²⁸⁴. This rights discourse opens the door to individual empowerment via access and means of rights' enforcement. They have the potential to give voice to people who previously would not exist in classical legal thought paving the way for social inclusion and "access justice"²⁸⁵ going beyond neo-formalism.

What we witness from this rights approach is a dual collective and individual approach in terms of both the distributive and protective effects of the path rights, equality and justice have followed. We can take the example here of the right to personal autonomy deemed so imperative during classical legal thought. However, there was no concurrent recognition of unequal bargaining power. The significant shift and recognition of the need for a more rights based approach to autonomy is exemplified through the "The Unfair Contract Terms Directive"²⁸⁶ which introduces a notion of good faith when it comes to the conclusion and execution of consumer contracts in Europe. The goal is to prevent significant imbalances when it comes to the rights and obligations of consumers on the one hand and sellers and suppliers on the other. It outlines a list of examples of specific terms that may be regarded as unfair and are therefore considered non-binding for consumers. This approach therefore recognizes a situation whereby parties to contractual relationships do not always come

²⁸³ Schiek, Dagmar. "From European Union non-discrimination towards multidimensional equality law for Europe", in Schiek, Dagmar. & Chege, Victoria. *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge, 2009) p. 3.

²⁸⁴ Micklitz, *The Politics of Judicial Co-Operation in the EU*.

²⁸⁵ Micklitz, *The Many Concepts of Social Justice in European Private Law*.

²⁸⁶ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts

to the “bargaining table” as equals and in a sense one party’s inability to exercise “correct autonomy” gives rise to the need for certain protective measures. In terms of our discourse here, this right to personal autonomy, in consideration of rights in conjunction of protection of weaker parties, is considerably debilitated.²⁸⁷

It is important to state from the outset, and as we will see this becomes a fundamental element in terms of the resolution of peripheral family law cases, that this third globalization is founded on an identity-based notion of rights. We can think about rights for women and as illustrated, for consumers and other ‘vulnerable’ groups. This relates to our discourse in terms of the reconstruction of the path to asserting one’s rights. For example, during the first globalization we can safely say that the path to be followed was one based on a formalistic consensus of wills – full stop. The social, in making some moves towards the integration of social justice made room for collective considerations and utilitarian approaches to the settlement of disputes. Here, however, we see an identity-based notion of rights i.e. I am a woman and a consumer and therefore I possess certain rights, not I possess rights per se. This differs from the Social in that it reintegrates the social into the legal system at the level of arguments about constitutional rights and balancing policy and identity. What are political disputes are portrayed as legal disputes about the scope of ones rights but they take the Social into account due to their sensitivity towards potentially disadvantaged groups, for example, employment legislation in Ireland that contains anti-discrimination clauses about travellers, women, ethnic minorities etc.

At this point, let us recall the impetus of this research: the family has changed and is changing, both in structure and substance and with regards to its values and ideologies and influences and that those differences must be recognised and granted a legal basis, or in other words, legally managed. Additionally, the external dynamics of the family and its regulation with regard to its market function in terms of the internal market, in light of increased migration within the EU, has given rise to the need to discuss a new forum within which peripheral family law disputes can be settled.

²⁸⁷

Teubner, G. “Substantive and Reflexive Elements in Modern Law”, (1983) 17 *Law and Society Review* 239-285.

In relating this to the outer dimension of the figure illustrating the hypothesis of this thesis set out in the introduction, we can indeed connect the peripheral family law issues that are coming before the CJEU to this neo-formalistic/concomitant globalization in the sense that, as noted, the family in terms of both internal and external dynamics has changed significantly in recent times and consequently via rights discourse, access to diverse paths of justice have necessarily been opened. The resolution of disputes is no longer confined to the patriarchal system which certainly left no room for equality and moreover completely ignored the peripheral subtleties of family functions. In terms of the internal dynamics, not only are new family compositions on an unequal footing with traditional, constitutionally defined families at the national level but they are also facing difficulties when they migrate within Europe since their composition and structures are often not recognised by national family legal orders creating tensions when it comes to the external dynamics. The EU, even though not specifically granted competence in family law issues has been forced to use its market based tool box to resolve the peripheral family law issues arising as a result of free movement. In fact, according to Kennedy:

The European Court of Justice is neo-formalist in its interpretation of the canonical “freedoms” of movement of goods and persons in a “single market” in part, as is widely recognized, in order to drape its legislative power in the cloak of legal necessity²⁸⁸

It is argued here that this “*interpretation*” is being conducted via the “*necessary*” application of anti-discrimination and more recently fundamental rights in consideration of the fluid structure of the EU that permits one to go beyond the competences debate²⁸⁹ in delineating the impact of such judicial reasoning.

Why though has the Court taken it upon itself to do so? On which basis is the Court assuming this neo-formalistic approach to peripheral legal issues? I argue that the basis for this stems from the general neo-formalistic language assumed when the

²⁸⁸ Kennedy. p. 69

²⁸⁹ This point is made by G. Comandè in “The Fifth European Union Freedom: Aggregating Citizenship...around Private Law” Hans-W. Micklitz, *The Constitutionalization of European Private Law* (Oxford University Press, 2014) in presenting his idea that “a plurality of agents, institutions and legal dynamics is relentlessly aggregating a European Citizenship”.

Court is confronted with many new, perhaps one might say not strictly market, issues that are coming before it. As a result of this, the Court is confronted with breaking down the barriers which national states established during the first and second globalizations with a view to defending their particular understanding of the family, its nature, structure and ideological basis.

III) The Union's Move Toward Recoding The Social

Article 69 of the ECSC Treaty provided for the free movement of all workers in the coal and steel industries and also included a provision on the prohibition of discrimination. This prohibition however only applied to workers who were in possession of a recognised qualification in coalmining or steelmaking. The prohibition of discrimination in relation to access to employment was accompanied by a prohibition on discrimination based on nationality in relation to remuneration and working conditions. Subsequently, the European Economic Community came into being. The Treaty of Rome, establishing the European Economic Community (EEC), was signed in Rome on 25 March 1957 and entered into force on 1 January 1958. It led to the provisions that were adopted by Member States in giving effect to article 69 of the ECSC Treaty being repealed due to the general character of the free movement of workers contained in the EC Treaty. From the title of the Treaty and the notion of establishing a European Economic Community, we can decipher the market standpoint by which this Treaty which underlined the Treaty. It provided for the abolition of obstacles to free movement where movement necessitated the pursuit of economic activity.

With the passing of time, however, we note from both primary and secondary legislation the weakening of the economic dimension of free movement. This was essentially caused by the intensification of the integration process in Europe, a change in the objectives of the EC which, as previously mentioned, it was argued were social as opposed to solely economic and most importantly for our purposes the broad interpretation that the Court gave to both primary and secondary EC law. In relation

to secondary legislation, this change in objective is exemplified by Directive 90/364/EEC²⁹⁰ which conferred a right to enter and reside to nationals of Member States who did not already enjoy this right under other provisions of Community law provided that sufficient resources were available to the migrant and that he or she was covered by sickness insurance. The Directive also extended this right to reside to family members, defined at that time as the spouse of the applicant and their dependant descendants and dependant relatives in the ascending line of the holder of the right of residence and his/her spouse. Equivalent rights were also extended to students and retired persons through directives 93/96/EEC²⁹¹ and 90/365/EEC²⁹² respectively. Furthermore, Directive 2004/38/EC²⁹³ on the right to move and reside freely within the EU, coined ‘the Citizens Directive’, further bolstered the free movement rights of EU citizens. From these Directives, we can note the extension of the rights to move and reside beyond the scope of economic activity solely. For our purposes, these developments not only paved the way for arrival of peripheral family law cases at the supranational level but they also legitimized EU adjudication in the various fields under examination that necessarily impact family life. This will be examined in Part II. For now, we will proceed to delineate the neo-formalistic tools at the Court’s disposal aimed at integrating a new version of the Social.

A. Anti-Discrimination

All discrimination based on nationality is prohibited by the European Union Treaties.²⁹⁴ This was considered as a fundamental stepping-stone in removing barriers to free movement within the internal market²⁹⁵ and has also played a key role in Union citizenship. Initially, the principle of non-discrimination was limited to sex

²⁹⁰ Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ L 180, 13/7/1990, 26

²⁹¹ Council Directive 93/96/EEC of October 1991, OJ L 317, 18/12/1993, 59.

²⁹² Council Directive 90/365/EEC of 28 June 1990, OJ 1990 L 180, 13/7/1990, 28.

²⁹³ Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

²⁹⁴ Article 12 EC. This article directly prohibits any discrimination on the grounds of nationality. It concerns the equal treatment of all citizens of Member States of the EC in any Member State.

²⁹⁵ The principle of non-discrimination applies also therefore to the free movement of goods in Article 90 EC.

discrimination in employment.²⁹⁶ However, this principle was gradually extended in both primary and secondary law based on the general principle of non-discrimination that the CJEU derived from the general principles of law, fundamental rights, and indeed taking into consideration the common constitutional traditions of the Member States.

On the basis of this, the Treaty of Amsterdam reinforced existing provisions in the EC Treaty on preventing pay-related discrimination between men and women that were contained in Article 141.²⁹⁷ In fact, it went beyond this by delineating a new role for the EU in promoting equality between men and women in general in Articles 2 and 3.²⁹⁸ In a ground-breaking new Article, Article 13, the Treaty empowered the EU to combat all discrimination based on sex, racial or ethnic origin, religion, disability, age and sexual orientation. On the basis of Article 13 of the EC Treaty, the Council adopted a directive designed to combat discrimination based on racial or ethnic origin (Directive 2000/43/EC) and a directive banning discrimination in employment on the grounds mentioned in Article 13 with the exception of sex (Directive 2000/78/EC). This is not to mention the equality provisions now enshrined in the Charter to which we will come below. Protection, therefore, at the supranational level is quite extensive.

B. Fundamental Rights

When the EU was created, the original treaties did not contain any reference to the protection of human rights as it was thought that the creation of an internal market

²⁹⁶ Ibid.

²⁹⁷ The basic provision in the EC Treaty is that "Each Member State shall . . . ensure and . . . maintain the application the principle that men and women should receive equal pay for equal work"(Treaty of Rome Art 141). Following this The Equal Pay Directive (75/117/EEC) provides that "the principle of equal pay for men and women outlined in Article [141] means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration" (Art 1) and the The Equal Treatment directive (76/207/EEC) is designed to put into effect "the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training" . Further, a new amending equal treatment Directive 2002/73/EC was made on 23rd September 2002 designed to modernise the Equal Treatment Directive (76/207/EEC).

²⁹⁸ Art. 2 EC Treaty requires Member States to promote equality between men and women. Art. 3 para. 2 EC Treaty demands that the EC shall aim to eliminate inequalities, and promote equality, between men and women in all its activities.

would not require recourse to a body of human rights provisions. However, on recognition that encouraging the free movement of persons, goods and services essentially lead to more than an efficient functioning of the market, the European Court of Justice as it was then, increasingly decided cases with human and fundamental rights aspects. In an effort to render effective a more rights-based approach and in order to substantiate EU citizenship, the EU Charter of Fundamental Rights was proclaimed in 2000, the content of which reflects significantly the European Convention on Human Rights and more generally protection afforded to nationals of Member States by their various Constitutions. The Charter, originally a declaration of compliance with human rights, became a legally binding document in 2009 when the Lisbon Treaty entered into force.

The development of these legal tools and their interpretation by the Court indicates, as we will see, the general assumption of a rights rhetoric at the supranational level which in turn paves the way for neo-formalist interpretation focused on managing the paradigm shift from internal market concerns to globalization and the need to respond to social concerns²⁹⁹ as we will see from the following case law analysis that serves to delineate the permeation of rights discourse, rhetorical or not,³⁰⁰ in the early case law of the court.

IV) Shifting Interpretations...

Kennedy's third Globalization talks of balancing difference. This, I argue, is being played out via the more general rights rhetoric that is developing at the EU level. Originally, the idea behind the European Economic Community revolved around establishing an internal market according to which legally relevant principles would enjoy mutual recognition and regulatory barriers would be demolished so as to provide an optimal forum within which the goals of a properly functioning market could be achieved.³⁰¹ On the surface, these economic aspirations remain the parole

²⁹⁹ Micklitz, *The Many Concepts of Social Justice in European Private Law*, p. 62.

³⁰⁰ This will be dealt with in more detail in Part II.

³⁰¹ Collins, H. *The European Civil Code: The Way Forward*, (Cambridge University Press, 2008) p. 22.

espoused by Europe and its institutions, which, it may be argued camouflages its reasoning with the language of economic freedoms. However, on close examination of the treaties and case law, we can discern a certain deflection from the formal economic requirements. Much evidence of the Union's shift in this direction can be provided here.

A. Economic to Social

First of all, it is clear from the changes introduced by the Treaty on the European Union, which at the time was considered as a merely a symbolic move, that the supranational institutions' aspirations have shifted from an economic to a more politically and socially orientated objective. The case law examination of the citizenship provisions that follows, by way of introduction below and more profoundly in the direction of family regulation in Part II, clearly exemplifies that the move was not just a symbolic one. In fact, it can be argued that the introduction of EU citizenship provisions, even though ancillary to national citizenship, have proven to provide not only a path that individuals can follow with the purpose of exercising participation in the EU but also it has provided the Court with an avenue through which the EU's social agenda can be expressed. In fact, I argue that it is via the Citizenship provisions that the Court has entered the sphere of the family via peripheral issues, finally making some indents to the family/market dichotomy. We will see that this argument, resulting in the development of a new societal ideal, in fact goes well beyond the neo-formalistic language related to the interpretation of anti-discrimination provisions and fundamental rights.

B. Protecting Fundamental Rights

Secondly, the Union's pledge to protect fundamental rights has obviously impacted the Court's interpretation and reasoning of cases. This impact has and is expected to intensify in the future. The pledge referred to here is contained in the Treaty of the European Union according to which the Union is based on the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights. The Charter of Fundamental Rights of the European Union, the aim of which is to strengthen the protection of fundamental rights by making those rights more visible

and more explicit for citizens, provided another important stepping stone in the fundamental rights area. It collates personal, civic, political, economic and social rights into one all-encompassing document which has become legally binding on the Union since the entry into force of the Treaty of Lisbon. In addition to this, the Treaty of Lisbon also establishes the legal basis for the Union's accession to the European Convention on Human Rights essentially meaning that the Strasbourg Court will assume competence to review the acts of the EU institutions.

However, even before these legislative progressions were set in motion, the Court had already made inroads into the area of fundamental rights reflecting a general trend to incorporate them into the jurisprudence of the Union. Indeed, this general trend can even be witnessed in the area of private law³⁰² in which the Court has tended towards a more frequent reference to fundamental rights. To take some early judgements by way of example, the Court, in the case of *Erich Stauder v City of Ulm*³⁰³ recognised that fundamental human rights are indeed enshrined in the general principles of Community law and are within the scope of protection granted by the Court. Subsequent recognition can be noted in the case of *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*³⁰⁴ in which the court furthered its position in stating that respect for fundamental rights forms an *integral* part of the general principles of law protected by the CJEU and the protection of such rights must be ensured within the framework of the structure and objectives of the community. Other cases including *Omega*³⁰⁵ and *Schmidberger*³⁰⁶ denote a

³⁰² G. Brüggemeier, A. Colombi Ciacchi & G Comandé (eds.) *Fundamental Rights and Private Law in Europe* Vol. I (Cambridge: Cambridge University Press, 2010), G. Brüggemeier, A. Colombi Ciacchi & G Comandé (eds.) *Fundamental Rights and Private Law in Europe* Vol. 2 (Cambridge: Cambridge University Press, 2010), C. Mak, *Fundamental Rights in European Contract Law. A comparison of the impact of fundamental rights on contractual relationships in Germany, Italy the Netherlands and England*, (Kluwer Law International, 2008); Jan M. Smits. "Private Law and Fundamental Rights: A Sceptical View" in T. Barkhuysen and S. Lindenbergh. *Constitutionalisation of Private Law* (Leiden-Boston: Brill, 2006). 9-22. Available at: http://works.bepress.com/jan_smits/5.

³⁰³Case C-29/69 *Erich Stauder v City of Ulm*.

³⁰⁴Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

³⁰⁵Case C-36/02 *Omega Spielhallen – und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*.

³⁰⁶Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*.

considerable shift from a strict interpretation of internal market objectives to perhaps a more socially orientated stance by the Court.³⁰⁷

C. Equal Treatment

Thirdly, the Union's strife for and development of equal treatment, described below, has led to a significant body of anti-discrimination law in Europe. What is more pertinent for our purposes are the interesting case law developments, particularly in the private law sector.³⁰⁸ Take for instance the *Feryn*³⁰⁹ case in which the Court ruled that a public declaration by an employer stating that he would not employ persons of a certain ethnic or racial origin, constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2) (a) of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. We can also make reference to the *Wood*³¹⁰ case. Here, the Court held that EU law prohibits discrimination on the grounds of nationality which would result in citizens of other Member States, who live and work in France, being excluded from receiving compensation from a French State fund intended to help victims of crimes. To take one more example, we note the case of *Mangold*³¹¹ concerning age discrimination within the scope of the Framework Employment Directive³¹². The case illustrates the expansive approach granted to the principle of equality by the CJEU, even though the period for transposing the Framework Employment Directive into national law had not yet expired, the CJEU ruled that the general principle of equal treatment in EC law prohibited a national measure from

³⁰⁷ On this however, see also the *Viking* (Case C-438/05) and *Laval* (Case C-3341/05) cases.

³⁰⁸ Among some of the most interesting cases concerning non discrimination, please see Case C-144/04, *Werner Mangold v Rüdiger Helm*; Case C-555/07 *Seda Kucukdeveci v Swedex*; Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*; Case C-164/07 *James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions*; Case C-148/02 *Carlos Garcia Avello v État belge*; Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul v Leonhard Matthias Grunkin-Paul and Standesamt Stadt Niebuß*; Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*. See also Eriksson, A., "European Court of Justice: Broadening the Scope of European Non Discrimination Law", 7, *International Journal of Constitutional Law*, 2009.

³⁰⁹ Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*.

³¹⁰ Case C-164/07 *James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions*.

³¹¹ Case C-144/04 *Werner Mangold v Rüdiger Helm*.

³¹² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

discriminating on the basis of age. Therefore, we note that indeed even the CJEU has embarked on the quest of balancing difference.

In fact, earlier intervention by the CJEU would seem to have enhanced the neo-formalist based reasoning, especially when we consider the wide interpretation, or as some say the manipulation,³¹³ the Court gave to Article 141 which provided for equal treatment between men and women in the area of remuneration. It is not my intention here to deal with the so-called competence creep³¹⁴ or the issue of legitimacy.³¹⁵ Rather, it suffices to bring to attention at this point that the scope of Union law has shifted.

We have noted the change in the scope of Union law and the basis for it. However, what has this meant in reality? This can once again be examined through a neo-formalist interpretation of developments in terms of the master/servant relationship.

D. From Master/Servant To Modern Employment

As we noted in the previous chapter, the social transformed contractual relationships between private parties. The result of the third globalization goes even further. In fact, as suggested by Collins,³¹⁶ the extensiveness of social regulation in the field of employment law now tends to overshadow its private law origins. In fact, anti-discrimination and the constitutionalization of equal treatment at the EU level has elevated these legal relationships to an inconceivable level from the perspective of

³¹³ Pollicino, O., “Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self Restraint”, *German Law Journal*, Vol 5, No. 3, 2004.

³¹⁴ For this please see, Maduro, M.P. “Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism”, *European Journal of Legal Studies*, Vol. 2, No. 2, 2007; Giorgi F., & Triart N., “National Judges, Community Judges: Invitation to Journey Through the Looking Glass – On the Need for Jurisdictions to Rethink the Inter-Systemic Relations Beyond the Hierarchical Principle”, *European Law Journal*, Vol 14, No. 6, 2008; Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, Clarendon, Oxford, 1993, pp43-85; Herzog R., & Gerken L., *Stop the European Court of Justice*, available at <http://euobserver.com/9/26714/?rk=1>

³¹⁶ Collins, Hugh. “Justifications and Techniques of Legal Regulation of the Employment Relation”, in Collins, H., Davies, P., & Rideout, R. (eds), *Legal Regulation of the Employment Relation* (2000) 2,p. 7.

classical legal thought³¹⁷. This process began when the ECJ developed its innovatory concept of direct effect permitting the enforcement of individual rights enshrined in the treaties in national courts. This position was confirmed in terms of equal pay in *Defrenne v SABENA*³¹⁸ effectively altering the concept of contractual autonomy shifting the contours of private law which would eventually develop into a field of law not only subject to the Defrenne logic but which would also be subject to the unwritten, hotly debated general principles of EU law which include the principle of equal treatment and respect for fundamental rights. Juxtaposing this neo-formalist position of the Court with the original scope of the Treaties informatively exemplifies the extent to which the aspirations of the EU have developed:

*...it must be concluded that the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental right.*³¹⁹

Suffice it to say that via the development from equal pay to a genuine concept of equal treatment expressed via the general principles and fundamental rights, significant steps have been taken by the court altering the dynamics of private law and reintegrating the social in terms of balancing rights.³²⁰

V) ...And Beyond

EU Citizenship adds a new layer in our attempt to reveal the effects of the third globalization on the family – a layer that – as is argued here – goes beyond the Kennedy’s neo-formalism in constructing a societal ideal according to which private law and family law are coming closer together. The case law in this direction implies a connection to the EU that was perhaps inconceivable when the internal market was

³¹⁷ Bell, Mark. “Constitutionalization and EU Employment Law” in Micklitz, H.W. *The Constitutionalization of European Private Law*.

³¹⁸ C-149/77 - *Defrenne v Sabena*

³¹⁹ Case 50/96 *Deutsche Telekom AG v Lilli Schröder*

³²⁰ The Schmidberger case acts as an example here. This line of case law will be developed in more detail below.

established by way of attempting to create a social sphere within which the EU can extend its powers of regulation.

The introduction of EU citizenship by the Maastricht Treaty in 1992 was considered by many as merely a symbolic move by the Union and one which would not confer many substantive rights on its addressees.³²¹ This widely held belief stemmed from the fact that the Treaty itself made citizenship of the Union depend on nationality of a Member State stating that “*Citizenship of the Union shall complement and not replace national citizenship*”. Therefore the benefits of Union citizenship from the very beginning were always to be enjoyed as dependent on individual legal systems and nationality of Member States. This restrictive view was also supported by the fact that free movement and residence rights had already been extended beyond economic connotations by secondary law as noted above.³²²

The notion of citizenship, however, has to some extent paved the way for the emergence of the ‘European Social’ and in fact, has permitted the European institutions to take on a role which national states shied away from during the second globalization in rejecting the assumption of the role of social engineers in the area of family law. The Treaty of Maastricht lessened the economic connotations that had provided for the foundational ethos of the Union. Article 17 of the TEU (now Article 20 of the Treaty on the Functioning of the European Union) states:

1. *Citizenship of the Union is hereby established. 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.*
2. *Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties.*

And Article 18.1 (now Article 21.1 of the TFEU) provided:

³²¹ With this said, the Treaty did specifically confer some substantive rights on those eligible for Union citizenship, such as the right to vote in Parliament elections, the right to petition and the right to a reply in the language of a request.

³²² Council Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity.

1. *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.*

These provisions at first sight may not seem so far-reaching especially considering that the rights to move and reside had already been extended to non-economic actors through secondary law as noted above. Therefore, the innovation of European Citizenship did not immediately herald major practical consequences. However, the Court has since repeatedly pronounced that Union Citizenship is intended to be the *fundamental status*³²³ of nationals of the Member States. Moreover, for our purposes, it is as a result of the Citizenship provisions that many of the peripheral family law cases explained above have come before the CJEU. Also, if we look to the history of the Union, and of course after an intense examination of the case law of the Court, we can demarcate the exact scope of these measures. On closer examination, the importance of the citizenship provisions can be deduced from the fact that movement and residence moved from a legislative footing to a Treaty footing, resulting in significant consequences indeed, as we will see.

The case of *Martinez Sala*³²⁴ was heralded as the first significant pronouncement concerning EU citizenship. Indeed the case itself points to the legal avenue peripheral family law cases are coming before the Court. It concerned a Spanish woman who was resident in Germany who was unemployed and claiming child benefit allowance. An issue arose in relation to the German authority's refusal to grant the benefit based on the fact that she did not possess a valid residence permit at the time of the claim. Essentially, the Court held the residence requirement to be a limiting condition. In reliance on Article 17 and 18 of the EC Treaty and on the principle of non-discrimination based on nationality contained in Article 12 of the same, the Court held that nationals of a Member State could rely on their European citizenship for protection against discrimination on grounds of nationality by another Member State.

³²³ Emphasis added.

³²⁴ *Martinez Sala v Freistaat Bayern* Case C-85/96.

This case is significant for our purposes since, by including the situation of Mrs. Martinez Sala within the scope of application of the EC Treaty, the ECJ enlarged that scope in two respects. First, the simple fact that Mrs. Sala was a Union citizen lawfully residing in another Member State was enough for her to fall under the scope of application of the EC Treaty. Secondly, the ECJ ruled that a benefit previously granted only to workers should also be granted to non-economically active persons in the EU. We note also from this case the first steps of the Court in assuming tentative responsibility concerning the allocation of welfare benefits³²⁵ to migrating families in Europe.

It is important to note, however, that there was a certain degree of reluctance on the part of the Court, exemplified by the *Konstantinidis*³²⁶, *Boukhalfa*³²⁷ and *Shingara*³²⁸ cases, to use the citizenship logic to grant benefits to European citizens. Indeed, for some time the Court largely reverted to economic reasoning even though the Advocates General in these cases specifically relied on the citizenship provisions. The Court in all three cases refused to follow this logic and based its judgments on economic considerations, clinging to the pre-Maastricht economic ethos of the Union.

The *Grzelczyk*³²⁹ case signified a significant stepping stone in the evolution of EU citizenship and we note from it the development of a general principle in the Court's jurisprudence, i.e. that discrimination on ground of nationality will not be

³²⁵ The Trojani case is another important case in the area of granting welfare benefits and in developing the relationship between non-discrimination and European Citizenship in the realm of social security benefits. The case concerned a French national who was lawfully residing at a Salvation Army hostel in Belgium. While residing there, he undertook various jobs amounting to approximately 30 hours per week in return for his board, lodging and an allowance of 25 euro per week. He applied for the Belgian minimex subsistence allowance which was granted to those with inadequate resources. This allowance however was refused on the basis that Mr. Trojani was not of Belgian nationality nor was he a worker as defined by Council Regulation 1612/68. The ECJ however, in following the reasoning in Martinez Sala, was of the opinion that he was exercising his right under Article 18(1) EC Treaty and therefore came within the scope of the citizenship provisions. As a result, the Court held that as a citizen of the EU Mr. Trojani could rely on Article 12 of the EC Treaty to claim the minimex benefit.

³²⁶ In this case the court refused to follow the Opinion of AG Jacobs that migrants should always be protected by fundamental rights as general principles of Community law. *Konstantinidis v Stadt Allensteig und Landratsamt Calw Ordnungsamt* Case C-168/91.

³²⁷ *Boukhalfa v BRD* Case C-214/85.

³²⁸ *Shingara v Radiom*, Case -65 and 111/95

³²⁹ *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-a-Neuve* Case C-184/99.

permitted against EU citizens who have exercised their free movement rights. The applicant in the case was a French national who had studied in Belgium for three years and who had also worked there so as to sustain himself financially. In his final year, Mr. Grzelczyk ceased to work so as to concentrate on his studies and therefore applied for the minimex allowance. Similar to the previous case, he was refused the allowance based on the fact that he did not fulfill the conditions set out in Belgian law, i.e. in order to claim the allowance one must either be of Belgian nationality or a worker. The question referred to the Court centered on whether or not the refusal was contrary to the EC Treaty provisions on citizenship in combination with the prohibition of discrimination on grounds of nationality. The Court essentially held that Articles 12 and 18 EC precluded preconditions such as those in the case at hand. The importance of the decision for our purposes lies in the fact that it recognized expressly that EU citizenship permits nationals of other Member States lawfully residing in the host Member State to access social benefits.

*Bidar*³³⁰ is another important development in area of citizenship, particularly in relation to student's rights. Essentially, this case concerned the application of a student of French nationality for a maintenance loan in the UK. Mr. Bidar's application was refused on the ground that he was not settled in the UK: settled meaning that he would have had to be living in the UK for four years for purposes other than full-time education. The question referred to the Court was whether a student applying for a student loan in the UK could invoke the principle of non-discrimination on grounds of nationality laid down in Article 12 EC Treaty. In response to this question, the ECJ held that a student, being a resident in a host Member State, could rely on the right of equal treatment contained in Article 12 EC Treaty. The Court stressed that a change in a student's financial position cannot automatically adversely affect his/her right of residence. In consideration of this, the Court held that it would be unlawful to deny a French citizen access to student loans. The Court did however note that a Member State could legitimately impose certain conditions on the success of the application such as integration into the host Member State therefore implying a minimum residence period.

³³⁰ *Bidar v London Borough of Ealing* Case C-209/03.

In the *D’Hoop*³³¹ case, the Court had to consider the case of a return migrant. Ms. D’Hoop was a Belgian national who, after completing her baccalaureate in France, returned to Belgium to continue her studies. On completion of these studies, she requested a tide over allowance which was available in Belgium for students in the process of entering the labour market for the first time. The Belgian national employment office refused the allowance on the basis that Ms. D’Hoop had completed her secondary education in France. This decision was appealed by the applicant to the *Tribunal du Travail de Liege* which referred a question to the ECJ. Specifically, the court requested a judgment on whether Community law precludes a Member State from refusing to grant the tide-over allowance to one of its nationals since that national completed her secondary education in another Member State. The Court ruled that the Belgian legislation did in fact contravene Article 12 and 18 of the EC Treaty demonstrating once again the strength of these provisions when applied simultaneously and moreover the assumption of a sort of welfarist role by the Court based on the citizenship and non-discrimination provisions.

In fact, the Court has also assumed this role in relation to job seeker’s allowance. The *Collins*³³² case concerned an applicant who had dual Irish and American nationality who moved to the UK with a view to seeking employment there. After one month he applied for jobseeker’s allowance which was refused based on the fact that he was not an habitual resident in the UK. The ECJ, however, was of the opinion that the applicant in fact fell within the scope of application of Article 39 EC Treaty as a national of a Member State and therefore was entitled to equal treatment in seeking employment.

Another development in relation to students took place in 2005 when the *Ioannidis*³³³ case was referred to the Court. After completing his secondary education in Greece, Mr. Ioannidis moved to Belgium in 1994 where he undertook studies and obtained a diploma in physiotherapy. After completing a vestibular course in France in 2001 he returned to Belgium and applied for the tide-over allowance. The

³³¹ *D’Hoop v Office Nationale de l’Emploi* Case C-224/98.

³³² *Collins v Secretary of State for Work and Pensions* Case, C-138/02.

³³³ *Office national de l’emploi v Ioannis Ioannidis*, Case C-258/04.

application was refused. The question referred to the Court was whether it is contrary to Community law to refuse the tide-over allowance to a national of another Member State on the ground that he completed his secondary education in another Member State. In response to this question, the ECJ stated that nationals in another Member State seeking employment indeed fall within the scope of Article 39 EC Treaty and therefore can rely on the prohibition on discrimination.

In fact, from this selection of case law we note the emergence of a *Grundfreiheit ohne Markt*,³³⁴ a de-economisation of the scope of the Union. The initial skepticism in relation to the novelty of EU citizenship no longer stands when we look to the actual role the Court is assuming in the allocation of social advantages, which prior to the introduction of EU citizenship were confined to the competence of Member States.

In terms of fundamental rights and their impact, in the years before the Charter became legally binding, there was some confusion as to the purpose, scope and effect of the instrument. For many years, the Court and Advocates General has made specific reference to the European Convention on Human Rights and the general principles of EU as sources of fundamental rights protection in the EU. The Charter, even though it remained non-binding at this point, provided the CJEU with an additional instrument, a toolbox of rights that could be considered and utilised by the Court as readymade general principles. In effect, as we will see from the pre-Lisbon case law examples, the Charter was used an instrument for identifying fundamental rights as general principles of Community law. As set out in *Parliament v. Council*:

the principal aim of the Charter, as is apparent from its preamble, is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and

³³⁴ Wollenschlager, F. “A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration”, *European Law Journal*, Vol. 17, No. 1, January 2011, pp. 1-34

*by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights.*³³⁵

This is particularly noticeable in reference to cases concerning anti-discrimination. As we have already pointed out, the EU institutions have increasingly broadened the scope of equality of treatment. With specific reference to the Charter, although the *Mangold*³³⁶ case did not explicitly mention it, it did provide an inkling of the direction into which the Court planned on going. In fact, this direction was again bolstered in the subsequent *Küçükdeveci*³³⁷ case in which it was made clear by the Court that:

Article 6(1) TEU provides that the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties. Under Article 21(1) of the charter, '[a]ny discrimination based on ... age ... shall be prohibited'.³³⁸

Both cases, although not very forceful in their use of the Charter (in fact *Mangold* made no reference to it at all) did, however, bring into perspective the persuasive character that the Court granted to the Charter coupled with the general principles by anticipating direct horizontal effect to the general principles.³³⁹ This step anticipated the post-Lisbon character that the Charter was to assume i.e. that of having the same legal value of the treaties.

VI) Concluding Remarks

From the above it is clear that a shift in legal reasoning has occurred. The third globalization has brought the rights discourse under spotlight having unprecedented effects on the structure and contours of private law as illustrated via the development of the master/servant relationship into one of employment law overlain with social ideals. The constitutionalization of private law at the EU level and the elaboration of general principles by the CJEU have underpinned the Union's reintegration of the

³³⁵ Case C-540/03 Parliament v. Council [2006] ECR I-05769, par. 38.

³³⁶ Case C-144/04, *Werner Mangold v Rüdiger Helm*.

³³⁷ Case C-555/07 *Seda Kucukdeveci v Swedex*.

³³⁸ Ibid. Para 22.

³³⁹ The Court did so based on the *Defrenne* doctrine.

social and a shift towards a more rights-based and socially orientated Union. Moreover, EU Citizenship makes further advances in creating a civic space within which the rights of nationals of Member States are provided with further protection. Based on these advances, I argue that the Court deconstructs the family/market dichotomy via the peripheral issues that it is being presented with. This argument will be played out in Part II to which we now turn.

Part Two: The Family Coming of Age

I) Introduction

This part of the thesis deals with issues relating to the family that have come to the fore since the creation of the European Economic Community. It correlates with the third globalization, i.e. neo-formalism, described as the globalization of a rights-based society. Its peculiarities, as noted in the previous chapter, include an increased importance weighted on human and democratic rights, the rule of law, and pragmatism as the legal ideal.³⁴⁰ In this era, Kennedy outlines that human rights have replaced the role played by private rights in the Classical Legal Thought globalization and the socially oriented fundament of the second globalization. We exemplified this via the rise of modern employment law and its treatment at the EU level and with regard to the development of the general principles of EU. The third globalization, what Kennedy refers to as the contemporary period, is more concerned with recognising and managing difference.³⁴¹

The previous chapter in fact acts as a sort of bridging point. It paved the way for a discussion of the principal hypothesis of this thesis which rests on the impetus that the regulation of the family is no longer suited to traditional methods. Families have shifted from the male breadwinner model to the dual earner model. In fact the gender division in care work³⁴² has lessened and instead we are provided with an adult worker model.³⁴³ The conception that the main purpose of marriage is that of procreation has been put into question³⁴⁴. In society, there are many couples, both married and co-habiting who freely choose not to procreate and many couples who

³⁴⁰ Kennedy, “The Three Globalizations of Law and Legal Thought”, p. 63.

³⁴¹ Kennedy, “The Three Globalizations of Law and Legal Thought”, p. 65.

³⁴² In the UK, for example, a spouse or partner of the woman (including same-sex relationships) may request a two week paid (at a fixed rate) paternity leave, demonstrating the law’s recognition of an increase of gender neutral care work in the home.

³⁴³ Lewis, J. “The Changing Context for the Obligation to Care and Earn”, in Maclean, M. (ed.), *Family Law and Family Values*, (Hart Publishing, 2005).

³⁴⁴ Illustrated above by the example of Ireland and its lifting of the ban on contraceptives.

simply cannot procreate. Moreover, many people procreate outside the bonds of marriage³⁴⁵ illustrating that marriage is not a necessary condition for procreation and vice versa.³⁴⁶ This is largely due to the developed society we now find ourselves living in and the influence that self-determination has in the private sphere.³⁴⁷ Even adoption law now refutes the presumption that procreation goes hand in hand with marriage. In Ireland³⁴⁸, for example, it is possible for a single person to adopt if the Adoption Board considers it desirable, considering the welfare of the child as its paramount condition. Indeed, more extensive rights regarding adoption are evidenced in the UK where adoption rights for homosexuals are in fact specifically legislated for.³⁴⁹ In Italy, adoption remains to a large extent reserved for married couples. However, there are exceptions based on the best interests of the child.³⁵⁰ In addition,

³⁴⁵ According to the 2006 census in Ireland there were 152,500 lone parent families in Ireland. See <http://www.cso.ie/>. In fact, a recent poll conducted by the BBC in the UK demonstrates that marriage levels in Britain are at an all-time low. For every three weddings there are now two divorces - the highest rate in Europe. Moreover, cohabitation has risen 64% in a decade, with almost half of children now born outside wedlock inherently signifying a decrease of births within the bonds of marriage. The complete results of the poll are available online at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/05_11_07familypoll.pdf

³⁴⁶ Abrams, K. & Brooks, P. (2009) "Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation", *Yale Journal of Law and the Humanities*, Vol. 21, No. 1

³⁴⁷ See Brüggemeier, G., Colombi Ciacchi, A., & Comandé G. (eds.) *Fundamental Rights and Private Law in Europe* Vol. I (Cambridge: Cambridge University Press, 2010); Brüggemeier, G., Colombi Ciacchi, A., & Comandé, G. (eds.) *Fundamental Rights and Private Law in Europe* Vol. 2 (Cambridge: Cambridge University Press, 2010)

³⁴⁸ In Ireland, adoption is governed by the Adoption Acts, 1952, 1964, 1974, 1976, 1988, 1991 and 1998.

³⁴⁹ See article 49 and 144 of the Adoption and Children Act 2002. For a European picture see Baraldi, M.B., (2007) "Different Families, Same Rights? Freedom and Justice in the EU: Implications of the Hague Programme for Lesbian, Gay, Bisexual and Transgender Families and their Children", *ILGA Europe*, p. 15, Box 2 outlining that Belgium, Denmark, Germany, the Netherlands, Spain, Sweden and the UK provide for second parent adoption whereas Belgium, the Netherlands, Spain, Sweden and the UK all allow for joint adoption.

³⁵⁰ Art 44 l. Law No. 184/1983

scientific advances,³⁵¹ for example, artificial insemination,³⁵² have reduced procreation barriers faced by lesbian couples and single people.³⁵³

We have also witnessed a change in attitude in relation to abortion³⁵⁴ and divorce.³⁵⁵ Many atypical family forms have emerged and have to some extent, in some countries, even been recognised by the law, for instance same sex civil partnerships,³⁵⁶ the decriminalisation of homosexual activity³⁵⁷ of heterosexual non-marital cohabitation³⁵⁸ and the right to marry for transsexuals.³⁵⁹ In general, there has been a decrease in the characterisation of cohabitation as sinful and a correlating desecralisation of marriage.³⁶⁰ As opposed to the patriarchal attitude towards the family during the first globalization, we note more of an emphasis on gender-neutral parenting. In France for example, the term “father’s” authority has been replaced by

³⁵¹ In general here see Shapiro, J. “Changing Ways, New Technologies and the Devaluation of the Genetic Connection to Children” in Maclean, M. (ed.), *Family Law and Family Values*, (Hart Publishing, 2005).

³⁵² Waldman, E.A. (2006) “What Do We Tell the Children?”, *Capital University Law Review*, Vol. 35, No. 2.; TJS Legal Studies Research Paper No. 1020095, discussing the rights of children in relation to Assisted Reproductive Technologies (ART) that are now offering an array of ways to parenthood for infertile heterosexuals, gay and lesbian couples, and singletons of varying sexual preferences.

³⁵³ This depends of course on whether or not national legislation provides for artificial insemination for same sex couples or single people. There is no Irish legislation dealing with assisted reproduction as yet. The Irish Medical Council’s ethical guidelines do not specify that unmarried partners or same sex partners are excluded from availing of fertility treatments. The Human Fertilisation and Embryology Act, as amended in 2008, in the UK extends clear legal rights to lesbian couples permitting fertility treatment and indeed granting parental rights and responsibilities. The actual moral implications of this will not be discussed here. For an overview see E.A. Waldman, *ibid.* Suffice to say that scientific advancements have lead to a situation in which marriage is not necessarily a precondition of procreation.

³⁵⁴ Abortion however is another delicate issue that reflects the intricacies of institutional decision making. See Bradley, D. “Convergence in Family Law: Mirrors, Transplants and Political Economy”, *Oxford University Comparative Law Forum*, 2 2001.

³⁵⁵ Even in Ireland, where there was much opposition, divorce was finally legislated for after a Constitutional Amendment in 1996; albeit in a restricted form.

³⁵⁶ This is evident in many Member States, for example, the UK has enacted the Civil Partnerships Act 2004 which has been commended for its comprehensiveness in granting rights comparable to marriage to same sex couples. Spain in 2004 opened the doors of marriage to same sex couples.

³⁵⁷ The long overdue decriminalisation of homosexuality in Ireland didn’t occur until 1993.

³⁵⁸ See Cottier, M. “Registered Partnerships for Same-Sex Couples in Switzerland: Constructing a New Model of Family Relationships”, in Maclean, M. (ed.), *Family Law and Family Values*, (Hart Publishing, 2005).

³⁵⁹ *Christine Goodwin v the United Kingdom*, Application No. 28957/95.

³⁶⁰ Reflected in the increase in the number of co-habiting couples, see note 57 above.

the term “parental” authority.³⁶¹ These gender-neutral parenting developments³⁶² can also be seen in the case law of the CJEU which will be described below.

This is both due to and a result of families at the national level moving beyond the discontent concerning their integration in the overall legal structure that became apparent during and in the aftermath of the social. In fact, this – coupled with the construction of a path via the preliminary reference procedure to the CJEU – has catapulted peripheral family law issues to the supranational level.

II) The Premise

In consideration of the above, one might state that a certain gradual demoralisation of the family has occurred at the national level leaving the regulation of the same in a sort of limbo, as it becomes de-exceptionalized. This has occurred in parallel with the shift that we have already noted at the EU level from market-based reasoning to a more socially inclined, rights-based approach legally integrated via adjudication at the EU level – the neo-formalist langue.

In deciphering this in terms of debunking the family/market dichotomy, Part II will be in Chapter IV with a case law analysis of the Court’s early conception of the family before taking our four categories of peripheral family law issues and closely examining the reasoning of the Court in resolving the issues that have come before it as a result of free movement and the dissolution of geographic boundaries between Member States. Chapter V will further this analysis in investigating the influence of fundamental rights especially considering the EU’s accession to the European

³⁶¹ Loi du 22 juillet, 1987. See Cardia, Vonèche L. & Bastard, B. “Can Co-Parenting be Enforced? Family Law Reform and Family Life in France”, in Maclean, M. (ed.), *Family Law and Family Values*, (Hart Publishing, 2005).

³⁶² We can also note here a very interesting case *Roca-Alvarez v Sesa Start España ETT SA*. The Court here was asked to decide whether it is acceptable, according to Art. 2(1), (3) and (4) and Art. 5 of Council Directive 76/207 on equal treatment of men and women in employment to grant employed mothers leave so as to breastfeed their child whilst the same leave is granted to employed fathers only in situations where the wife is also employed? The Court concluded that the Spanish legislation in question did indeed breach the Directive and that it constituted an unjustified discrimination on grounds of sex. This very clearly highlights the acceptance of gender neutral parenting that has occurred in recent times.

Convention on Human Rights and the potential cross-over effect this may have. On the basis of these two chapters, we place developments against the backdrop of the theoretical underpinnings of this research in an attempt to uncover the path of family regulation and the construction of new methods of adjudication that necessarily influence the migrating family and infiltrate national family law systems.

Chapters IV and V essentially speak to the neo-formalism that Kennedy puts forward as the new legal consciousness. Chapter VI proceeds via a critical analysis of EU citizenship, arguing that it goes beyond Kennedy's neo-formalism in an attempt to decipher the additional dimension it adds to the rights debate in providing for a new societal ideal at the EU level.

What we will see emerging is a concept of the family as regulated by EU law that moves, leaps and bounds, beyond the individualism that underpinned the first globalization, beyond the vagueness of the social that prevented national courts from assuming the role of social engineers in terms of family law, to a more activist approach on the part of the Court in developing a post-national conception of the family underpinned by equality, respect for fundamental rights and most importantly, albeit perhaps in its early stages, a post-national conception of EU citizenship which gives life to the primary and secondary law of the Union.³⁶³

³⁶³ MacCormick, Neil. "Beyond the Sovereign State" (1993) 56 *Modern Law Review*, 1-18; Habermas, Jurgen. *The Postnational Constellation* (Cambridge: Polity Press, 2001).

Chapter IV: Swash and Backwash: A Post-National Conception of the Family

“When we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back”³⁶⁴.

I) Introduction

This chapter seeks to explore the potential of the neo-formalist language introduced in the previous chapter to debunk the family/market dichotomy. An attestation of the rationale for EU intervention clearly radiates from the statement forwarded by AG Sharpston in a recent judgment delivered by the Grand Chamber of the European Union Court of Justice on 8 March 2011 – the *Zambrano* case³⁶⁵: “when citizens move, they do so as human beings, not as robots. They fall in love, marry and have families”³⁶⁶. The recognition that individual citizens of Europe cannot be considered as mere factors of production has thrust family law issues under the European spotlight.

To this end, the primary and secondary law of the EU and its scope of application has had to adjust to provide protection not only for the factors of production migrating in Europe but also for the humanistic aspect that is inherent in the free movement of persons. We have noted that with the passage of time the traditional family based on marriage has evolved and different types of families emerged. The role of the European Union, and more specifically the Court of Justice in providing a legal basis for today’s families may prove to be pivotal.

³⁶⁴ Lord Denning in *H.P. Bulmer Ltd v J. Bollinger SA* [1974] Ch 401 at 418.

³⁶⁵ Case C-34/09 Gerardo Ruiz Zambrano v Office national de l’emploi (ONEM).

³⁶⁶ Opinion of Advocate General Sharpston delivered on 30 September 2010 Case C-34/09 Gerardo Ruiz Zambrano v Office national de l’emploi (ONEM) para 128.

Bearing this in mind, we will proceed by firstly demarcating The Court's early conception of the family and the development of a rather broad understanding of family construction and structure. We will then proceed to examine in depth the cases pertaining to the five selected categories of peripheral family law issues – the swash. The cases have been chosen based on their relevance to the new types of family structures that have emerged in Europe and their reflection of elements of the third globalization. In addition, the cases have been selected in relation to the legal tools used by the court in its reasoning i.e. its use of the prohibition on discrimination, fundamental rights and European Citizenship. The chapter proceeds by attempting to provide some evidence of the reception – the backwash - of these cases in the Member States so as to decipher the potential of EU in the domestic family law field.

II) The 'European' Family: The Swash

One of the cruxes of EU law is the right to free movement – enshrined in the primary law of the EU – supported by the invisibility of geographical boundaries between the Member States of the EU. This, in conjunction with the decline of the nation-state, has led to a certain Europeanization of family law. Let us recall here the six wives case and the fact that just over one hundred years ago, due to the effects of the isolation of the family as a result of its classical character, courts were more than reluctant to interfere in the private, family sphere.

The Europeanization of the family, however, has been introduced via the 'new' issues that have come before the national courts but which are dealt with ineffectively or not at all due to the family/market dichotomy. In order to facilitate a delineation of the 'swash' argument, the cases under investigation have been grouped under four headings: rights of residence including family reunification; welfare benefits; name registration; and employment rights. It should be noted that many of the issues presented in these cases overlap rendering a rigid classification impossible. However, the attempted classification assists us in some way to frame the discussion of the growing body of case law at the EU level.

A. Rights Of Residence

The case law concerning rights of residence demonstrates a clear path in terms of access for peripheral family law cases to the CJEU. Additionally, from the cases analyzed here we can note not only Kennedy's neo-formalist approach but also the onset of a new paradigm within the rights rhetoric discussed above in Chapter III.

Carpenter

The *Carpenter*³⁶⁷ case is an interesting case for many reasons. In terms of our scope, it illustrates the more market early approach of the Court which can be juxtaposed with its more recent attempts to reintegrate the social. The case concerned the third country national spouse of a British national who applied for a permit to stay in the UK (note the peripheral nature of the question referred), an application which was rejected. Since Mrs. Carpenter was unable to rely on Directive 73/148³⁶⁸, the Court, in my opinion heavily influenced by unity of the family concerns, was forced to explore other avenues through which the case could be interpreted. Although significantly criticized for its decision, the Court chose to decide the case in consideration of Mr. Carpenter and in particular his exercise of rights conferred on him by Article 49 EC Treaty. More specifically, the Court considered his economic activities including his occasional provision of services in other Member States. In so doing, the Court held that EC law recognizes the right to family life to those providing services in the EU and that to deport Mrs. Carpenter would essentially cause a breach of that right and would also constitute a barrier to his freedom to provide services since Mrs. Carpenter maintained care giving functions to Mr. Carpenter's children while he exercised his freedom to provide services. The Court made an important

³⁶⁷ *Carpenterv Secretary of State for the Home Department* Case C-60/00.

³⁶⁸ Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services.

reference to the respect for family life provided for by the European Convention for the Protection of Human Rights and Fundamental Freedoms stating that to deport Mrs. Carpenter would cause:

... An interference with the exercise by Mr. Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter “the Convention”), which is among the fundamental rights which, according to the Court’s settled case-law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community law.³⁶⁹

In other words, the Court maintained that if Mrs. Carpenter were deported this would effectively result in an infringement in Mr. Carpenter’s right to provide services which would be contrary to EU law. Effectively then, the unity of this family was upheld not in consideration of its importance per se but rather in consideration of Mr. Carpenter’s market rights. The Court, therefore, even though it had limited tools at its disposal, granted this particular reconstituted family stronger protection surreptitiously via the use of market freedoms.

Chen

The second important case to consider here is the well renowned *Chen*³⁷⁰ case. It concerned a Chinese national (Mrs. Chen) who travelled to Northern Ireland to give birth. The child acquired Irish citizenship by virtue of the constitutional changes introduced in 1998, namely the introduction of *jus soli*. The family subsequently moved to Wales and applied for a residence permit which was refused. The application was appealed and referred to the ECJ (note the peripheral nature of the question referred). The Advocate General opined that a young child as a national of a Member State has a right to reside in another Member State insofar as he/she has sickness insurance and sufficient resources not to become an ‘unreasonable burden’ on the host Member State.

³⁶⁹ Paragraph 41

³⁷⁰ *Chen and Zhu v Secretary of State for the Home Department*, Case C-200/02.

Furthermore, Advocate General Tizzano reasoned that a child's right of residence would be ineffective if the parent was denied right of residence.

The Court reasoned that on the basis of Article 18 of the EC Treaty, Catherine Zhu as an EU Citizen had an inalienable right to reside in a place of her choice in the EU and that to deny residency rights to the parents of a minor child would effectively render this right ineffective. In other words, the right of the mother to reside with her child came under the scope of the "*effet utile*" residence right of the child. Again we can note the underlying importance of one of the fundamentals of family law, i.e. the preservation of family unity which obviously infers physical proximity and the right of children to company, care and parentage. By recognising the child's independent rights in this case but also that these rights would be rendered ineffective without the support of parents, the Court effectively granted the right of the family to remain together based on the citizen status of the child.

Two points can be made here. First, if the issue at hand were to be left to the national legal system, this particular family would not have been granted resident rights based on a rigid interpretation of immigration rules. Secondly, the very existence of EU rights provided an avenue for this issue to reach the EU level in effect permitting a disconnection from the nation state and instead connecting it to the developing body of citizenship rights at the EU level.

Metock

The well renowned *Metock* case³⁷¹ proved to be an important advance in issues concerning European involvement in family law. The main issue in the case

³⁷¹ Case C-127/08, *Metock and Others v Minister for Justice, Equality and Law Reform*. The case concerned a refusal by the Irish Minister for Justice to grant residence cards to the non-EU spouses of EU nationals based on the European Communities (Free Movement of Persons) Regulation 2006 (S.I. No. 2) ("2006 Regulations"), which transposes Directive 2004/38 into Irish law. Under Regulation 3(2) of the 2006 Regulations, the spouses of EU citizens were only entitled to a right of residence in Ireland if they had previously been lawfully resident in another Member State. For a concise discussion on the case see E. Fahey, (2009) "Going Back to Basics: Re-Embracing the Fundamentals of the Free Movement of Persons in *Metock*", available online at SSRN: <http://ssrn.com/abstract=1371516>, and also N. Cambien, (2009) Case C-127/08,

concerned the reconciliation of residence rights and immigration control.³⁷² In transposing the Directive on free movement of Union citizens,³⁷³ Ireland added a condition which provided that third country nationals seeking to reside with Union citizens are eligible to do so only if they have already been lawfully resident in another Member State. The compatibility of this condition was questioned in four cases before the High Court of Ireland where the applicants had arrived and sought asylum which was refused. The applicants subsequently married Union citizens who were resident in Ireland.³⁷⁴ On marrying the EU nationals, each of the third country nationals applied for residency on the basis of being a spouse of a Union citizen. Obviously then the condition concerning lawful prior residence (note the peripheral nature of the specific question) in another Member State came into question.

The Court found that the residence application of a family member of a Union citizen should not be conditional on prior residence in another Member State. It specifically pointed out that the Citizens Directive applied to all Union citizens exercising their free movement rights and to their family members. It held that family members, according to the Directive, cannot be distinguished according to prior lawful residence. The Court stressed that a non-Community spouse of a Union citizen who accompanies or joins that citizen can benefit from the Directive, irrespective of when and where their marriage took place and of how that spouse entered the host Member State. Particularly interesting is the Court's clarification that the Directive in question does not specify on issues of family formation³⁷⁵. In effect, it held that the Directive does not require that the

Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform, *Colum. J. Eur. L.* 15, 321.

³⁷² For a detailed discussion of the case see Costello, C., "Metock: Free movement and 'Normal Family Life' in the Union", *Common Market Law Review*, 46: 587-662, 2009

³⁷³ Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

³⁷⁴ None of the marriages were marriages of convenience.

³⁷⁵ We can make reference here to Case C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* which dealt with the interpretation of the transposition of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification and in particular Articles 2(d) and 7(1) of it. The Raad van State asked whether the directive allows a distinction to be made between a family relationship which arose before the resident's entry into the Member State and

Union citizen have founded a family at the time when s/he moves in order for his family members, who are nationals of non-member countries, to enjoy the rights established by the Directive. In other words, the Directive has become “*an instrument for both family formation and family reunification*”.³⁷⁶ The reasoning of the Court proves very interesting and a comprehensive tool in protecting the unity of the family. It stated that “*if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are granted by the Treaty would be seriously obstructed*”. Therefore, according to market-based tools, the Court permitted the primary law of the Union to triumph over the exclusionary effects of national law firmly reconnecting the family to the supranational sphere.

Zambrano

We mentioned at the beginning that the case law delineated here indicates a new paradigm in terms of Kennedy’s neo-formalism. This new paradigm is clearly introduced here via the *Zambrano* case, which, for our purposes exposes how primary law, particularly the citizenship provisions in going beyond the prohibition on discrimination, can grant more comprehensive protection to modern family issues in consideration of their reconceptualization.

The case concerned a Columbian national and his wife who had been refused refugee status in Belgium. The Belgian authorities did however make a

that of a family relationship formed after entry. Advocate General Sharpston was not convinced by the argument of the Netherlands government making specific reference to fundamental rights and moreover to the general principles of non-discrimination and equal treatment. She asserted that “*it might seem foolhardy to assert that the difference between a family relationship which arose before the sponsor’s entry into the Member State and one which arose later can never justify difference in some regard*” in effect precluding the notion brought forward by the Netherlands legislation. In addition, the Netherlands government argued that families that were formed previous to the entry of the sponsor to the Member State are more deserving of favourable conditions in relation to the social assistance requirement as opposed to those families not yet constituted at the time of entry. Here, importantly, the Advocate General again made reference to the principle of non-discrimination in refuting this claim, in what, according to the foregoing, might be termed a neo-formalist reading. The Court agreed with the Advocate General in stating that “*Article 2(d) of the Directive defines family reunification without drawing any distinction based on the time of marriage of the spouses, since it states that reunification must be understood as meaning the entry into and residence in the host Member State by family members of a third-country national residing lawfully in that Member State in order to preserve the family unit, “whether the family relationship arose before or after the resident’s entry”*”.

³⁷⁶ Costello, C. “Metock: Free Movement and ‘Normal Family Life’ in the Union”, *Common Market Law Review*, 46: 587-662, 2009.

refoulment order considering the on-going civil war in Columbia. While appeals regarding the refugee determination were ongoing, Mr. Zambrano fathered two children, both gaining Belgian nationality based on a provision of Belgian nationality law which at that time stated that any child born in Belgium who had not reached the age of majority and who would otherwise be stateless will be Belgian. During this time, Mr. Zambrano was also in gainful employment.³⁷⁷ On becoming unemployed, the applicant applied to the National Employment Office (ONEm) for an unemployment benefit which was refused based on the fact that he had not accumulated enough worked hours prior to becoming unemployed. This was effectively the result of certain periods of employment being disregarded since he was not a legal resident at the time. However, Mr. Zambrano argued that by virtue of EU law he derived a right of residence (note the peripheral nature of the issue referred) based on the fact of being a parent to EU citizens and that therefore he should have been exempt from the work permit condition.

The legal question then revolved around whether Mr. Zambrano, as a parent of an EU citizen child, derived a right of residence by virtue of the Treaty on the Functioning of the European Union. If this question were to be answered in the affirmative, then the further question would be whether he can be exempt from having to obtain a work permit.

All the Member States that made written submissions and the Commission argued that this was a wholly internal situation which did not come within the scope of application of EU law since the citizen children in this case had never exercised their free movement rights.³⁷⁸ The Court, however, held that the Citizens Directive was not applicable in this case and instead turned to the citizenship provisions for guidance. Although difficult to state with confidence, we can perhaps wonder whether this reliance on the citizenship

³⁷⁷ This was later terminated as a result of immigration investigations.

³⁷⁸ *This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members [defined as a spouse, those in registered partnerships recognised by both Member States; direct descendants under 21 and dependent direct relatives in the ascending link].*

provisions indicates a desire on behalf of the Court to accommodate the Zambrano family just as was likely in the Carpenter case when the Court, even though Mrs Carpenter's avenue was blocked, shifted the focus onto Mr. Carpenter's economic rights. Regardless of the Court's motives – which we can only attempt to infer, it went on to recognize that EU citizenship is “*intended to be the fundamental status of nationals of the Member States*” citing Article 20(1) of the TFEU. In effect the Court, in relying on previous case law, held that Article 20 of the TFEU precludes measures that have the effect of depriving citizens of the enjoyment of their substantive rights under EU law. In applying this to the facts of the case at hand, if Mr. Zambrano were to be deported then this would effectively mean that the citizenship rights of the minor children would become ineffective. The Court stated that:

*Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, insofar as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.*³⁷⁹

From a family law perspective then, this reasoning stands to reason when one considers one of the foundations of family law, particularly concerning the rights and duties owed to parties within the private sphere i.e. that it is in the best interests of the child to have the company care and parentage of their parent ascendants. In fact, this was bolstered by Advocate General Sharpston's reference to Articles 7 and 24 of the Charter of Fundamental Rights³⁸⁰ and relevant international provisions including Article 17 of the International

³⁷⁹ Paragraph 45

³⁸⁰ Article 7 states “Everyone has the right to respect for his or her private and family life, home and communications” and Article 24.3 states “Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests”.

Covenant on Civil and Political Rights;³⁸¹ Article 9.1 of the Convention on the Rights of the Child;³⁸² Article 8 and Article 3 of Protocol 4 to the European Convention of Human Rights.³⁸³

From a fundamental rights perspective, the question in the case was really quite simple: would there be a breach of the fundamental right to family life if the parents were to be deported? Unfortunately, but perhaps understandably, the Court itself did not engage in a profound discussion of the fundamental rights aspect. However, we can decipher that in basing its decision on previous case law concerning family issues, the court did not have to take a hugely significant step here. Already, as we have seen in *Carpenter* and *Chen*, the court upheld the importance of family life in recognising, what have been criticised as dubious, links to the Treaty in order to protect family life and the right of migrants.

In effect, via a proper realization of citizens' rights – including fundamental rights – the Court is, via its deliberation of what are, on the one hand, EU law issues and simultaneously, for our purposes, peripheral family law issues on the other, reconnecting the unruly teenager we spoke of in Part I to the post-national sphere. This is neo-formalism par excellence whereby rights are the medium through which the family is reconceptualised. The economic goals of the EU essentially require the free movement of goods, services and people which in

³⁸¹ Article 17 states “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everybody has the right to the protection of the law against such interference or attacks”.

³⁸² Article 9.1 states “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as the one involving abuse or neglect of the child by the parents, or where the parents are living separately and a decision must be made as to the child's place of residence”.

³⁸³ Article 8 states “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. Article 3 of Protocol 4 states “No one shall be expelled, by mean either of an individual or of a collective measure, from the territory of the State of which he is a national. No one shall be deprived of the right to enter the territory of the State of which he is a national”.

turn has developed into a social understanding of the internal market as rightly pointed out by Advocate General Sharpston in stating that “*when citizens move, they do so as human beings, not as robots. They fall in love, marry and have families*”³⁸⁴. To this end, the primary law of the EU and its scope of application has had to adjust to provide protection not only for the factors of production migrating in Europe but also for the humanistic aspect that is inherent in the free movement of persons. It is within this realm that *Zambrano* takes a significant step essentially recognising that movement is not a necessary prerequisite to trigger the scope of EU citizenship rules therefore expanding its scope to wholly internal situations. The effects of this interpretation of primary law on family law therefore have the potential to be significant.

B. Welfare Benefits

The area of welfare benefits is one of the more pronounced areas in which we can note the increased occurrence of peripheral family law issues. The right to education conferring rights of residence, pension rights and sickness insurance, for instance, pave the way for a consideration of the changing concept of relationship bonds.

Baumbast

We begin here by outlining the *Baumbast*³⁸⁵ case and more specifically the Opinion of Advocate General Geelhoed in the case who recognised, for the purposes of interpreting Regulation 1612/68,³⁸⁶ the changing nature of the family and in particular the social acceptance that had occurred since the *Reed*³⁸⁷ case of extra-marital cohabitation and also, at least to some extent the

³⁸⁴ Opinion of Advocate General Sharpston delivered on 30 September 2010 Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)* para 128.

³⁸⁵ *Baumbast and R v Secretary of State for the Home Department* Case C/413/99.

³⁸⁶ Regulation No 1612/66 EEC of the Council of 15 October 1968 on freedom of movement for workers within the Community.

³⁸⁷ Case C-59/85 - *Netherlands v Reed* in which the Court was called upon to decide whether a partner in a cohabiting relationship could be considered equivalent to a spouse. The Court was of the opinion that the partnership at issue did not come within the concept of family rights effectively excluding this family construction from the “European family”.

recognition of homosexual partnerships. The case concerned two families, the first of which concerned a marriage breakdown and consequent divorce and the other concerned a stepchild whose father worked away from the family home. The main question in the proceedings revolved around the rights to education in the host Member State for the children and rights of residence for the children's carer. From the family law perspective, though, the case raised an interesting question in relation to family relationships with the Advocate General noting that Regulation 1612/68 emanates from a time when "family relationships were relatively stable" and any provisions contained therein concerned the protection of the traditional family or in other words, the classical notion of the family that persisted through the Social aided by the constitutionalization of the marital family as we have seen. However, in recognising that "*considerable social developments have occurred which are likely to have considerable influence on the view to be formed as to the nature and scope of the provisions of the Regulation*" and that the Court must consider these developments, the AG argued that "*relevant rules of law risk losing their effectiveness*". Indeed, the Court reasoned that to deprive the parents of rights of residence would effectively deprive children of their Community right, notably basing its reasoning on the Regulation as opposed to the Charter of Fundamental Rights and the right to education contained in it. Therefore, we can note here the Court's acceptance of the changing nature of the family and its use of the European Economic Constitution toolbox in resolving the issue at hand.

London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department and Maria Teixeira v. London borough of Lambeth

A more recent case is the joint case of *London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department*³⁸⁸ and *Maria Teixeira v. London borough of Lambeth*³⁸⁹ concerning free movement and the child's right to education. The CJEU, concurring with Advocate General Mazak, in this case decided that a

³⁸⁸ Case C-310/08.

³⁸⁹ Case C-480/08.

parent caring for a child of a migrant worker who is in education in the host Member State has a right of residence in that State and that this right is not conditional on the parent having sufficient resources not to become a burden on the social assistance system. Importantly, the Court made reference to the respect for family life in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in reference to the *Baumbast and R* case³⁹⁰ it recalled that the child of a migrant worker, in pursuing his/her education in the host Member State, has the right to be accompanied by his/her primary carer, thereby granting a right of residence to the carer, rejecting the UK government's argument that *Baumbast* only protected the residence rights of economically active primary carers of children. Here then, we see a shift from economic reasoning to an approach more in tune with the social reality of migrating families. Indeed, the peripheral family law issues we speak of here are creating a real path to a new European socialization of 'modern' family issues.

Commission v Anton Pieter Roodhuijzen

Another interesting case reflecting the 'modern' family issues which are coming before the court is that of *Commission v Anton Pieter Roodhuijzen*.³⁹¹ In this case, the Court of First Instance of the European Communities, held that in situations where a European official can demonstrate that his/her partnership constitutes a union and that their status as non-marital partners has been recognised by a Member State then the partner can in fact benefit from the sickness insurance scheme of the communities. The access path via sickness insurance paved the way for a supranational consideration of an atypical family structure at a time when many national courts were struggling with a lack of legislative or constitutional recognition of the same. Indeed, it is important to note here that this case concerned a partnership of opposite sex. In relation to same sex couples, prior to this case, the case law of the CJEU in relation to the recognition of same sex families had shown signs of much evolution. The Court in the case of *Tadao*

³⁹⁰ Case C-148/02

³⁹¹ Case T-58/08

*Maruko v Versorgungsanstalt der deutschen Bühnen*³⁹² held that a life partner of the same sex might be entitled to a survivor's pension under an occupational pension scheme (note the peripheral nature of the issue referred). In particular the Court held, in consideration of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, that a refusal to do so would constitute direct discrimination on grounds of sexual orientation where surviving spouses and surviving life partners are in a comparable situation.³⁹³ What we see developing here is a neo-formalist approach to peripheral issues based on the shift in interpretative methods bringing difficult family law questions under the spotlight. The neo-formalist language is employed by the Court in reasoning these cases essentially, via a reintegration of the equality debate, granting protection to those atypical families that would otherwise be left outside the scope of the law.

K.B. v National Health Service Pensions Agency and Secretary of State for Health

This supranational approach can also be exemplified via the neo-formalist approach to sexual identity. In *K.B. v National Health Service Pensions Agency and Secretary of State for Health*³⁹⁴ the Court held that national legislation which, in failing to recognise transsexuals' new sexual identity, denies them the right to marry, is contrary to community law. The court stated that inequalities occur when a person is prevented from satisfying a condition upon which the award of a benefit (note the peripheral avenue) protected by Community law depends. Importantly, the Court again in this case made reference to the case law of the European Court of Human Rights in its reasoning.³⁹⁵

³⁹² *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* C-267/06

³⁹³ For an analysis of the case law in this area see G. N. Toggenburg, "LGBT" go Luxembourg: on the stance of Lesbian Gay Bisexual and Transgender Rights before the European Court of Justice" (Judgment in the Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, CJEU April 1, 2008) *European Law Reporter* 5, 2008.

³⁹⁴ *K.B. v National Health Service Pensions Agency and Secretary of State for Health* Case C-117/01

³⁹⁵ *Christine Goodwin v the United Kingdom*, Application No. 28957/95.

Joseph Griesmar v French Republic

Gender-neutral parenting has also found its way before the Court and the neo-formalistic language has been used to balance the rights of parties that who find themselves at a disadvantage resulting from gender discrepancies. In the case of *Joseph Griesmar v French Republic*³⁹⁶ the Court held that civil servants who are fathers and mothers must be treated equally when their retirement pensions (note the peripheral nature of the reference) are being calculated. The exclusion of men from entitlement to the service credits granted to retired civil servants who are mothers is contrary to the principle of equal pay if those fathers can prove that they brought up their children. To a certain extent it may even seem obvious but nonetheless necessary to point out the importance of this real reintegration of the social dimension of rights based on recognition of the changing nature of the family and moreover in this case the role reversals witnessed in terms of the internal dynamics of the family.³⁹⁷

Another interesting case concerning gender-neutral parenting is that of *Roca-Alvarez v Sesa Start España ETT SA*.³⁹⁸ The Court here was asked to decide whether it is acceptable, according to Art. 2(1), (3) and (4) and Art. 5 of Council Directive 76/207 on equal treatment of men and women in employment to grant employed mothers leave so as to breastfeed their children whilst the same leave is granted to employed fathers only in situations where the wife is also employed. The Court concluded that the Spanish legislation in question did indeed breach the Directive and that it constituted an unjustified discrimination on grounds of sex. This very clearly highlights the acceptance of gender neutral parenting that has occurred in recent times and the Court's neo-formalist interpretation of this new structure of the family.

³⁹⁶ *Joseph Griesmar v French Republic* Case C-366/99

³⁹⁷ McGlynn, Clare. *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press, 2006) p. 83

³⁹⁸ Case C-104/09 *Roca-Alvarez v Sesa Start España ETT SA*

C. Name Registration

Name registration is generally perceived as a national competence. However, more recently, a significant body of supranational case law has developed in this field and calls have been made for a more coherent approach to the area:

...And, given the increasing mobility of citizens throughout the territory of the European Union, which is not merely a single market but a single area of freedom, security and justice, it is clear that conflicts of interest involving the determination and use of personal names can (and probably will) arise with increasing frequency unless and until some adequate solution is found³⁹⁹

Garcia Avello

This field was first considered by the ECJ basing its reasoning on the principle of anti-discrimination based on nationality in the case of *Garcia Avello*⁴⁰⁰ clearly exemplifying the force of European citizenship and non-discrimination when coupled together. The dispute arose between Mr. Avello and the Belgian State concerning an application to change the surname of his children, a private international law issue, who were in possession of dual nationality (Belgian and Spanish). The CJEU concluded that since the children, as EU citizens, were residing in another Member State exercising their free movement, this provided them with a sufficient link to Community law enabling them to be afforded protection under Article 12 EC Treaty. This illustrates the capacity of EU citizenship provisions to set aside national rules when necessary to facilitate the free movement of families. Indeed, even when matters recognised as inherent competences of the Member States come before the CJEU, it is clear that compliance with EC law is vital, illustrated by the case of *Grunkin and Paul*⁴⁰¹ in which the CJEU reiterated that national legislation, in this case concerning the refusal to register a double-barrelled surname, which disadvantages those who

³⁹⁹ Advocate General Sharpston Case C-353/06 *Grunkin-Paul v Standesamt Niebüll*.

⁴⁰⁰ C-148/02 *Carlos Garcia Avello v État belge*.

⁴⁰¹ C-353/06 *Stefan Grunkin and Dorothee Regina Paul v Leonhard Matthias Grunkin-Paul and Standesamt Stadt Niebüll*.

wish to exercise their freedom to move and reside in another Member State, constitutes a restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union.

At first glance, this may appear to be a more technical issue related to free movement. However, it penetrates both the internal and external dynamics of the family law sphere by giving content to the genuine enjoyment of rights conveyed by virtue of EU citizenship.⁴⁰²

D. Employment

At the beginning of the year, the *Grand Chambre* of the CJEU delivered its judgement in relation to two preliminary references, namely *Z*⁴⁰³ and *CD*,⁴⁰⁴ which questioned whether a woman is entitled to maternity leave in instances where a surrogate carries the child. The issue of surrogacy therefore came before the court via EU provisions on employment law (note the peripheral path) providing an access route for the supranational consideration of equal treatment and social rights within the family structure.⁴⁰⁵

The Z Case

The *Z* case concerned a teacher in an Irish school who had applied for paid maternity leave after her baby was born through a surrogacy mother in California. Her application however was refused and on appeal the national court requested direction from the Court in Luxembourg in consideration of whether or not the national decision not to grant the mother leave was contrary to the Pregnant Workers Directive or whether it constituted discrimination on grounds of sex or of disability. It ruled that the mother in question does not fall within the scope of the Pregnant Workers Directive, as the directive “*presupposes*

⁴⁰² See Comandè, Giovanni. “The Fifth European Union Freedom: Aggregating Citizenship...around Private Law” in Micklitz, *The Constitutionalization of European Private Law*.

⁴⁰³ C-363/12, *Z, v A Government Department and The Board of management of a community school*.

⁴⁰⁴ C-167/12, *C.D. v S.T.*

⁴⁰⁵ Finck M. & Kas B., Case note: Surrogacy leave as a matter of EU law: CD and Z, on file with the author.

that the worker concerns has been pregnant and has given birth to a child". It said that, while maternity leave is also intended to ensure that the special relationship between a woman and her child is protected, that objective concerns only the period after pregnancy and childbirth. However, the court said member states are free to apply "more favourable rules" for such mothers, if they so wish.

In addition, the court found no evidence of discrimination on the grounds of sex as the father would not be entitled to such leave either. Similarly, while expressing sympathy that "*a woman's inability to bear her own child may be a source of great suffering for her*", the Court rejected the argument that Ms Z has been discriminated against on the grounds of disability, in light of the fact that the woman had no uterus and could not support a pregnancy. According to the judgment:

The concept of 'disability' within the meaning of that directive presupposes that the limitation, from which the person suffers, in interaction with various barriers, may hinder that person's full and effective participation in professional life on an equal basis with other workers

The CD Case

In the CD case, a similar approach was taken in that the Court refused to equate the situation of commissioning mothers to those who have carried a child. Although the Advocate General proposed the following solution...

In a case such as that in the main proceedings, an intended mother who has a baby through a surrogacy arrangement has the right to receive maternity leave under Articles 2 and 8 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding after the birth of the child in any event where she takes the child into her care following birth, surrogacy is permitted in the Member State concerned and its national requirements are satisfied, even where the intended mother does not breastfeed the child following birth; the leave must amount to at

*least two weeks and any other maternity leave taken by the surrogate mother must be deducted.*⁴⁰⁶

The Court did not follow this logic. However, it must be noted that surrogacy is a relatively contemporary issue in family law giving rise, as noted by Advocate General Wahl,⁴⁰⁷ to a number of socio-cultural, ethical, medical and legal questions and one which has most certainly evolved at a hastier pace than legislative attempts at the national level to deal with the intricacies concerned. This situation, and we must stress it is one of national competence, spearheads some very complex legal and social uncertainties concerning, for instance, the commercialization of surrogacy and the associated risk of creating a black market; the risk to children, born as a result of surrogacy agreements, existing in a legal vacuum with unclear or no rights in terms of parenting, welfare, etc.; the contractual nature of such agreements and the legal implications if parties don't adhere to the agreement for instance, what if the surrogate mother changes her mind and decides to keep the child she gave birth to according to the *Mater semper certa est* principle?; What if the commissioning mother changes her mind?⁴⁰⁸

In consideration of these issues, and of course the legal uncertainty that exists in the various Member States in terms of legislative efforts in this area,⁴⁰⁹ it is hardly surprising that the Court decided in the way it did. In fact, even though Advocate General Kokott argued that a link could be with EU law in making reference to the

⁴⁰⁶ Opinion of AG Kokott in C-167/12, *C.D. v S.T* at para. 76.

⁴⁰⁷ He noted from the outset of his opinion at para 1 that surrogacy is “an increasingly common form of medically assisted reproduction” that “constitutes a sensitive political and social issue in a number of Member States.”

⁴⁰⁸ For an overview of these and related issues, see Katarina Trimmings and Paul Beaumont, *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart 2013); Deepa Kharb, “Assisted Reproductive Techniques Ethical And Legal Concerns” 4 *The Internet Journal of Law, Healthcare and Ethics*; Margaret E. Swain, “Surrogacy and Gestational Carrier Arrangements: Legal Aspects” in James M. Goldfarb (ed), *Third Party Reproduction* (Springer, 2014).

⁴⁰⁹ See Report by the European Parliament, Committee on Legal Affairs, A Comparative Study on the Regime of Surrogacy in EU Member States, 2013 which points out that While EU action in the area may be considered, a global approach may be more effective to regulate the global aspect of current surrogacy practices.

rights of the child contained in Article 24 the Charter of Fundamental Rights⁴¹⁰ and Article 3(3) TEU,⁴¹¹ the Court did not make this linkage.

For our purposes here, the judgment is interesting for a number of reasons. Firstly, it demonstrates the peripheral path family law issues are taking in arriving at the EU legal order. Secondly, it could be argued that even though we have thus far illustrated the reach of the neo-formalist langue by way of the Court's pronouncements, this langue can only go so far in terms of family law. In other words, it would be argued, that it has managed to infiltrate national family law riding the wave of equal treatment based on economic integration but in terms of the balancing of fundamental rights against social policy and national legislation (or lack of as the case may be) it stops short of offering full and effective rights to individuals. This is not to say that the Court should or can, legitimately, follow such a path. It is simply to say that the implementation of fundamental rights at the EU level still faces barriers in terms of the arguably persistent ties to the economic basis of the Union. The role of citizenship in light of the precarious nature of the implementation of the Charter and fundamental rights in general will be examined below. For now, suffice it to highlight that it is precisely here, where the rights rhetoric gains an additional dimension - the European legal order runs into some difficulties.

III) Jurisprudential Evolution

This delineation of the selected case law goes some way to in confirming Kennedy's notion that a more neo-formalist langue is developing and a move towards balancing difference is evident, especially in terms of anti-discrimination. In fact, this is specifically reflected in the case law above that

⁴¹⁰ Article 24(1) of the Charter of Fundamental Rights: 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

⁴¹¹ Stipulating that the EU shall promote "protections of the rights of the child."

makes reference to non-discrimination, the tool expanded on by the Court with a view to managing difference, one of the fundamentals of the third globalization.

To summarise, the principle of equality has been applied by the Court to recognise the changing role of individuals within the family unit shifting the internal/vertical dynamics with family structures based on a new, post-national approach to the external/horizontal dynamics. The recognition of more gender neutral parenting, an issue which has arrived at the European level via pension rights and employment law, has been recognised in the *Joseph Griesmar* case and the *Roca-Alvarez v Sesa Start España ETT SA* noted above. To take the latter case, the discrimination argument revolved around the fact that the Spanish legislation provided that female employees, who have given birth to a child, had the right to feeding leave irrespective of the employment status of the father, whereas male employees were not granted the same right unless the mother was also in gainful employment. The question by the referring court concerned whether this amounted to direct discrimination on the ground of sex, as prohibited in Council Directive 76/207 and if so, whether a legally recognised justification for this discrimination could be found. As we have already noted the Court indeed held that the specific facts did constitute discrimination illustrating once again the usefulness of this tool in reconciling the changing nature of relations with the family of the third globalization.

Family reunification cases have brought the question of family formation to the attention of the Court, highlighted above by *Metock* and the *Chakroun* case. In the latter case, the decisive question in this case concerned whether or to what extent the fact that the family relationship arose prior or subsequent to the sponsor's entry to the host Member State can render one situation different from another. The Court, unfortunately, does not enter into this discussion. However, it would seem that it was influenced by Advocate General Sharpston's Opinion and in particular her emphasis on the fact that were different income thresholds to be applied based on the moment of family formation then discrimination could in fact be realised arguing in para 40 that "*comparable situations must not be treated differently*".

In terms of name registration, the Court has chosen to base its reasoning on the citizenship provisions. The cases examined clearly exemplify the force of European Citizenship and non-discrimination when coupled together. Indeed, even when matters recognised as inherent competences of the Member States come before the CJEU, it is clear that compliance with EC law is vital, specifically illustrated by the case of *Garcia Avello*⁴¹² in which the Court specifically relied on the prohibition of discrimination based on nationality.

The welfare benefit cases provide not only the most frequent but also the most prominent example of how the Court attempts to reconcile its shifting perspective from mercantilist reasoning to more social goals. In addition, they provide us with much food for thought in terms of a more European approach to family regulation. In fact, the cases described above clearly provide concrete examples of the issues that third globalization families face when migrating in Europe. The Court's use of both non-discrimination and citizenship in resolving these issues is very powerful. Indeed, we may question, and this will be dealt with in more detail in Chapter VI, the Court's role in terms of adjudicating family law matters from a civil society perspective and the assumption of the role of social engineer – a role that national courts did not engage with during the second globalization. In connection to this, we refer to academic discussion in recent times concerning different categorisations of citizenship. Scholars in the field of EU law have already developed a discourse contemplating notions related to the birth of consumer citizens⁴¹³ and market citizens.⁴¹⁴ As a result of the case law described here, particularly that pertaining to the rights inferred from EU citizenship, I would pre-emptively question whether we can now talk of the emergence of a type of *family citizen* along the lines of market citizens and consumer citizens or whether the citizenship provisions and increasing reference to them are simply an additional layer added to the economic basis of the Court's

⁴¹² C-148/02 *Carlos Garcia Avello v État belge*

⁴¹³ See Davies, J., Entrenchment of “New Governance in Consumer Policy Formulation: A Platform for European Consumer Citizenship Practice?”, *Journal of Consumer Policy*, 32: 245-267, 2009.

⁴¹⁴ See Everson, M. *The Legacy of the Market Citizen*, in Shaw, J. & More, G., *New Legal Dynamics of European Union*, (Clarendon Press, Oxford, 1995).

reasoning. This argument will be played out in full in Chapter VI. For now, it is sufficient to question at this point whether the neo-formalist language of the Court really intends to manage difference by recoding The Social into the supranational sphere or are we simply witnessing a process of social engineering according to an ideology of gender neutrality incorporating the family as an appendage to the economic citizen.

For now, in terms of the scope of this chapter, we must decipher to what extent however the Court's pronouncements are reaching the far corners of the Union and to what extent the sedimentary backwash is influencing the situation of migrating families.

IV) The European Family: The Backwash

We have already noted above, in Ireland, it was not until legislation on equal pay was introduced in 1974 and employment equality legislation followed in 1977, both as a result of European directives, that remuneration rates between men and women were formally equalized. This finally began to break down the walls of the exceptionalized family in terms of equal treatment of the constitutive adult members.

More importantly, however, for our purposes the recognition of the need for equal treatment at the European level finally paved the way for the social revolution to take hold within the family in terms of its private and institutional dynamics, catapulting peripheral family law issues to the supranational level generating a body of case law the influence of which has been largely ignored. In order to fully understand the neo-formalistic potential of non-discrimination as a legal catalyst capable of infiltrating the family law sphere of Member States, we must decipher whether or not there is evidence, either positive or negative, at the national level which indicates these trends.

To take some specific examples, the above-mentioned *Maruko*⁴¹⁵ case, held that a life partner of the same sex might be entitled to a survivor's pension under an occupational pension scheme. In particular, the court held, in consideration of Council Directive 2000/78/EC, that a refusal to do so would constitute direct discrimination on grounds of sexual orientation where surviving spouses and surviving life partners are in a comparable situation. Since this judgment by the CJEU, a further, similar case has come before the Federal Labour Court in Germany⁴¹⁶ in which it was held that given the comparable situation of marriage and life partnership, non-discrimination law applies. As a result, the same sex partner in this case was indeed able to claim benefits under an occupational pension scheme that reserved this particular right to spouses. This is a very important example of a positive reception of the non-discrimination catalyst in German law going some way to accepting change to the definition of the family. In fact, German legal practitioners have openly welcomed the catalytic effects of the pronouncements of the CJEU:

*“In Germany we would not be where we are today without the decisions of the ECJ including decisions stemming from referrals from other EC States”*⁴¹⁷

This is also true for issues concerning discrimination in pregnancy related cases in the UK which developed according to the non-discrimination principle applied in cases before the CJEU,⁴¹⁸ exemplified clearly by the *Webb v EMO Cargo (UK) Ltd* judgment in which the House of Lords placed great weight on the CJEU's ruling.⁴¹⁹

There are, however, instances where the courts are reluctant, for one reason or another, to positively receive the judgments of the CJEU. At the time of writing, we note the rather negative reception of the Court's judgements in

⁴¹⁵ Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*.

⁴¹⁶ *Bundesarbeitsgericht*, decision of 14.01.2009, Az.: 3 AZR 20/07.

⁴¹⁷ Bertelsmann, K. “Who's afraid of the European Court of Justice? A Guide to the Preliminary Reference Procedure for National Courts”, *European Anti-Discrimination Law Review*, Issue No. 2, Oct 2005.

⁴¹⁸ Case C-32/93 *Webb v EMO Air Cargo*.

⁴¹⁹ *Webb v EMO Air Cargo (UK) Ltd (No 2)* (1994).

*London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department*⁴²⁰ and *Maria Teixeira v. London borough of Lambeth*.⁴²¹ We can defer from the response of the Secretary of State for Communities and Local Government: “because of the very specific circumstances of the two cases, we do not expect that the judgment will have a significant impact on the amount of council housing provided to migrant workers” that the judgment of the Court may not have the practical effects it was intended to have. This stated, it has been noted in academic commentary that the broad interpretation given to Article 12 of the Regulation will lead to these joint cases instigating “change (in) the welfare eligibility rules in a number of Member States”⁴²² and will in particular, as acknowledged by Advocate General Kokott, lead to an increase in social assistance claims for persons in similar positions.

Moreover, when we note the reception of indirect discrimination we cannot help but notice the positive, albeit at times problematic, reaction of Member States. First of all, it is important to note that none of the Member States, apart from the UK, were familiar with this legal concept.⁴²³ In Germany, the concept was introduced as a direct result of the *Bilka*⁴²⁴ case and indeed in the UK, while already having acknowledged the existence of the concept, clarification was provided by this same case.⁴²⁵ In addition, when we look to Spain, we note that the concept was introduced by the Constitutional Court in 1991, directly taken from the ECJ case law.⁴²⁶

From this brief analysis of the reception in Member States then we deduce that in general the prohibition of discrimination at the European level, and

⁴²⁰ Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department*.

⁴²¹ Case C-480/08 *Maria Teixeira v. London borough of Lambeth*.

⁴²² Case C-310/08, *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* Judgment of the Court (Grand Chamber) of 23 February, 2010, nyr, Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department*, Judgment of the Court (Grand Chamber) of 23 February 2010, nyr, *Common Market Law Review*, 48: 203-225, 2011.

⁴²³ Prechal, S. Equality of Treatment, Non Discrimination and Social Policy Achievements in Three Themes, *Common Market Law Review*, 41, 533-551, 2004, p. 535.

⁴²⁴ Case 170/84, *Bilka v Weber von Hartz*.

⁴²⁵ Prechal and Masselot, “Legal Impact Assessment of the Equally Directives, A Report to the Commission”, (Tilburg/Leeds, 2003).

⁴²⁶ Above No. 224 p. 536.

particularly its interpretation by the CJEU has indeed seeped into the legal systems of the Member States and is generally viewed in a positive manner.

The additional paradigm we have made reference to goes, however, beyond the neo-formalist approach set out by Kennedy. In fact, European citizenship has proven to be a rather delicate issue, especially when considered in relation to the policies, particularly the economic concerns of national governments and the effects this can have on family law. The strife can be particularly noticed in Ireland where citizenship amendments, as a result of a series of national cases and the *Chen* case, in 2004 substantially affected migrants' rights to family life. In 1998, Articles 2 and 3 were inserted into the Irish Constitution which respectively introduced the entitlement of anyone born on the 'island of Ireland' to Irish citizenship (*jus soli*) and recognised the 'diversity of identities and traditions on the island of Ireland'. However, even previous to this, case law itself had expanded the rights of migrants and their families. In 1989, the Supreme Court ruled in the *Fajjonu* case⁴²⁷ that Irish citizen children had the right to the '*company, care and parentage*' of their parents within the family unit which effectively routinely granted the right to remain to non-national parents. Change came in 2003 when the Supreme Court ruled in the *L. and O case*⁴²⁸ that the automatic right of residence granted to the parents of Irish-born children, regardless of the legal status of the parents, could no longer be sustained. This judgement was in fact intended to stem the flow of inward migration to Ireland. It is important to note here, that at the time of the case, more than 11,500 applications for residence from parents with Irish citizen children were pending.⁴²⁹ The attempt, however, failed to stem the flow and consequently the 2004 referendum took place which effectively revoked the *jus soli* principle.

What is interesting is that in the *Fajjonu* case, the majority of the Supreme Court held that the '*company, care and parentage (provided by) parents within a*

⁴²⁷ *Fajjonu v Minister for Justice* (1990) IR 151; (1990) ILRM 234.

⁴²⁸ *L and O v Minister for Justice, Equality and Law Reform* (2003) IESC, 1.

⁴²⁹ Mullally, S. "Children citizenship and constitutional change", in Fanning, B. (ed.) *Immigration and Social Change in Republic of Ireland*, (Manchester University Press, 2007).

family unit was a right of the child derived from the constitution. Moreover, just one year prior to the *L and O* judgement, in the *N.W.H.B* case,⁴³⁰ Keane CJ held that the family, because it derives from the natural order was endowed with an authority that the Constitution itself recognised as being superior even to the authority of the State. As a result of the *L and O cases*, however, it would seem that only certain types of families are deserving of this constitutional protection afforded by the entrenched provisions on family life. The EU however added a further twist to the ‘citizenship, family life, fundamental rights’ debate, as noted the *Chen case*⁴³¹ in effect bolstering the right to family life for migrating families by stating that a Union citizen child’s right of residence would be yielded ineffective if her parent was denied a right of residence. Placed in contrast with the Irish Supreme Court decision in the *L and O* case, the *Chen* case augments the child’s right to family life and has afforded greater protection than that of the Irish Constitution. However, as a result of the *Chen* case, the national judgments and the consequent referendum, Ireland has since changed its nationality laws in effect limiting the possibility of acquiring Irish nationality of children born to third country nationals.

In terms of reception of the *Metock* case in the UK, we note some interesting points. First, the UK Border Agency has revised its guidance rules to comply with the judgment. In so doing, it revised Chapter 3 of the UKBA’s European Casework Instructions to ensure that neither the ‘lawful residence requirement’ nor the requirements in the Immigration Rules may be applied when direct family members apply for residence. What is more interesting though, is that the Asylum and Immigration Tribunal has been faced with a case in which it had to apply *Metock*. In the case of *HB (Algeria)*,⁴³² the Tribunal emphatically stated that “*it will be apparent from what we go on to say that the ECJ ruling in Metock affects a number of Tribunal and Court of Appeal decisions*” signifying the Tribunal’s willingness to adjust its reasoning in consideration of the ruling in

⁴³⁰ *North Western Health Board v HW and CW* (2001) 3 IR 622.

⁴³¹ *Chen v Secretary of State for the Home Department*, Case C-200/02.

⁴³² *HB (EEA right to reside - Metock) Algeria* [2008] UKAIT 00069.

Metock. Unfortunately, the issue of family formation was not at issue in this case. It would be interesting to see how the tribunal might deal with this issue, specifically the fact that in *Metock* the ECJ construed the Directive as a tool for both family formation and family reunification.

One of the clearest pronouncements of the Court has been that Union citizenship is intended to be the fundamental status of nationals of the Member States. The *Zambrano* case discussed above certainly goes one step further in achieving this EU goal and in recognising a real, coherent status for citizens of the Union. This judgment, however, has been quite controversial. First of all, it is important to note that all Member States that made written submissions in the case and the Commission argued that the situation in the case at hand did not come within those envisaged by the freedoms of movement and residence guaranteed under EU law. In addition, the Irish government argued that to suggest otherwise would essentially result in opening the floodgates for similar types of claims. Therefore, it was not surprising when two days after the *Zambrano* judgement an Irish High Court judge openly called for a judicial conference to discuss the implications of the ruling while also urging the Government to take a formal position on the judgment as soon as possible so as to provide clarity in relation to a number of judicial reviews that were (and now still are) pending before the courts. Moreover, in the same week of the judgement, there were calls that the Irish government revoke the deportation orders of parents of 20 Irish citizen children who were forced to leave the country as a result of their parents' deportation in addition to the countless number of parents of Irish citizen children who had left the county. The result of the judgement would seem to call into question the Irish government's policy of deporting parents of Irish citizen children since the new rules on the acquisition of citizenship came into force. Most deportations are based on the reasoning that the family unit can still be preserved if the citizen child accompanies the parents back to their state of origin. This may indeed be true, the main crux of family preservation resting on the company and care of children by their parents therefore implying physical proximity. However, *Zambrano* and essentially the interpretation of EU citizenship by the Court has shed new light on these types

of cases affording weight to the protection of the family unit in the host EU Member State.

In response to these calls, the Department of Justice released a statement on the *Zambrano* judgement.⁴³³ The main points it highlighted include stressing that the judgement applies only in cases where the child concerned is a citizen thereby reinforcing the existing citizenship rules that were introduced in 2004 and stressing that the acquisition of citizenship remains a domestic matter. The Minister for Justice then went on to highlight that the government would take a proactive approach to the matter as opposed to waiting for the Irish Courts to decide pending cases in consideration of the judgement. In view of this, the Minister has initiated an urgent examination of all the cases that are pending before the courts (of which there are approximately 120) so as to decipher as quickly as possible if the *Zambrano* judgement is relevant. Furthermore, the Minister has said that parents of Irish citizen children who have been deported in the last 5 years could now apply to return to Ireland and that their situation will be reviewed.

The results of this investigation will certainly provide for interesting reading. Suffice it to say for now that once again the primary law of the Union has granted stronger protection to the family and as we have seen from its reception in Ireland has the potential to infiltrate the domestic systems strengthening the rights of the family as a unit. In sum, in relation this to the overall impetus of this research, it could be argued that the European legal order is providing a level of protection for families in Europe based on a completely different set of rules in comparison to those used at the national level which are, as we have seen, generally developed along national, constitutional underpinnings in terms of the traditional family and which do not take into

⁴³³Available online:

<http://www.inis.gov.ie/en/JELR/Pages/Statement%20by%20Minister%20for%20Justice,%20Equality%20and%20Defence,%20Mr%20Alan%20Shatter,%20TD,%20on%20the%20implications%20of%20the%20recent%20ruling%20of%20the%20Court%20of%20Justice%20of%20the%20European%20Union%20in%20the%20case%20of%20Ruiz%20Zambrano>.

consideration the difficulties this presents when it comes to peripheral issues that necessarily affect the horizontal and vertical dynamics of the family.

However, we can already note that Belgium, in the meantime, has in fact changed its nationality laws. Therefore, although the case has an innovative character, particularly when we consider its potential impact on family law, it may induce Member States to tighten their nationality laws so as to make this judgement applicable to a minimum number of cases.

In terms of reception in Italy, we can look to a recent case concerning name registration for some indication on the reception of *Garcia Avello* and *Grunkin Paul*. In the case of *Cusan and Fazzo v. Italy*,⁴³⁴ a married couple attempted to register the birth of their baby girl according to the mother's surname. However, this request was rejected and Fazzo was used on the civil register. The couple appealed, but was told that though there was no law, the rule according to which births were to be registered according to the surname of the father was rooted in social consciousness and in Italian history. After years of appeals in Italy's courts, the city of Milan ruled that Fazzo-Cusan could be used in 2012. This did not satisfy the couple, who took their case to Europe. The seven-judge court found in favour of the couple, stating that discrimination existed in how they were treated. It said that the Italian Supreme Court had enforced a '*patriarchal concept*' in stipulating that:

The Italian Constitutional Court itself had recognised that the system in force had its roots in a patriarchal concept of the family which was not compatible with the constitutional principle of equality between men and women...It was possible that the rule that the father's surname be handed down to legitimate children was necessary in practice, and was not necessarily incompatible with the Convention, but the fact that it

⁴³⁴ ECtHR, *Cusan and Fazzo v. Italy*, no. 77/07, Judgment of 7 January 2014.

*was impossible to derogate from it had been excessively rigid and discriminatory towards women.*⁴³⁵

V) Concluding Remarks

We can see then from these few select cases investigating the reception of CJEU judgements varies. In most cases, the principle of equality has been quite well received, perhaps since equality of treatment is a shared goal at both the domestic and EU level. The employment of fundamental rights logic, so long as there is a sufficient link to European law, is, albeit less so, also making advances at the EU level bolstered by the Union's pledge to protect fundamental rights. Citizenship on the other hand, although specifically legislated for as an ancillary status, seems to be even more contentious. This is particularly true when one considers the preoccupation of Member States that the EU is intruding on wholly internal situations, interfering with immigration policy of the Member States and assuming, it could be argued, a sort of social engineering function.⁴³⁶

This issue will be dealt with in Chapter VI on Citizenship. First it is necessary to delve into the case law of the European Court of Justice so as to delineate the concept of the family according to fundamental rights.

⁴³⁵ Paragraph 67 “*Par ailleurs, la Cour constitutionnelle italienne elle-même a reconnu que le système en vigueur procède d’une conception patriarcale de la famille et des pouvoirs du mari, qui n’est plus compatible avec le principe constitutionnel de l’égalité entre homme et femme...Si la règle voulant que le nom du mari soit attribué aux « enfants légitimes » peut s’avérer nécessaire en pratique et n’est pas forcément en contradiction avec la Convention, l’impossibilité d’y déroger lors de l’inscription des nouveau-nés dans les registres d’état civil est excessivement rigide et discriminatoire envers les femmes*”.

⁴³⁶ For a broader discussion see Wilhelmsson, T. “Varieties of welfarism in European contract law”, *European Law Journal*, (2004) 10, 6, p. 712-733; Wilhelmsson, T. & Hurri, S.J. (eds.), *From dissonance to sense: welfare state expectations, privatisation and private law*, (Aldershot: Ashgate, 1999).

Chapter V: Beyond Equality - The Influence of Fundamental Rights

*“nonsense upon stilts”*⁴³⁷

I) Introduction

In 1791, Jeremy Bentham, in reference to the French Human Rights Declaration of 1789 commented that natural, imprescriptible rights were simply nonsense upon stilts. Today, however, as we will see, references to natural rights inherent to the person, from which the principles of human dignity and equality derive, have advanced a discourse that would seem to have arguably won out the nonsensical approach.⁴³⁸

In the previous chapter, we noted the path by which peripheral family law issues arrive for adjudication at the CJEU. In so doing, we uncovered the role of anti-discrimination in breaking down the barrier that exceptionalized family law during the globalization of Classical Legal Thought and The Social. However, what we also uncovered was an increased reference to fundamental rights and EU Citizenship as concepts used by the Court in the adjudication process.

The purpose of this chapter therefore is to assess the effects of fundamental rights in family law cases at the supranational level. More specifically, we will investigate the relationship between the European Court of

⁴³⁷ Bentham, Jeremy. “Anarchical Fallacies”, in Bowring, J. (ed.), *The Works of Jeremy Bentham*, Vol II (Edinburgh: W. Tait, 1843).

⁴³⁸ It must, however, be pointed out that reference to Bentham is used here by way of provoking a discourse on the true nature of fundamental rights and how they are perceived. In fact, Bentham’s “nonsense” was hyperbolic, his actual point being more subtle in that he aimed to demonstrate that behind rights discourse lay policy choices. In other words, rights discourse acts as a cloak for policy driven decisions. He pointed to the indeterminable nature of rights, for example, how does one in any straightforward way reconcile freedom of expression and freedom of religion? Today, balancing and proportionality are advanced as a reasonable methodology.

Human Rights⁴³⁹ and its assessment of the right to family life (Article 8) and the European Union Court of Justice, which in recent times has increasingly made reference to ECtHR pronouncements. In addition, we will investigate the potential of the Charter of Fundamental Rights which has been modelled on the ECHR and which now assumes the position of primary law which must be respected and adhered to. The premise is that the emergence of a fundamental rights approach to resolving cross-border family disputes in cases concerning personal status and private relationships is a response to the phenomenon of migration and a lack of legal tools in view of the resolution of these issues at the national level.

In fact, fundamental rights in family law have always played a particular role. As noted above in Chapter II, the constitutional protection of families that was espoused during the Social paved the way for a “special” protection that continued to inform the debate on family protection resulting in a persistent coupling of family law with morals and tradition effectively substantiating the family/market dichotomy. Nonetheless, the advancement of the interpretation of fundamental rights at the supranational level must be investigated since any discussion on family law at the European level must consider the potential of fundamental rights protection within the internal market.

In addition, we must be aware that the application of fundamental rights across the board in terms of private law has gathered momentum in recent years, both at the national and supranational level.⁴⁴⁰ The aim here is to investigate this premise in the area of family law so as to uncover the extent to which new ideologies have been recognised in an attempt to inform the discussion concerning the reconstruction of family law at both the supra and national level in consideration of peripheral family law issues.

⁴³⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11), Council of Europe CETS No. 5, Rome, 4 November 1950, in force 3 September 1953.

⁴⁴⁰ Brüggemeier, G., et al., *Fundamental Rights and Private Law in the European Union: Comparative Analyses of Selected Case Patterns* (Cambridge University Press, 2010). Mak, C. *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Kluwer Law International, 2008).

To this end, this Chapter will proceed in the following way: by way of setting the scene, we will indicate some of the CJEU’s jurisprudence in which fundamental rights first played a notable role particularly with reference to the influence of the ECHR. This serves to introduce the relationship between the two Courts in a way that will inform the discussion on the potential of fundamental rights considerations in the peripheral family law cases coming before the CJEU. We will then proceed to delineate the case law of the ECtHR concerning the family with a view to establishing the acceptance of atypical family types by that Court. With the case law analysis in place, we can proceed to contrast the interpretation of fundamental rights by the two Courts. Finally, we will proceed by delineating the role of the Charter of Fundamental Rights and the CJEU’s reliance on this fundamental rights document.

II) Introducing The Interpretation Of Fundamental Rights By The CJEU

It is often argued that the CJEU only pays lip service to fundamental rights protection in its jurisprudence owing to difficulties inherent in such an application in the field of private law.⁴⁴¹ A counter argument, however, is that a notable change has occurred since specific reference to fundamental rights has increasingly become more pronounced in balancing economic rights with fundamental rights.⁴⁴²

⁴⁴¹ In terms of the difficulties of applying a fundamental rights based logic see Collins H., “On the (In)compatibility of Human Rights Discourse and Private Law”, LSE Law, Society and Economy Working Papers 7/2012; Smits, J.M. “Private Law and Fundamental Rights: A Sceptical View” in Barkhuysen, T. and Lindenbergh, S. (eds.), *Constitutionalisation of Private Law* (Brill, 2006).

⁴⁴² In this regard, see Safjan M., “The Horizontal Effect of Fundamental Rights in Private Law—On Actors, Vectors, and Factors of Influence”, in Purnhagen K., & Rott P. (eds), *Varieties of European Economic Law and Regulation, Liber Amicorum for Hans Micklitz*, (Springer International Publishing, 2014) where he examines the radiating effect of fundamental rights on private law according to various jurisdictions including the national and European setting.

The *International Handelgesellschaft*⁴⁴³ case was the first pronouncement by the ECJ that specifically recognised the importance of fundamental rights in the internal market⁴⁴⁴:

Although Community regulations are not German national laws, but legal rules pertaining to the Community, they must respect the elementary, fundamental rights guaranteed by the German Constitution and the essential structural principles of national law.

The Court went on to state that:

...respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

It is clear from the judgment then that the ECJ was already mindful of and attempting to assimilate the common constitutional principles of the Member States. This agenda was pursued in subsequent case law leading to not only a recognition of the importance of fundamental rights but rather to a situation according to which fundamental rights were actually balanced against market freedoms. A few important, oft-cited cases can be mentioned here by way of illustrating this development.

First, we refer to the well-known *Schmidberger v Austria*⁴⁴⁵ judgment. In that case, Austria argued that the temporary closure of roads between Austria and Italy, effectively hampering free movement guaranteed by the EC treaty, was justified on the basis of freedom of expression and assembly (the road was blocked so as to allow an environmental demonstration). The Court therefore

⁴⁴³ *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11-70

⁴⁴⁴ We can also make reference here to *Stauder v City of Ulm*. For an historical account of the development of human rights and their role in the EU see Douglas-Scott, *Constitutional Law of the European Union*, (Longman, 2002) Chapter 13.

⁴⁴⁵ *Schmidberger v Austria*, Case C-112/00.

was forced to juxtapose internal market considerations with fundamental rights. The Court reasoned, on the basis of “settled case-law”, that:

...fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, inter alia, Case C-260/89 ERT[1991] ECR I-2925, paragraph 41; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37, and Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25).⁴⁴⁶

Two points can be noted here. First, we can identify, from the language used in the court’s reasoning, the shift we have already made reference to – be it rhetorical or not - in terms of market v social reasoning. Secondly, the Court directly refers to the case law of the European Court of Human Rights in its attempt to ground the application of fundamental rights by drawing inspiration from common constitutional provisions and international treaties. One might consider the real consequences of this advance i.e. the instigation of a rights-based logic to be applied by a court that has its origins in the interpretation of legal issues related to the proper functioning of an internal market, which goes well beyond what was initially conceived in 1951 by the Treaty of Paris. However, we might also argue that the fundamental rights-based approach necessarily remains bound to the logic and language of the market oriented economic freedoms given the very basis of the EU legal order.

With the wheels in motion, the *Omega*⁴⁴⁷ case followed and firmly substantiated the direction the Court was prepared to take. The case concerned a German prohibition on the importation of laser guns that involved players targeting each other a type of “play at killing”. It was argued that the

⁴⁴⁶ Paragraph 71.

⁴⁴⁷ *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02.

encouragement of fictitious violence for entertainment purposes amounted to violation of human dignity, a key principle of the German Constitution. The ECJ in the case accepted the German government's prohibition which furthered, at least in this case, a priority of fundamental rights over community law.⁴⁴⁸ The Court made reference to its judgment in *Schmidberger* confirming that the protection of fundamental rights justifies, in principle, a restriction upon fundamental freedoms. In balancing the fundamental rights approach with economic, internal market considerations, the Court made reference to the opinion of the Advocate General that “*the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law*” going beyond, a merely market rights based approach. In other words, it would seem that what the Court does is not replace no rights with some rights, but rather supplements economic rights, with social and dignitary ones.

From these early examples, we can already note the Court's attempt to ascertain the sources of fundamental rights as reference points in deciding certain cases and for our purposes it allows us to introduce the impact of the European Convention of Human Rights and the fundamental rights delineated therein and interpreted by the ECtHR. The extent to which the ECHR has influenced the CJEU, either directly or indirectly, has led to an interesting debate on the European legal scene. Indeed, much attention has been given to the relationship between the two Courts. However, attention must be intensified now with the entry into force of the Lisbon Treaty and with it the Charter of Fundamental Rights, article 52(3) which stipulates that the ECHR should act as the minimum standard of human rights in the EU and the EU's accession to the ECHR. Indeed, much of the following analysis will focus on the interaction between these two fundamental rights instruments and the Court.

Bearing that in mind, we will proceed with an analysis of the jurisprudence of the ECtHR in relation to the family in order to decipher what

⁴⁴⁸ We can make reference here also to the *Schmidberger* case in which the protection of the freedom of assembly and expression justified a derogation from free movement of goods.

exactly it considers the family to be. Once this is established, I will proceed to examine the CJEU's references to the Convention and the case law of the ECtHR in order to evaluate the role of fundamental rights in private law at the Union level. In furtherance to this, the Charter will be examined.

III) The European Convention On Human Rights

Prior to delineating the case law on the ECHR, it is important to recall the premise of this thesis i.e. the family, in structure, nature and ideology has, and continues to change. We argue here that this change has been interpreted in view of advancing fundamental rights protection reflected in the variety of cases, examined below, coming before the ECtHR.

At the national level, the principal preoccupation for a long time was in striking the delicate balance between private ordering within the family structure on the one hand and state protection, for example in cases concerning domestic violence, education and family welfare often justified by the special protection afforded to families in national constitutions.⁴⁴⁹ More recently, and here we recall the peripheral family law issues, family law has been further convoluted by two significant developments: the first being the increase of what we might term 'atypical family structures' and the second, linked to the first, is the mobility of persons as individuals and families as units within Europe's borders. Suffice it to say, at the risk of repetition, that the focus of this thesis is on the peripheral issues and specifically in this chapter on how fundamental rights arguments have been used in these areas.

⁴⁴⁹ Here, we can make reference to the Irish Constitution (Bunreacht na hEireann) enacted in 1937 according to which "The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law" (Article 41.1) "The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State" (Article 41.2). Similar pronouncements can be found in the Italian Constitution in Article 31 which states that (1) The republic furthers family formation and the fulfilment of related tasks by means of economic and other provisions with special regard to large families. (2) The republic protects maternity, infancy, and youth; it supports and encourages institutions needed for this purpose.

To this end, and so as to simplify the ascertainment of relevant cases, a distinction will be made here between peripheral cases concerning the changing structure and composition of families on the one hand and on the other, cases that are in some way related to the mobility of families. Naturally, the facts of some cases cannot be neatly packed into one or the other box nor are their facts strictly limited to either core or peripheral issues. Therefore, some overlap is to be expected in allowing a concise overview of the intervention of fundamental rights in the development the family and its legal sphere.

Generally speaking, the cases outlined give rise to an interpretation of Articles 8, 12 and 14 of the Convention.

A. Article 8: Right To Respect For Private And Family Life

Article 8 is the most obvious provision protecting the family. It is entitled right to respect for private and family life and states:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*

From the provision it is clear that it is characterized by negative and positive obligations in that not only does it protect individuals against arbitrary interference by public authorities but it also stipulates that states must act

affirmatively to respect family life⁴⁵⁰. This was made clear in the case of *X & Y v the Netherlands*⁴⁵¹ in which the Court held that:

[Article 8] does not merely compel the state to abstain from...interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life...These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

B. Article 12: The Right to Marry

Article 12 concerns the right to marry. It specifically states:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

It is clear then from this provision that the recipients of this right are opposite sex couples of marriageable age according to the national laws in force. It excludes therefore new family formations such as same-sex couples. However, as we will see from the case law examination, and in accordance with Article 14 outlined below, cases, more frequently, come before the court based on these two articles taken in conjunction in relation to same-sex rights to marriage and transsexuals' right to marry.

C. Article 14: Prohibition of Discrimination

Article 14 of the ECHR concerns the prohibition of discrimination in stating:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion,

⁴⁵⁰ Kilkelly, Ursula. Human Rights handbook, No. 1. The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights. 2003.

⁴⁵¹ *X & Y v the Netherlands*, Application no. 8978/80.

political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Again it is clear from the wording of the Article that it guarantees equality in relation to the substantive rights laid out in the Convention. However, it must be noted here that in 2010⁴⁵² protocol 12 to the Convention came into force expanding the scope of equal treatment to cover rights guaranteed not just those rights delineated in the Convention but also those at the national level.⁴⁵³

With the relevant provisions set out, an examination of the case law will inform us as to how the Court has applied these fundamental rights in cases concerning the family.

D. Application

It is important to note from the outset that new, atypical family forms i.e. those that do not subscribe to the traditional, classical family based on heterosexual marriage have presented difficult, some might say controversial questions for society and law. The ECtHR professes its preference for equal acceptance when it comes to deciding “family life” cases. To this end, rather than focusing on strict formal ties, it stipulates that the general principle to be applied is whether there are close personal ties between the parties. Necessarily then, in recognising the ever-changing nature of family life, it takes a case-by-case approach to the cases that come before it permitting it to interpret the Convention as a “living instrument”⁴⁵⁴. In the case of *EM (Lebanon)*,⁴⁵⁵ the Court highlighted this fact-specificity of family life and the meaning attributed to it by Article 8 of the Convention in stating that:

⁴⁵² It was supposed to enter into force in 2005 but there were serious delays leading to Protocol No. 14bis to the European Convention on Human Rights.

⁴⁵³ Protocol no. 12 to the Convention for the protection of Human Rights and Fundamental Freedoms (ETS no. 177), Explanatory Report, available online at: <http://conventions.coe.int/Treaty/en/Reports/Html/177.htm> .

⁴⁵⁴ *Tyrer v. The United Kingdom*, Application no. 5856/72.

⁴⁵⁵ *EM (Lebanon)* [2008] UKHL 6, [2009] 1 AC 1198.

*Families differ widely, in their composition and in the mutual relations which exist between the members, and marked changes are likely to occur over time within the same family. Thus there is no pre-determined model of family or family life to which article 8 must be applied. The article requires respect to be shown for the right to such family life as is or may be enjoyed by the particular applicant or applicants before the court, always bearing in mind (since any family must have at least two members, and may have many more) the participation of other members who share in the life of that family. In this context, as in most Convention contexts, the facts of the particular case are crucial.*⁴⁵⁶

Parenting

On examination of the case law of the Court, particularly some of the early cases, we note that atypical family structures and the issues emanating from these new family types, often arrive to the Court on the basis of questions concerning parenting. Our starting reference point here is the issue of non-marital heterosexual families encompassing both couples that cohabit and those that perhaps were once married but separate and which have children together and therefore the ties, once formal but now functional, which must be maintained.

Let us first look to the case of *Marckx v Belgium*.⁴⁵⁷ This early case, although it did not actually feature the term *de facto* family did, in an attempt to equalise the situation of *de facto* families with that of marital families, recognise that the family protected by Article 8 was not limited to the traditional family based on marriage, which, in terms of our analysis of the family and progression from Classical Legal Thought represents a significant advancement and one which national courts shied away from. The Court stated that it:

recognises that support and encouragement of the traditional family is in itself legitimate or even praiseworthy. However, in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the 'illegitimate'

⁴⁵⁶ Ibid. Para 37

⁴⁵⁷ *Marckx v Belgium*, application No. 6833/74

*family; the members of the 'illegitimate' family enjoy the guarantees of Article 8 (art. 8)
on an equal footing with the members of the traditional family*

This case concerned a Belgian law in existence at the time of the case concerning unmarried mothers and children born out of wedlock. The law stipulated that in order to establish a maternal affiliation to a child, unmarried mothers had to recognise the child, and then adopt him/her. It was argued that this constituted a violation of Article 8 of the Convention. The Court, even though it obviously expressed a legal privileging for marital families in guaranteeing respect for family life, held that Article 8 and its reference to family life encompasses ties between an unmarried mother and her child thereby essentially recognising the importance of “family life” in *de facto* family situations.

Even though the situation of fathers and their biological children has been more convoluted, the case of *Berrehab v. The Netherlands*⁴⁵⁸ illustrates the approach of the Court in analysing the facts of the specific case so as to determine the existence or not as the case may be, of a real and substantial bond between parents and their children. The applicants in this case were a father, a citizen of Morocco, and his daughter. The father had divorced from his Dutch wife and the daughter lived with her mother. However, the father was co-guardian of his daughter and contributed financially in view of her maintenance on a monthly basis. As a result of the divorce, the Government of the Netherlands refused to renew the father's work permit and expelled him from the country. It was argued that these actions, even though the father continued to maintain contact with the child, violated Article 8 of the Convention. The European Court of Human Rights agreed with the applicants and held that Article 8 had been violated in the case on the basis that by refusing to accommodate the father with a work permit renewal and his subsequent expulsion, the father was prevented from maintaining regular contact with his daughter. It stated:

⁴⁵⁸ *Berrehab v. The Netherlands* Application No. 10730/84.

It follows from the concept of family life on which Article 8 is based that a child born of such a union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life", even if the parents are not living together

The issue was further clarified in *Boughanemi v France*⁴⁵⁹ according to which cohabitation, let alone marriage, is not essential in establishing family life for the purposes of Article 8. The Court was clear in pronouncing that a presumption of family life exists between biological parents and children regardless of marital status in stating that:

The concept of family life on which Article 8 (art. 8) is based embraces, even where there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is legitimate...although that tie may be broken by subsequent events, this can only happen in exceptional circumstances...

It is clear from these selected examples that the Court concentrates its approach on the substance of family relationships as opposed to formalities permitting a fundamental rights based approach to *de facto* families with a view to establishing the existence of family life. What is interesting though is that the Court seems to place great weight on the pre-existence of a relationship, especially when it comes to unmarried fathers and their children. It has established that unmarried natural fathers must establish a sufficient degree of commitment to their children in order for family life to be established for the purposes of Article 8. This was made clear in *Lebbink v Netherlands*⁴⁶⁰ in which the Court stated that if Article 8 were to apply to "a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth". Subsequent case law clarified to some extent what the Court meant by 'demonstrable interest' and it would seem that in cases where the parents are cohabiting i.e. in cases where a child is born into an existing *de*

⁴⁵⁹ *Boughanemi v France*, Application No. 22070/93.

⁴⁶⁰ *Lebbink v Netherlands*, App. No. 45582/99.

facto family then family ties can be said to exist between the father and the child. Where there is no cohabitation, however, the Court will have to examine “contributions to the child’s care and upbringing” and “the quality and regularity of contact”⁴⁶¹.

The issue of transsexual parenting has also brought more controversial issues before the Court forcing the Court to once again deal with relationships not based on blood ties. Family ties between children and stepparents had already been recognised by the Court in the case of *Nuutinen v Finland*.⁴⁶² In the case of *X, Y and Z v The United Kingdom* ⁴⁶³ the Court had to consider whether *de facto* family ties existed between a transsexual male and a child born to his partner through artificial insemination. In considering the facts, it opined that the relationship between a female-to-male transsexual and his child born by artificial insemination by donor (AID) amounted to family life. In deliberating, the Court attached significance, first, to the fact that their relationship was otherwise indistinguishable from that enjoyed by the traditional family and secondly, that the transsexual participated in the AID process as the child’s father.

More recently, the Court has pronounced on the very interesting and increasingly controversial issue of the legal recognition of the rights of children born to surrogate mothers. In the cases of *Mennesson v. France*⁴⁶⁴ and *Labassee v. France* ⁴⁶⁵ the court stipulated that France has the right to ban surrogate parenthood but it cannot extend its stance in refusing to grant legal protection to parent-child relationships of children born to surrogate mothers. It ruled that the

⁴⁶¹ *Khan v United Kingdom*, Application no. 47486/06.

⁴⁶² *Nuutinen v Finland*, Application No. 45830/99.

⁴⁶³ *X, Y and Z v The United Kingdom*, Application no. 21830/93.

⁴⁶⁴ *Mennesson v. France* Application no. 65192/11.

⁴⁶⁵ *Labassee v. France* Application no. 65941/11.

current practice in France constituted an infringement of the children's right to respect for their *private life*.⁴⁶⁶

Same-sex

Thus far, we have described how the Court deals with atypical family forms that come before it when parenting is involved. What we haven't considered is relationships that are formed between two people of the same sex who seek recognition of their family status when there are no children concerned. The issue of same-sex families has given rise to much controversy.

The case of *Karner v Austria*⁴⁶⁷ exemplifies the Court's tendency to privilege the traditional family. It concerned an applicant, who was deceased by the time of the judgment, who shared a flat with his same-sex partner. They shared all the utility costs of the apartment. In 1991 Mr. Karner's partner discovered that he was infected with the AIDS virus and from 1993 until his death Mr Karner nursed him. He died in 1994 designating Mr Karner as his heir. In 1995 the landlord of the apartment sought to terminate the tenancy and brought proceedings to this effect. The action was dismissed on the basis that family members held a statutory right to succeed in a tenancy agreement and the court opined that this applied to persons in a homosexual relationship. After being upheld by the Regional Court, the Supreme Court eventually quashed the decision in 1996 reasoning that the notion of "life companion" had to be interpreted in accordance to its meaning at the time the legislation was enacted in 1974. It opined that the legislature's intention at that time had not been to include persons in same-sex relationships. The applicant took the case to the ECtHR claiming a violation of Article 14 taken in conjunction with Article 8 of the Convention. Even though the applicant had died before the case was heard, the Court decided to proceed. It was of the opinion that the subject matter was of significant importance for all the state parties to the Convention. It held that

⁴⁶⁶ Emphasis added so as to note that, in the opinion of the Court, the applicants had not claimed that the obstacles they faced had been insurmountable, nor had they demonstrated that they had been prevented from the enjoyment in France of their right to respect for their family life.

⁴⁶⁷ *Karner v Austria*, Application No. 40016/98.

Article 14 was applicable in that differences based on sexual orientation could only be justified on the basis of serious reason. The fact that the Court based its decision on Article 14 rather than Article 8 is very telling in that its usual reasoning path, based on the social function rather than formal ties and biological links, was inapplicable to these cases. The Austrian Government argued that the aim of the legislation in question was the protection of the traditional family unit and the Court accepted that this was, in principle, a weighty and legitimate reason with the potential to justify a difference in treatment. Thankfully, however, it found that the aim pursued was rather abstract and in theory a broad variety of concrete measures could be used to achieve such an aim. In reality, it was necessary for the Government to demonstrate that the measure chosen to realise the aim had to be a measure necessary to exclude homosexual couples from the scope of the legislation in order to achieve that aim.

Although the Court in the above case demonstrated a clear preference for maintaining the traditional family, the issues of same-sex families has again recently come before the Court. In considering whether same-sex couples can enjoy family life for the purposes of Article 8, the Court, in *Schalk and Kopf v Austria*⁴⁶⁸ made reference to changing social attitudes and legal reform that has taken place in contracting states to reflect these changes. It held:

In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of 'family life', just as the relationship of a different sex couple in the same situation would.

What is especially important in this judgment, and something that will be dealt with in more detail below, is the Court's reference to the Charter of

⁴⁶⁸ *Schalk and Kopf v Austria*, Application no. 30141/04

Fundamental Rights, illustrating the cross-pollination of certain elements from one legal order to another.

*Regard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint.*⁴⁶⁹

More attention will be paid to this reference below when we discuss the relationship between the CJEU and the ECtHR. For now, suffice it to say that an alternative approach has been adopted by the ECtHR in guaranteeing the fundamental right to family life for families whose structures differ from the classical one based on formal ties of marriage.

The judgments referred to thus far are important with a view to setting the scene in relation to the Court's interpretation of family life. However, it is now important to make reference to the more peripheral-like cases that have come before the Court as a result of migration with a view to juxtaposing the ECtHR's approach to that of the CJEU.

Family Reunification and Residence Rights

As we have seen from the previous chapter, the opening up of the path to the CJEU via anti-discrimination and a neo-formalist approach has led to real access in terms of the peripheral family law issues we consider here, including rights of residence⁴⁷⁰. In a similar vein, the question of family unity has come before the ECtHR via family reunification issues and rights of residence.

Let us begin here by making reference to the case of *Abdulaziz, Cabales, and Balkandali v. United Kingdom*⁴⁷¹. The applicants in this case were three lawfully settled residents of the UK who applied to the UK Government to have their

⁴⁶⁹ Paragraph 61 of *Schalk and Kopf v Austria*, Application no. 30141/04.

⁴⁷⁰ See Chapter IV.

⁴⁷¹ *Abdulaziz, Cabales, and Balkandali v. United Kingdom*, Application nos. 9214/80; 9473/81; 9474/81.

husbands join them on the basis of the immigration rules that were in force at that time. This application was refused and therefore the case arose from their challenge to the refusal. They argued that the rules in question applied stricter conditions for the granting of permission for husbands to join their wives than vice versa. The Government claimed the stricter measures complained of were in force in order to protect the domestic labour market and maintain “public tranquillity”. On the basis of this, the applicants claimed discrimination on the grounds of race and sex, and in the case of the third Applicant, Ms. Balkandali, on the grounds of birth. They specifically alleged a violation of Article 14 (prohibition of discrimination), Article 3 (prohibition of torture), Article 8 (respect for family life) and Article 13 (right to an effective remedy) of the European Convention on Human Rights.

The arguments based on Article 8 of the Convention are of particular interest to us. It was submitted that Article 8 in protecting the right to family life inferred the right to establish one’s home in the State of lawful residence. Based on this, they argued that if this right was not upheld, then they would be forced either to move abroad to set up the family home or to be separated from their spouses. More specifically, they claimed that in conjunction with Article 14 of the Convention dealing with discrimination, that the immigration rules not only violated their right to family life but that they were discriminatory on the basis of sex, race and, in the case of Mrs. Balkandali, birth. The applicants claimed there was no objective and reasonable justification for the difference in treatment and that the Government’s position disrespected the role of women in modern society. In response to the claims, the UK Government argued that Article 8 was inapplicable to the case at hand and rather argued that it was an immigration case governed by Protocol 4. It argued that even if the Court were to find Article 8 applicable then the differences made on the basis of race, sex and birth were objective and reasonable and proportionate to the legitimate aim pursued i.e. the need to protect the domestic labour market at a time of high domestic unemployment, and to advance public tranquillity through effective immigration control.

In deciding the case, the ECtHR resolved that the facts fell within the ambit of Article 8 when examined in conjunction with Article 14. It is important to note however that it was of the opinion that Article 8 when taken alone had not been violated. It observed that case in question concerned immigrants who married after arrival to the UK in differentiating between immigrants who had come to the UK leaving a family behind in their country of origin. On the basis of this the Court held that the duty on states imposed by Article 8 does not imply a general obligation on the part of contracting States to respect the choice of matrimonial residence. It substantiated in arguing that the applicants to the case had not sufficiently demonstrated obstacles to establishing family life in their own or their husbands' home countries. For that reason, taken on its own there was no violation of respect for family life. It did, however, unanimously find a violation of Article 14 together with Article 8 on the basis that there had been discrimination on the grounds of sex reasoning that the difference in treatment was not justified. It is interesting to note that the Court made specific reference to efforts at that time to achieve gender equality, a recognition that can be paralleled to efforts at the EU level that were discussed above.

Family Name

Family name is another issue that has been considered by the Court (one which can be contrasted to the CJEU's approach to the issue⁴⁷²). It is an issue that indeed comes under the scope of protection of Article 8 but it is suggested that the Court does not attach great importance to the issue since it has never found a violation. In the case of *Sterjna v Finland*⁴⁷³, the applicant was refused permission to change his Swedish surname based on the fact that it caused problems and was likely to be mispronounced by Finnish speakers. He claimed that the relevant Finnish law violated Article 8. The Court however was not convinced and held that there was no violation as the applicant had not established any particular inconvenience or singularity in his name.

⁴⁷² See Chapter IV.

⁴⁷³ *Sterjna v Finland*, Application no. 18131/91.

The case of *Guillot v France*⁴⁷⁴ concerned the registration of a forename. The applicants wished to name their daughter 'Fleur de Marie' after the heroine in *Mystères de Paris*. The European Court of Human Rights noted that Article 8 does not contain any explicit provision on forenames. However, since they constitute a means of identifying persons within their families and community, forenames, like surnames do concern private and family life. Furthermore, the choice of a child's name by its parents is a personal, emotional matter and therefore comes within their private sphere. The subject-matter of the complaint thus fell within the ambit of Article 8. The Court noted the upset caused by the refusal to register the forename they had chosen. It stated that that forename consequently could not appear on official documents and deeds. In addition, the Court found it probable that the difference between the child's forename in law and the forename she actually used entailed certain complications for the applicants when acting as her statutory representatives. However, the Court noted that it was not disputed that the child regularly used the forename in issue without hindrance and that the French courts which had considered the child's interest had allowed the application made in the alternative by the applicants for registration of the forename 'Fleur-Marie'. In consequence, the Court did not find that the inconvenience complained of was sufficient to raise an issue of failure to respect private and family life. There had been no violation of Article 8 ECHR.

More recently, however, we note the case of *Cusan and Fazzo v. Italy*⁴⁷⁵ already mentioned above. To recall briefly, the case concerned a married couple attempted to register the birth of their infant girl according to the mother's surname. However, this request was rejected and Fazzo was used on the civil register. The couple appealed, but was told that though there was no law, the rule according to which births were to be registered according to the surname of

⁴⁷⁴ *Guillot v France*, Application No. 22500/93.

⁴⁷⁵ *Cusan and Fazzo v. Italy*, Application No. 77/07.

the father was rooted in social consciousness and in Italian history. After years of appeals in Italy's courts, the city of Milan ruled that Fazzo-Cusan could be used in 2012. This did not satisfy the couple, who took their case to European Court of Human Rights. The seven-judge court found in the couple's favour, saying that discrimination existed in the treatment of the couple. It said that the Italian Supreme Court had enforced a '*patriarchal concept*' in stipulating that:

*The Italian Constitutional Court itself had recognised that the system in force had its roots in a patriarchal concept of the family which was not compatible with the constitutional principle of equality between men and women...It was possible that the rule that the father's surname be handed down to legitimate children was necessary in practice, and was not necessarily incompatible with the Convention, but the fact that it was impossible to derogate from it had been excessively rigid and discriminatory towards women.*⁴⁷⁶

Cross-Pollination of Religion and Culture

Another interesting issue that has come before the Court is that concerning religion and the family. This is particularly interesting considering the wider scope of this hypothesis of this thesis i.e. migration within the EU and the peripheral family law issues that ensue. Two very pertinent judgments can be referred to here.

The first case to consider is that of *Muñoz Díaz v. Spain*⁴⁷⁷. The applicant in this case was a Spanish national of Roma descent who married, in accordance with Roma customs and traditions, Mr Muñoz Díaz. The marriage was therefore recognised by the Roma community who afforded all the normal social effects of marriage to the couple. On Mr. Díaz's death, the applicant applied for a survivor's pension based on the social security contributions that her husband had made during the 19 years prior to his death. The *Instituto Nacional de la Seguridad Social* (the National Institute of Social Security INSS) however refused

⁴⁷⁶ At paragraph 67.

⁴⁷⁷ *Muñoz Díaz v. Spain*, Application No. 49151/07.

the application stating that the applicant “[had] never been the wife of the deceased prior to the date of death” in that the marriage did not constitute a valid civil marriage in accordance with the Civil Code. Mrs. Diaz subsequently filed a claim with the Labour Court which on the contrary recognised the civil effects of the marriage and based on this granted the entitlement to Mrs. Diaz. This decision however was appealed by the INSS to the Madrid Higher Court of Justice resulting in the quashing, on the basis of Article 49 of the Civil Code, of the Labour Court judgment. It viewed the union as a *more uxorio* cohabitation arrangement that fell outside the scope of the General Social Security Act. The appeal continued with the applicant referring the question to the Constitutional Court. Mrs. Diaz at this point based her claim on the principle of non-discrimination in respect of race and social condition contained in Article 14 of the Spanish Constitution. The Constitutional Court however dismissed the appeal in holding that the legal possibility of marrying in a civil form was “neutral from a racial or ethnic point of view” and therefore no discrimination had taken place. The case eventually came before the ECtHR. It held that here had indeed been a violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol 1. In particular, the Court made reference to the State’s willingness to treat Mr. and Mrs. Diaz as spouses in that the civil registration authorities had granted the family status as a ‘large family’ for other purposes and that therefore it would be disproportionate for the State to refuse to recognise the civil effects of the marriage in assessing entitlement to a survivor’s pension.

The second case we can make reference to here is *Şerife Yiğit v. Turkey*⁴⁷⁸. The case was brought under Article 8 of the Convention and again concerned social security benefits. The applicant in this case married her husband, again in a religious ceremony in 1976 and they had six children. The husband died in 2002 and one year later the applicant brought a claim in her name and in the name of their youngest daughter. She sought to have their marriage registered and to have the name of her daughter entered in the civil register as a child of the marriage. In furtherance to this, the applicant applied to the retirement

⁴⁷⁸ *Şerife Yiğit v. Turkey*, Application No. 3976/05.

pension fund for a transfer of the said benefits to her and her daughter's name. Her claim was successful in relation to the transfer to the daughter's name but, on the basis that their marriage had never been legally recognised, the claim in her name failed. Therefore, the Court was asked to consider whether there was discrimination on the basis of the nature of the marriage. In this case, however, the Court held that there had been no discrimination and distinguished it from *Muñoz Díaz v. Spain* considering the element of good faith that was present in that case. More precisely, the Court pointed to the fact that the Spanish authorities in the Diaz case had already recognised Mrs. Díaz as her partner's spouse as she had been granted 'large family' status and had also been issued with a family record book. The Court also placed weight on the fact Mrs. Díaz at the moment of her marriage had no other option available as the only form of marriage at that time was in accordance with the rites of the Catholic Church. In the case at hand however, the Court claimed that Mrs. Yiğit was aware of the fact that in order to obtain the pension in question she would have to regularise her relationship in accordance with the civil code and moreover she had twenty-six years to do so. Article 8 was also considered by the Court; however, it was decided that it could not be interpreted as imposing an obligation on contracting States to recognise religious marriages.

Family Allowances

This is another indicative judgment of the ECtHR in relation to family structure and composition. Joined cases, *Fawsie v Greece*⁴⁷⁹ and *Saidoun v Greece*⁴⁸⁰, concerned Syrian and Lebanese nationals legally resident in Greece as political refugees. Both families claimed an allowance that in Greece is paid to mothers of large families. Their claims were rejected however on the basis that they did not have the status of "mother of a large family" within the meaning of the legislation since the legislation stipulated that either the parents or the children should have Greek nationality or the nationality of one of the member States of

⁴⁷⁹ *Fawsie v Greece*, Application No. 40080/07.

⁴⁸⁰ *Saidoun v Greece*, Application No. 40083/07.

the European Union. The Supreme Administrative Court, in consideration of Article 8 of the Convention, found that the legislation did not lead to a disruption of family ties, nor did it impede the construction of family life. In addition, the Supreme Administrative Court considered the case on the basis of Article 14 of the Convention but did not deem the refusal of the allowance wrongful on the basis of discrimination since the distinction between foreigners and nationals was based on the reasonable and objective criterion of nationality. The ECtHR however was of a different opinion. It recalled that a difference in treatment based solely on nationality could only be justified by very strong considerations. It held unanimously that there had been a violation of Articles 8 and 14 of the Convention taken together.

Gender Roles in Family Life

Another interesting body of case law can be discerned in relation to the prohibition on discrimination, particularly when considered in conjunction with Article 8. Most recently, we can make reference to the case of *Andrle v the Czech Republic*⁴⁸¹. The applicant was a divorced man who complained that there was no lowering of the pensionable age for men who had raised children equivalent to that available for women in the same position. More specifically, the applicant applied for a retirement pension at the age of fifty-seven based on the fact that he had cared for two children. The claim was rejected however with the Czech Social Security Administration arguing that he had not reached the pensionable age, in his case sixty-one years and ten months, required by section 32 of the Pension Insurance Act. Mr. Andrle appealed this decision which eventually reached the Czech Constitutional Court that decided that his claim was manifestly ill-founded basing its decision on the discretion afforded to the legislature to implement preferential treatment, the objective and reasonable aim pursued by this preferential treatment of women and the relationship of proportionality between the means employed and the aim pursued. In relation to the aim of the preferential treatment of women pursued by the Czech

⁴⁸¹ *Andrle v the Czech Republic*, Application No. 6268/08.

government, it was argued that under the old communist system women with children were required to work full-time while simultaneously caring for children and the household. Therefore, it was argued that the differential treatment was a measure intended to compensate for the burdensome existence that women were forced to adhere to during this time. The ECtHR noted the government's recent efforts to equalise the retirement age of men and women however held that progressive modification of the pension system could not be criticised especially taking into consideration the gradual nature of demographic shifts and changes in perceptions of the role of the sexes. Therefore the ECtHR granted a wide margin of appreciation in consideration of discrimination in this case.

With the ECtHR cases delineated, let us now turn to the case law of the CJEU in relation to the Charter of Fundamental Rights before turning to an analysis of the relationship between the two Courts and the instruments on which they rely.

IV) The Charter Of Fundamental Rights Of The European Union

When the EU was created, the original treaties did not contain any reference to the protection of human rights as it was thought that the creation of an internal market would not require recourse to a body of human rights provisions. However, on recognition that encouraging the free movement of persons, goods and services essentially lead to more than an efficient functioning of the market, the European Court of Justice increasingly decided cases with human and fundamental rights aspects. In an effort to render effective a more rights-based approach and in order to substantiate EU citizenship the EU Charter of Fundamental Rights was proclaimed in 2000, the content of which reflects greatly the European Convention on Human Rights and more generally protection afforded to nationals of Member States by the various Constitutions of the Member States. The Charter, originally a declaration of compliance with human rights became a legally binding document in 2009 when the Lisbon Treaty entered into force.

A. Early Reference to the Charter

In the years before the Charter became legally binding, there was some confusion as to the purpose, scope and effect of the instrument. For some time, the Court and Advocates General made specific reference to the European Convention on Human Rights and the general principles of EU law as sources of fundamental rights protection in the EU. The Charter, however, even though it remained non-binding at this point, provided the CJEU with an additional instrument, a toolbox of rights that could be considered and utilised by the Court as readymade general principles. In effect, as we will see from the pre-Lisbon case law examples, the Charter was used as an instrument for identifying fundamental rights as general principles of Community law. As set out in *Parliament v. Council*:

*the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights.'*⁴⁸²

This is particularly notable in reference to cases concerning anti-discrimination. As we have already pointed out in the previous chapter, the EU institutions have increasingly broadened the scope of equality of treatment. With specific reference to the Charter, although the *Mangold*⁴⁸³ did not explicitly mention it, it did provide an inkling of the direction into which the Court planned on going. In fact, this direction was again bolstered in the subsequent *Küçükdeveci*⁴⁸⁴ case in which it was made clear by the Court that:

⁴⁸² *Parliament v. Council*, Case C-540/03 at para. 38.

⁴⁸³ *Werner Mangold v Rüdiger Helm*, Case C-144/04.

⁴⁸⁴ *Seda Küçükdeveci v Swedex*, Case C-555/07

Article 6(1) TEU provides that the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties. Under Article 21(1) of the charter, '[a]ny discrimination based on ... age ... shall be prohibited'.⁴⁸⁵

The two cases, although not very forceful in their use of the Charter (in fact *Mangold* made no reference to it at all) did however bring to light the inspirational character that the Court granted to the Charter coupled with the general principles by anticipating direct horizontal effect to the general principles⁴⁸⁶. This step anticipated the post-Lisbon characteristic that the Charter⁴⁸⁷ was to assume i.e. that of having the same legal value of the treaties.

B. The Family and the Charter

The Charter, as mentioned, is modelled on the ECHR. However, there are some relevant differences, some of which have already been alluded to, which should be highlighted before the case law analysis. The relevant provisions for the purposes of family law include.

Article 7: Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

As we can see then, Article 7 of the Charter directly corresponds to Article 8 of the ECHR aside from the change in wording from correspondence to communications taking into account advances in modern technology.

⁴⁸⁵ Ibid. at paragraph 22

⁴⁸⁶ The Court did so based on the *Defrenne* doctrine.

⁴⁸⁷ For a discussion on the role fundamental rights play in relation to questions concerning European identity see Safjan M., "Between Mangold and Omega: Fundamental Rights versus Constitutional Identity", (2012) 3 *Il diritto dell'Unione europea* 442-449.

Article 9: Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 9 of the Charter protects the right to marry and found a family in accordance with the national laws governing the exercise of these rights. In comparison to the ECHR, and its Article 12, we note that the wording of Article 9 has been left open so as to provide protection for marriages and the foundation of families other than heterosexual.

Article 21: Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Although these provisions are indeed important in laying the foundations for a meaningful protection of families and their fundamental rights at the European level, what is also important, particularly for our purposes, is Article 24 of the Charter which provides that:

Article 24: The rights of the child

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

With the relevant provisions laid out, we can now turn to some of the case law examples so as to decipher whether or not the Charter adds in any significant way to the protection of migrating families in Europe.

C. Interpreting The Charter

One of the first cases concerning family law issues that the Court directly applied the Charter is the *McB*⁴⁸⁸ case. In this case, the CJEU was asked, by the Supreme Court of Ireland, whether Article 7 of the Charter which protects the right to family life influenced in any way the interpretation of the Brussels II bis Regulation⁴⁸⁹. The question was focused on the actions of a mother who removed her children from the country in which the father of the children was living without his consent. To give some more particulars of the case: the parents were not married, and under Irish law the father did not have the right to custody of the children seeing as he had just filed for paternity at the time when the mother took their child from Ireland to England. Based on Irish custody law therefore, formally, the mother had the right to choose the place of residence of the children and, when she removed them, the father could not obtain a court judgment declaring the wrongfulness of her conduct.

The father argued that the peculiarity of Irish law disproportionately affected his parental rights and that the Regulation should have been interpreted in light of the Charter (and of Art. 8 ECHR), so as to afford the natural father with custody rights *de jure*. This would have allowed him to seek a court declaration of the wrongfulness of the removal of his children by the mother.

The CJEU confirmed that the Regulation must be construed to allow a parent with custody to invoke the wrongfulness of removal without his consent. However, custody rights are conferred exclusively according to domestic law; a subject matter that, under Art. 51(2) of the Charter, is outside the competence of

⁴⁸⁸ *J. McB. v L. E.*, Case C-400/10.

⁴⁸⁹ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

the EU i.e. outside the reach of the Charter. The case-law of the ECtHR was of little help to the father's cause: a similar case was resolved by the Strasbourg court in recognising that national legislation conferring custody rights on only one of the natural parents was legitimate, provided that the other had the right to seek a court order reversing this initial allocation (this being the minimum standard of protection that the Convention ensures). In its ultimate analysis, the CJEU rejected the extensive interpretation of the Regulation advocated by the father in the main proceedings, and arguably made clear that, for the time being, it would not abuse any incorporation doctrine in order to expand the competence of the EU. Thus, the *McB* case and the Charter invoked in support of the father's rights did little by the way of protecting the father's rights in this case.

However, if we look to another category of case law, that which also invokes the EU citizenship provisions (which will be dealt with more thoroughly in the following chapter) we note that family rights, and in particular family unity, have been protected and the Charter has been more frequently relied upon in these instances. We point briefly to the *Dereci* case⁴⁹⁰, a case that forms part of a series of cases that will be dealt with in more detail in the following chapter. For now, we will examine whether the reasoning is perhaps more reflective of the Court's reasoning in cases concerning fundamental rights when coupled with EU citizenship.

V) Cross-Referencing Of The Courts

In examining the relationship between the two Courts⁴⁹¹ and the legal instruments at their disposal, we make reference to the above-mentioned *McB*⁴⁹² case and the Court's reference to the comparable *Guichard v. France*⁴⁹³ case heard

⁴⁹⁰ *Dereci and others v Bundesministerium für Inneres*, Case C-256/11.

⁴⁹¹ See Douglas-Scott, A., "A Tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis: (2006) 43 *Common Market Law Review*, Issue 3, pp. 629-665.

⁴⁹² *J. McB. v L. E.*, Case C-400/10.

⁴⁹³ *Guichard v. France*, Application No. 56838/00.

before the ECtHR. The CJEU specifically pointed to this case highlighting the similarities in their fact patterns:

*The European Court of Human Rights has already considered a case in which the facts were comparable to those of the case in the main proceedings, where the child of an unmarried couple was taken to another State by its mother, who was the only person with parental responsibility for that child. In that regard, that court ruled, in essence, that national legislation granting, by operation of law, parental responsibility for such a child solely to the child's mother is not contrary to Article 8 of the ECHR, interpreted in the light of the 1980 Hague Convention, provided that it permits the child's father, not vested with parental responsibility, to ask the national court with jurisdiction to vary the award of that responsibility (Guichard v. France ECHR 2003-X 714; see also, to that effect, Balbontin v. United Kingdom, no.39067/97, 14 September 1999).*⁴⁹⁴

The facts of the *Guichard v. France* case are as follows. The applicant in the case was the father of a child born out of wedlock. Both the mother and the father, however, had officially acknowledged parental responsibility of the child. After some time, the mother decided to move to Canada with the child and there she applied for custody and it was granted to her. The father applied to the French courts to have the child placed under joint parental authority but this was refused. Simultaneously, in reliance on the Hague Convention on the civil aspects of international child abduction, he sought the assistance of the Ministry of Justice for the safe return of his daughter to France. The Ministry refused to assist on the basis that the mother, at the time of moving to Canada, legally had custody of the child and therefore the removal of the child without the father's consent was not wrongful for the purposes of the Convention. The administrative courts agreed with this position and so the applicant was forced to refer to the ECtHR. As outlined, the ECtHR ruled that the national legislation did not infringe upon the right to family life.

⁴⁹⁴ *J. McB. v L. E.*, Case C-400/10. Para. 54.

The CJEU made reference to another case in its reasoning, that of *Zaunegger v. Germany*⁴⁹⁵ In so doing, it stated that:

*The European Court of Human Rights has also ruled that national legislation which does not allow the natural father any possibility of obtaining rights of custody in respect of his child in the absence of the mother's agreement constitutes unjustified discrimination against the father and is therefore a breach of Article 14 of the ECHR, taken together with Article 8 of the ECHR (Zaunegger v. Germany, no. 22028/04, § 63 and 64, 3 December 2009).*⁴⁹⁶

That stated, the Court went on to rule, after a consideration of Article 24 of the Charter and considerations of the best interests of the child, that Regulation No 2201/2003 must be interpreted as not precluding a Member State from providing, by its law, that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court with jurisdiction awarding such rights to him, on the basis of which the removal of the child by its mother or the retention of that child may be considered wrongful, within the meaning of Article 2(11) of that regulation.

The reasoning of the Court is interesting in that we can note its willingness to engage with the ECtHR. What is more compelling however is the feeling we get from the case in relation to the aspirational value of the Charter. The Court, in para. 53, states that:

Moreover, it follows from Article 52(3) of the Charter that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. However, that provision does not preclude the grant of wider protection by European Union law. Under Article 7 of the Charter, '[e]veryone has the right to respect for his or her private and family life, home and communications'. The wording of Article 8(1) of the ECHR is identical to

⁴⁹⁵ *Zaunegger v. Germany*, Ppplcation no. 22028/04.

⁴⁹⁶ *J. McB. v L. E.*, Case C-400/10. Para. 56

that of the said Article 7, except that it uses the expression ‘correspondence’ instead of ‘communications’. That being so, it is clear that the said Article 7 contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights⁴⁹⁷

In short, this case demonstrates the Court’s willingness to go beyond the ECHR. We can make reference to past cases such as *Carpenter*⁴⁹⁸, *Akrich*⁴⁹⁹, *Metock*⁵⁰⁰ and *MRAX*⁵⁰¹ all of which made reference to Article 8 of the ECHR in emphasizing that the separation of family members must be sufficiently justified. Now, however, it would seem that the Charter represents a new path for fundamental rights protection, a toolbox exclusive to the Court. As indicated above, however, the influence of EU Citizenship is also key here, particularly in consideration of the interplay between these two notions and how this interplay influences family law cases at the European level.

VI) Concluding Remarks

In consideration of the foregoing, coupled with our understanding of the neo-formalist langue, we can clearly note a transformative dimension when it comes to the interpretation of family law issues, both before the CJEU and, as highlighted above, before the European Court of Human Rights. The influence of a supranational body of case law dealing with emerging family issues on the CJEU, particularly considering the cross-referencing before the two courts, has caused the court to shift gears, abandoning its strict economic rights position and incorporating, by a variety of means, dignitary and social rights into its family law jurisprudence. This has led to a balancing of rights at the European level influenced by pronouncements of the ECtHR. What were formerly policy

⁴⁹⁷ *J. McB. v L. E.*, Case C-400/10. Para. 54. para. 53

⁴⁹⁸ *Carpenter v Secretary of State for the Home Department* Case C-60/00.

⁴⁹⁹ *Secretary of State for the Home Department v Akrich*, Case C-109/01.

⁵⁰⁰ *Metock and Others v Minister for Justice, Equality and Law Reform*, Case C-127/08.

⁵⁰¹ *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State*, Case C-459/99.

arguments then are being recast as rights – the recodification of the social parole in the neo-formalist langue.

Chapter VI: Reconstructing the Family

*“Union Citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.”*⁵⁰²

I) Introduction

Thus far, we have outlined in Part I how the family became exceptionalized and how the Social failed to break down the dichotomy between the family and the market which essentially left the family to regulation in terms of its horizontal dynamic based on local law, custom and a classical approach to the traditional family based on marriage. The results of this led to inequality not only within family structures but also in terms of its vertical dynamic with the state and the family’s role in society. Chapters IV and V of part II have delineated the role of anti-discrimination and to a certain extent the role of fundamental rights in balancing difference as part of the CJEU’s assumed neo-formalist language as manifested in relation to peripheral family law issues. This approach, and indeed secondary law implemented in the Member States, coupled with a dissatisfaction of the stagnant nature of family law at the national level has led to a deconstruction of the classical/traditional notion of the family both in terms of its horizontal and vertical dynamics that persisted for so long. Simultaneously, the march of equality and fundamental rights interpretation, in breaking down the wall that isolated the family, has begun to reconstruct the family in line with the neo-formalist language.

This thesis, however, takes a further step based on the analysis of the case law of the CJEU as we have already pre-empted. The pronouncement of the ECJ, that *“Union Citizenship is destined to be the fundamental status of nationals of the*

⁵⁰² Case C-184/99 *Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Nueve* [2001] ECR I-6193, para. 31.

Member States” is very telling in terms of an advancement of a new, transnational, or better, what we have already referred to as post-neo-formalist approach, that is materializing at the supranational level. It expresses clearly the goal that the introduction of European citizenship into the primary law of the Union intends to meet. We question here to what extent citizen rights go beyond the formal rights the court has developed on the basis of its progression from a market based approach to anti-discrimination to its interpretation of fundamental rights in providing for a new societal ideal. What we will see emanating is that the rights rhetoric we have already made reference to in terms of the shifting goals of the EU assume an additional dimension not only when we consider individuals as the recipients of citizenship rights but also in consideration of the family as a unit.

This analysis will be conducted through a delineation of the developments since the introduction of the concept of EU Citizenship exploring the concept of citizenship itself in an attempt to decipher the expectations it conjured on its initial inclusion in the Maastricht Treaty to what it means for EU citizens today. In so doing, we will investigate the notions of market citizens and consumer citizens in an attempt to decipher whether we can now talk of, as a result of the Court’s interpretation of the citizenship provisions, in conjunction with anti-discrimination and fundamental rights, the emergence of a new dimension of protection for what may be termed ‘family citizens’. We investigate the foundational role that EU Citizenship⁵⁰³ has played in moulding a private law capable of dealing with cross-border situations in general and more specifically to our scope in developing a foundation for the protection of families in Europe considering the new social goals of the EU.

⁵⁰³ The work of G. Comandé in this regard has been significantly influential. He argues that the private law of the Member States is being used as a tool to aggregate what she terms “shadow citizenship” in the everyday lives of EU citizens. See Comandé, G. “The Fifth European Union Freedom: Aggregating Citizenship...around Private Law’, in Micklitz, *The Constitutionalization of European Private Law* (2014)

II) EU Citizenship

The integration process has come a long way since the establishment of the European Community. Goals have changed based on the recognition that a truly integrated market depends on the interdependence of all involved actors in turn leading to a change in ideology, from market-based to socially informed reasoning. In short, it became clear that the neo-functionalism⁵⁰⁴ thinking had reached a deadlock and a new approach was required. That new approach was influenced by the recognition that the EC needed to engage not only with Member States but also with the demos so as to construct a common identity horizontally amongst the people within Europe's borders and in turn, in a vertical fashion, strengthening the relationship between the people and Europe and its institutions⁵⁰⁵. As convoluted as it may appear, citizenship, in conjuring both political and social rights, was meant to allow the growth of the Union beyond the market while simultaneously strengthening the market itself through protection of its actors.

We may say then that the market building process evolved into an identity building process⁵⁰⁶, bolstered by the following few, rather vague and seemingly perfunctory, lines introduced by the Treaty of Maastricht in 1992:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

⁵⁰⁴ Laffan, B. "The Politics of Identity and Political Order in Europe", 34 *J. Common Market Studies* 81, 83 (1996) making reference to the Monnet method.

⁵⁰⁵ Weiler, J. "To be a European Citizen – Eros and Civilisation" 41-42 Madison Working Paper Series in European Studies 1998

⁵⁰⁶ For a critique see G. Comandé, "The Fifth European Union Freedom: Aggregating Citizenship...around Private Law", in Micklitz, *The Constitutionalization of European Private Law* (2014)

Initially, these provisions were heavily criticised, branded as derived⁵⁰⁷, redundant⁵⁰⁸ and a mere symbolic move by the Union in that the new provisions did not extend any new rights to the people of Europe but rather simply congregated existing entitlements under the umbrella of the new concept. It was met with a certain degree of scepticism on the basis that its main value lay in its rhetoric⁵⁰⁹ and it would not essentially confer many substantive rights on its intended addressees⁵¹⁰. In addition, it was argued that the Treaty itself made citizenship of the Union depend on nationality of a Member State stating that “*Citizenship of the Union shall complement and not replace national citizenship*”. Therefore, the benefits of Union citizenship from the outset were always to be enjoyed as dependent on individual legal systems and nationality of Member States. This sceptical view was also supported by the fact that the free movement and residence rights had already been extended beyond economic connotations by secondary law as noted above⁵¹¹. Initially, the added value of the constitutionalisation of the concept of European Union Citizenship was questioned.

Additionally, we may also argue that it was not possible to transpose a concept of citizenship to a transnational, non-nation state polity such as the EU. In fact, we can assume that the EU Citizenship provisions never intended to implant a notion synonymous to national citizenship since the transplantation of legal notions from one environment to another is always met with a certain amount of resistance, as reception is dependent on the economic, legal, political

⁵⁰⁷ Shaw, Jo. “European Citizenship: The IGC and Beyond European Integration”. Online paper Vol 1 1997 No 3. Available at:

<http://ssrn.com/abstract=302662> or <http://dx.doi.org/10.2139/ssrn.302662>

⁵⁰⁸ Bulvinante, I. “Union Citizenship and its Role in the Free Movement of Persons Regimes”, 5 Web *JCLI* at 3 2003.

⁵⁰⁹ See Lyons, C. “Citizenship in the Constitution of the European Union: Rhetoric or Reality?”, in Bellamy, R. (ed.), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avebury, 1996), 96; D’Oliviera, H. “European Citizenship: Its meaning, Its Potential”, in Dehousse, R. (ed.), *Europe after Maastricht* (Munich, 1994).

⁵¹⁰ With this said, the Treaty did specifically confer some substantive rights on those eligible for Union citizenship, such as the right to vote in Parliament elections, the right to petition and the right to a reply in the language of a request.

⁵¹¹ Council Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity.

and social milieu at the receiving end of the transplant⁵¹². Therefore, it would seem that EU Citizenship was pronounced in the Maastricht Treaty along with an awareness that the concept would need to be out-worked in order to delineate what exactly this novel concept added to the European toolkit in terms of its relationship with Member States.

It is clear then that clarification regarding this novel concept was required and that clarification has come in the form of judgments of the CJEU. The ambiguous nature of European Citizenship has been and continues to be explored by the Court, strengthening, as we shall see, the rights of EU citizens qua citizens rather than based on economic participation (albeit at times arguably masked by economic reasoning). The Court's interpretation of the free movement provisions and the prohibition on discrimination based on nationality has in itself been interpreted as the creation, on the basis of citizenship in its embryonic form in the original EEC Treaty of 1957⁵¹³, as creating 'an incipient form of European citizenship⁵¹⁴' subsequently developed and strengthened by the Court.

It is this development from citizenship in its embryonic form to its constitutionalization in the primary law of the EU that we are concerned with. It is imperative here that we investigate the case law, particularly in relation to family law, and the role it has played in advancing a more substantive notion of

⁵¹² For a discussion on the notion of citizenship see C. Scott, "'Transnational Law' as Proto-Concept: Three Conceptions", *German Law Journal*, 2009, Vol. 10, No. 7, at 877, 2009; D. Kochenov, "Citizenship without Respect: The EU's Troubled Equality Ideal", (Jean Monnet Working Papers 8 (2010)); D. Kochenov, "Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights", *Columbia Journal of European Law* (2009) 2.

⁵¹³ Jacobs, F.G. "Citizenship of the European Union-A Legal Analysis", *European Law Journal*, Vol. 13, No. 5, September 2007 pp. 591-610.

⁵¹⁴ Plender, R.O. "An Incipient Form of European Citizenship", in Jacobs, F.G. (ed.) *European Law and the Individual* (North-Holland, 1976).

European Citizenship advancing the rights of European families by casting the widest possible social safety net around EU citizens⁵¹⁵.

III) European Citizenship As A Developing Concept

As has been noted and clearly pronounced by the judgments of the CJEU, more forcefully in recent times, the landscape of the Union has changed dramatically since the birth of the European Economic Community. We have witnessed a significant change in the way actors within Europe's boundaries are perceived and characterized which can be linked back to Kennedy and the shift from Classical Legal Thought to the Social to the Neo-formalist language. This will be explored in more detail below but not before outlining the important shift that has occurred in relation to actors and how the citizenship provisions have acted as a catalyst in bringing about new categories of citizens.

A. From Market Citizenship to Consumer Citizens...

At the outset, the underlying premise of establishing a common, internal market was that market actors were required to ensure the functioning and growth of such an economic forum. These actors, described as *homo economicus*⁵¹⁶ were characterized as holders of economic rights effectuated via economic activity enjoying the rights of free movement, the right to seek employment⁵¹⁷ and to provide and receive services⁵¹⁸ in other Member States. According to Everson

⁵¹⁵ O'Neill, P. & Sandler, S.R. "The EU Citizenship Acquis and the Court of Justice: Citizenship Vigilante or Merely Vigilant Treaty Guardian?", 7 *Rich J. Global L. & Bus*, 205, 2008.

⁵¹⁶ Everson, Michelle. "The Legacy of the Market Citizen", in Shaw, J. & More, G. (eds.), *New Legal Dynamics of European Union*, (Clarendon Press, Oxford, 1995) 71.

⁵¹⁷ Case 344/87 *Beltray v Staatssecretaris van Justice*, 1989; Case C-292/89, *R v Immigrations Appeal Tribunal ex parte Antonissen* 1991.

⁵¹⁸ Case 286/82 and 26/83, *Luisi and Carbone v Ministero del Tesoro* 1984; Case 33/74 *Johannes van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, 1974.

(making reference to Ipsen⁵¹⁹) “*whilst market citizens or Marktbürger were drawn from amongst the ranks of the nationals of the EC member states, such nationals were only to be regarded as fully fledged market citizens when ‘acting as participants in or as beneficiaries of the common market’*”⁵²⁰.

The market citizen⁵²¹ is an important player in the European field and is a concept upon which an economic based approach to equal treatment was developed. The underlying hypothesis in relation to market citizens is that their citizenship rights kick in when they act “*as participants in or as beneficiaries of the common market*”⁵²². They are expected to play a specific role towards the “*legal and practical realisation of the internal market*”⁵²³. The notion was bolstered by the view of market players as consumers who were, by virtue of the open market, granted access to a wide range of products and services bolstering individual choice. This was also reflected in secondary legislation, for example Directive 93/13⁵²⁴ on unfair terms in consumer contract. In fact, as Everson points out, the language of freedom and choice dominated the legislation and the scope of the legislation that was enacted so as to confer this market citizenship on market players⁵²⁵. The main point here is that by virtue of being a market player in the open market, rights and duties were conferred on the consumer constructing a dependency relationship between the Union as the addressor and the nationals of the Member States as the addressees.

The development of Europe’s goals, however, brought with it a change in perspective in terms of market citizens as economic players.⁵²⁶ A new semantic

⁵¹⁹ Ipsen, H.P. *Europäisches Gemeinschaftsrecht*, (Tübingen: J.C.B. Mohr, 1972) p. 187 cited in Everson, M. “The Legacy of the Market Citizen”, in Shaw J. and More G., *New Legal Dynamics of European Union*, (Clarendon Press, Oxford, 1995).

⁵²⁰ Ibid.

⁵²¹ Everson, M. *The Legacy of the Market Citizen*, in Shaw, J. & More, G., *New Legal Dynamics of European Union*, (Clarendon Press, Oxford, 1995).

⁵²² Ibid. citing Ipsen (1972) p. 102.

⁵²³ Above No. 238.

⁵²⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

⁵²⁵ Everson, M. “The Legacy of the Market Citizen”, in Shaw, J. & More, G., *New Legal Dynamics of European Union*, (Clarendon Press, Oxford, 1995).

⁵²⁶ Davies, Jim. *The European Consumer Citizen in Law and Policy*, (Palgrave MacMillan, 2011), p. 22.

was adopted, one that can be related back once again to Kennedy's second globalization, The Social and its transition into the Neo-formalist period, that increased attention on the rights and responsibilities of market players, and on the political landscape of the EU. This was largely in response to the recognition of a certain disconnect with the 'European polity'. What we already see emerging, in fact, is the shift from economic, *market citizens* to *consumer citizens* advocating that

*The consumer is no longer seen merely as a purchaser and user of goods and services for personal, family or group purposes but also as a person concerned with the various facets of society which might affect him directly or indirectly as a consumer*⁵²⁷

Previously, consumers in the EU were simply characterised by their consumption. In other words, the perception was that if you consumed, you were a consumer acting within the framework of the market reliant on the law of contract. Individual interests and ensuring equality were typically safeguarded by the contractual notions of 'good faith', 'undue influence' and 'misrepresentation'⁵²⁸. This individualist approach altered with the recognition that consumption was also concerned with society at large and the different aspects of society that could touch, either directly or indirectly, consumers. In other words, the individual ethos that had characterised consumer law, and consumer redress for a long time was gradually replaced in view of the recognition of collective consumers possessing collective interests⁵²⁹. We can recall here the shift from Classical Legal Thought to The Social based on the acknowledgement of interdependence between, not only the market and society that supports it via consumption but also between different groups or actors participating in this exchange. This shift not only increases complexity but also allure in terms of the protection afforded by the EU institutions. In the words of Everson and Joerges, in relation to consumer protection in the EU:

⁵²⁷ EEC Council Resolution on a "Preliminary Programme for a Consumer Protection and Information Policy" (OJ 1975 C92/1):

⁵²⁸ Everson, M. "The Legacy of the Market Citizen", in Shaw, J. & More, G., *New Legal Dynamics of European Union*, (Clarendon Press, Oxford, 1995).

⁵²⁹ Ibid.

*Ubiquitous though this simple consumer protection formulation may be, however, it barely begins to describe the true complexity that characterises the interrelationships that are established between the act of consumption and the whole of any one legal order, be that order national, supranational or transnational in nature*⁵³⁰

In effect, when considering the EU, consumption was reshaped by intervention from the EU institutions. The consumer was reconstructed via rights, for example the right to protection of health and safety, of economic interests, to redress, to information, education and representation and responsibilities for instance, to inform oneself, environmental concerns etc. The market citizen developed from a passive actor in the internal market, ‘*a mere cog in the economic machinery of the internal market*’ with limited rights, to becoming a ‘cognisant’ actor, ‘*an influential market actor, cognisant of a role that demands a broader contribution to European society than the mere final purchase of a good or service*’⁵³¹. The move represented an evolution to encompass “*rights granted to individuals as participants and beneficiaries of economic integration*”⁵³².

It can be argued that this consumer citizen⁵³³ we speak of was an inevitable progression from the market citizen in that the two are inextricably linked. The market citizen was instrumentalised with a view to fulfilling the objectives of the internal market. It was inevitable that that same market citizen would eventually become instrumentalist in its demands for a legally protected forum, essentially paving the way to consumer citizens. In other words, the passage from passive consumers to consumers who were empowered and protected by a rights enforcement framework was one that effectively led to the development of this category of citizen. As pointed out by Davies⁵³⁴, the evolution we are concerned with here takes stock of the emergence of average consumers, vulnerable

⁵³⁰ Everson, Michelle & Joerges, Christian. “Consumer Citizenship in Postnational Constellations?” EUI Working Papers, LAW No. 2006/47

⁵³¹ Maduro, M., “Europe’s Social Self: ‘The Sickness unto Death’”, in Shaw, J., (ed.), *Social Law and Policy in an Evolving European Union*, (Oxford, Hart, 2000).

⁵³² Ibid.

⁵³³ Davies, J., “Entrenchment of New Governance in Consumer Policy Formulation: A Platform for European Consumer Citizenship Practice?”, *Journal of Consumer Policy*, 32: 245-267, 2009.

⁵³⁴ Ibid.

consumers and finally consumer citizens, that concept being nicely summed up by Gabriel and Lang:

the marketplace becomes surrogate for political discourse...the citizen is being redefined as a purchaser whose 'ballots...help create and maintain the trading areas'...buying becomes tantamount to voting, market surveys the nearest we have to a collective will⁵³⁵.

Therefore, by being a player in the market and exercising rights and assuming responsibilities one becomes a consumer citizen. Bearing this discussion on the different classifications of citizen in mind, we will now proceed to investigate the shift to Union citizens all the while bearing in mind the particular situation of the family and how jurisprudential developments could potentially create a space for the emergence of a notion of *family citizens*. In doing so, we will go right to the heart of what is termed here the post-neo-formalist period in assessing the extent to which the citizenship provisions have gone beyond the recodification of economic based rights to self-standing rights as the additional dimension.

B. ...to Union Citizens: "Putting Flesh on the Bones"⁵³⁶

When the European Economic Community was construed, there was a clear distinction between the competences of the parties to the agreement in that the EEC was charged with establishing the common market with social matters being left to the Member States⁵³⁷. Over time, it was recognized that the proper functioning of the market was reliant on interdependence and that proper Union citizenship, one that takes account of the trans-national character of the EU, must be based on social citizenship⁵³⁸. We have witnessed a progressive increased consideration of the link between the people of Europe, considered as more than mere factors of production, and the Union itself. This is reflected in the

⁵³⁵ Gabriel and Lang 1995 pp. 175-176 quoted in Davies, "Entrenchment of a New Governance in Consumer Policy Formulation: A Platform for European Consumer Citizenship Practice?" *Journal of Consumer Policy*, 2009 32: 245-267.

⁵³⁶ O' Leary, S. "Putting Flesh on the Bones of European Union Citizenship", 1999 24 *ELRev* 68.

⁵³⁷ Consumer law is an exception...see HM, Social Justice.

⁵³⁸ Douglas-Scott.

pronouncements of the Court, in particular, at least initially, by the Advocates General in their Opinions. We can make reference here to the proclamation of Advocate General Jacobs in the case of *Konstantinidis v Stadt Altensteig*⁵³⁹ as an indication of the impact of the rights that pertain to citizenship of the Union in their claim to ‘*civis europeus sum*’ in opposing any violation of fundamental rights.

This is far removed from the initial reaction to what might be called the skeleton citizenship provisions that make no reference to rights or duties to be assumed by addressors or addressees leaving the concept wide-open to criticism based on its empty and symbolic nature⁵⁴⁰. Much criticism was based on the fact that EU Citizenship did not confer additional rights to the people of the Union in the sense that it simply extended the right of mobility to non-economically active nationals of Member States, a right that had already be granted to specific groups, for example, students and pensioners. In addition, at the broader, more theoretical level, the notion concerning the commonly understood institution of citizenship i.e. national citizenship traditionally rooted in cultural identity and civic and political participation, was not, as we have already pointed above, directly transplantable based on the transnational character of the Union. Therefore, it was difficult to decipher what exactly the new concept entailed. This, coupled with the fact that EU citizenship was dependant on national citizenship, led to the belief that it was a concept that did little to further or add to the rights and duties expected from its inclusion in the Treaty.

That stated, the scepticism with which EU citizenship was met was soon knocked on its head by the pronouncements of the then Court of Justice. As we will see from the early case law, the Court took a broad approach to the notion

⁵³⁹ Case C-168/91, *Konstantinidis v Stadt Altensteig* 1993.

⁵⁴⁰ On the symbolic nature of the change in wording brought about by the Maastricht Treaty in general i.e. from the European Economic Community to the European Union, see C. Closa, “The Concept of Citizenship in the Treaty on European Union”, 1992, 29 *CMLRev.* 1137; S. O’Leary, “Nationality Law and Community Citizenship: A tale of Two Uneasy Bedfellows” 1992 12 *YBEL* 353.

and used it instrumentally, to borrow the classification of AG Jacobs⁵⁴¹, in three veins:

1. to broaden the scope of the non-discrimination principle;
2. to broaden the scope of the non-discrimination principle in the context of market freedoms;
3. as an independent source of rights.

It serves here to provide some examples, that will primarily focus on the first two veins of extension, with the final one i.e. citizenship being used as an independent source of rights, being discussed more specifically in relation to core hypothesis of this thesis, the reconstruction of family law. Where relevant, however, reference will be made to the influence certain of these cases have had in relation to the peripheral cases.

Broadening the scope of the anti-discrimination principle

The case of *Martinez Sala*⁵⁴² was heralded as the first significant pronouncement concerning EU citizenship in furthering anti-discrimination extracting it from its previously economic underpinnings. The Court in this case broadened the scope of application of the non-discrimination principle with regards to financial benefits in holding that in cases where the EU national is lawfully resident in a Member State other than that of origin, then that EU citizen is entitled to equal treatment in relation to financial benefits that come within the scope of the Treaty. It concerned a Spanish woman who had been residing in Germany for twenty-five years. She was receiving social assistance for her own unemployment at the time. She then applied for a child-raising allowance but was refused this on the basis that she was not a German national and did not possess a residence entitlement or a residence permit for Germany. The issue came before the ECJ which considered the residence requirement for receipt of a benefit to be a

⁵⁴¹ Jacobs, F.G. “Citizenship of the European Union-A Legal Analysis”, *European Law Journal*, Vol. 13, No. 5, September 2007, pp. 591–610.

⁵⁴² *Martinez Sala v Freistaat Bayern* Case C-85/96.

limiting condition and moreover, discriminatory where a Member State's own nationals were not subject to the same condition. In reliance on Article 17 and 18 of the EC Treaty and on the principle of non-discrimination based on nationality contained in Article 12 of the same, the Court held that nationals of a Member State could rely on their European citizenship for protection against discrimination on grounds of nationality by another Member State. Put simply, the ECJ applied the general principle of non-discrimination on the grounds of nationality to the applicant on the basis of her EU citizenship in stating that

*Article 8(2)...attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 6...not to suffer discrimination on the grounds of nationality within the scope ratione materiae of the Treaty*⁵⁴³.

This case is significant for our purposes since, by including the situation of Mrs. Martinez Sala within the scope of application of the EC Treaty, the ECJ enlarged that scope in two respects. First, the simple fact that Mrs. Sala was a Union citizen lawfully residing in another Member State was enough for her to fall under the scope of application of the EC Treaty. Secondly, the ECJ ruled that a benefit previously granted only to workers should also be granted to non-economically active persons in the EU.⁵⁴⁴ It is opportune to make reference here to the concluding remarks of Advocate General La Pergola. He quite simply concluded his opinion by stating that:

justification for equality of treatment lies rather, as I have explained, in the legal status of a citizen of the Union, in the guarantee afforded by the status of the individual, as it is now governed by Article 8 of the Treaty, which is enjoyed by a national of any Member State and in any Member State. In other words, the Union, as conceived in the

⁵⁴³ Paragraph 62.

⁵⁴⁴ In fact it has been commented that the Court in this case seemed to be prepared to “explode the linkages’ previously required for the application of the principle of non-discrimination which had been built in previous case law. See O’Leary, S. “Putting Flesh on the Bones of European Union Citizenship?” (1999) 24 *ELRev.* 68, 77-78 cited in Craig and De Burca, *EU Law, Text, cases and materials*, 4th Ed, Oxford.

*Maastricht Treaty, requires that the principle of prohibiting discrimination should embrace the domain of the new legal status of common citizenship*⁵⁴⁵.

In following the opinion, it is clear that the Court agreed with the view that equal treatment should be broadened to augment the rights of EU citizens based solely on their status as EU citizens.

Not long after this groundbreaking decision, the Court ruled in the *Grzelczyk*⁵⁴⁶ case. Its ruling in this subsequent case signified a significant stepping stone in the evolution of EU citizenship and it is from this case that the intentions of the Court emerge very clearly based on the oft-cited clarification that

*Union Citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.*⁵⁴⁷

We note from this case the development of a general principle in the Court's jurisprudence, i.e. that discrimination on ground of nationality will not be permitted against EU citizens who have exercised their free movement rights. The applicant in the case was a French national who had studied in Belgium for three years and who had also worked there so as to sustain himself financially. In his final year, Mr. Grzelczyk ceased to work so as to concentrate on his studies and therefore applied for a non-contributory minimum subsistence allowance. The allowance was initially granted but subsequently withdrawn based on the fact that the applicant did not fulfill the conditions set out in Belgian law, i.e. in order to claim the allowance one must either be of Belgian nationality or a worker. The question referred to the Court centered around whether or not the refusal was contrary to the EC Treaty provisions on citizenship in combination

⁵⁴⁵ Paragraph 23 Opinion AG Pergola, *Martinez Sala*.

⁵⁴⁶ *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* Case C-184/99.

⁵⁴⁷ *Ibid.*

with the prohibition of discrimination on grounds of nationality. Previous to this case, the situation was that assistance for students fell outside the scope of the Treaty. However, this case expanded the scope of the non-discrimination provisions to students based on the new EC Treaty title on education and the citizenship provisions. The Court essentially held that Articles 12 and 18 EC precluded preconditions such as those in the case at hand i.e. conditions relevant to sufficient resources and sickness insurance.

*The fact that a Union citizen pursues university studies in a Member State other than the State of which he is a national cannot of itself, deprive him of the possibility of relying on the prohibition of all discrimination on grounds of nationality laid down in Article 6 of the Treaty*⁵⁴⁸

The importance of the decision for our purposes lies in the fact that the court, even though it had previously ruled that assistance for students fell outside the scope of the EC Treaty, recognized expressly that EU citizenship permits nationals of other Member States lawfully residing in the host Member State to access social benefits.

The third and final example here concerns the well-known case of *Garcia Avello*⁵⁴⁹ and provides us with yet another example of an active Court taking the opportunity to put flesh on the citizenship bones. As previously outlined, the case revolved around the surname borne by children born in Belgium to a married couple resident there. The father of the children, Mr. Garcia Avello, was a Spanish national, the mother Belgian. The two children were in possession of dual nationality. On registration of their births in Belgium, the children were given the double surname borne by their father composed in accordance with Spanish law and custom according to which children took the first element of their father's surname and the first element of his mother's surname. Wishing to adopt the Spanish way, the parents subsequently applied to the Belgian authorities to have the children's surname changed to Garcia Weber i.e. so that

⁵⁴⁸ Paragraph 36.

⁵⁴⁹ C-148/02 *Carlos Garcia Avello v État belge*.

it was comprised of the first element of their father's surname, followed by their mother's (maiden) surname. That application was refused as contrary to Belgian practice and the question of whether such a refusal might be precluded by principles of Community law such as those relating to citizenship of the European Union and freedom of movement for citizens was referred to the ECJ by the *Conseil d'État*. This case deserves particular attention, as it is not only one of the early cases that added flesh to the citizenship bones but it also represents an example of how citizenship is used as a tool by the Court in decided peripheral family law cases. The opinion of Advocate General Jacobs is particularly telling and reflective of the actuality of European families. The Advocate General reasoned that

In the present case, the Commission submits that the introduction of citizenship of the Union, with its attendant enjoyment of all the rights conferred by the Treaty — including, thus, the right to be free from any discrimination on grounds of nationality — is a new factor enabling the Court to reach a decision in this case on a rather broader basis than it did in Konstantinidis. I agree that Article 17 makes clearer the applicability of the principle of non-discrimination to all situations falling within the sphere of Community law, without there being any need to establish a specific interference with a specific economic freedom.⁵⁵⁰

It is clear from this then that the citizenship provisions are an important factor in broadening the scope of non-discrimination to situations other than those characterized by economic activities. In doing so, based on the rights conferred by EU citizenship, anti-discrimination moves away from its economic underpinnings. In terms of our scope here, in consideration of the potential influence of the new post-national setting the family finds itself in, the Advocate General in recognizing the 'Europeanization' of families as a result of free movement coupled with the changes in family structure, stated that:

⁵⁵⁰ Paragraph 61.

As regards social order in the broader sense, it does not seem to me that there is any overriding public interest in ensuring that one particular pattern of surname transmission should always prevail for the citizens of a Member State within its territory. This is a field in which both legal rules and social practice have been changing in recent years, and continue to change, throughout the European Union. Increases in numbers of divorces and remarriages, together with a significant decrease in the social stigma of illegitimacy, have considerably reduced the rigidity of expectations as to identity of surname between father and child. Increased mobility for citizens of the Union has led to increased familiarity with other naming systems. Thus, whilst conformity with the norm in the home Member State remains one factor to be taken into consideration when deciding whether it is in the interest of a child — or of society — for his or her surname to be changed, it is neither the only nor the preponderant factor in that regard.⁵⁵¹

I would moreover take issue with the argument that the principle of non-discrimination seeks essentially to ensure the integration of migrant citizens into their host Member State. The concept of 'moving and residing freely in the territory of the Member States' is not based on the hypothesis of a single move from one Member State to another, to be followed by integration into the latter. The intention is rather to allow free, and possibly repeated or even continuous, movement within a single 'area of freedom, security and justice', in which both cultural diversity and freedom from discrimination are ensured.⁵⁵²

This recognition comes at an important juncture in the development of family law and the Advocate General's support of the diversification of family types on the one hand and the novel peripheral issues that free movement has instigated on the other is welcomed. The Court, in a less detailed reasoning reached the same conclusion as the Advocate General holding that since the children, as EU citizens, were residing in another Member State exercising their free movement, this provided them with a sufficient link to Community law enabling them to be afforded protection under Article 12 EC Treaty illustrating the capacity of EU citizenship provisions to set aside national rules when necessary so as to facilitate the free movement of families. In addition to this, we decipher from the

⁵⁵¹ Paragraph 71.

⁵⁵² Paragraph 72.

judgment that because the Court gave full effect to European law in this situation we can begin to contemplate the possibility that many other issues can be considered in the same way, opening a Pandora's box⁵⁵³.

Broadening the scope of the non-discrimination principle in the context of market freedoms

In accordance with Advocate General Jacob's classification, we will now turn to the Court's use of the citizenship provisions in broadening the scope of the non-discrimination principle in the context of market freedoms.

The *Collins*⁵⁵⁴ case concerned an applicant who had dual Irish and American nationality who moved to the UK with a view to seeking employment there. After one month he applied for jobseeker's allowance which was refused based on the fact that he was not an habitual resident in the UK. Essentially, the referred question was whether, as a citizen of the Union, even though the applicant is not considered to be a 'worker' within the meaning of Regulation No 1612/68 and does not have a right, pursuant to Directive No 68/360/EEC, to reside in the Member State in which he is seeking work, he may rely on any other provision of Community law in order to obtain the income-based jobseeker's allowance, the granting of which is normally subject to a condition of habitual residence in the State. The Court recalled its earlier case law highlighting that even though job-seekers are covered by Article 39 in terms of access to employment, their social and tax advantages were not covered by the same⁵⁵⁵. However, the Court subsequently reasoned, based on the introduction of the citizenship provisions using them in essence to depart from its earlier case

⁵⁵³ Comandé, G. "The Fifth European Union Freedom: Aggregating Citizenship...around Private Law", in Micklitz, *The Constitutionalization of European Private Law* (2014).

⁵⁵⁴ *Collins v Secretary of State for Work and Pensions* Case, C-138/02.

⁵⁵⁵ See para. 58 where the Court makes reference to the *Lebon* case and the *Commission v Belgium* case: As regards the question whether the right to equal treatment enjoyed by nationals of a Member State seeking employment in another Member State also encompasses benefits of a financial nature, such as the benefit at issue in the main proceedings, the Court has held that Member State nationals who move in search of employment qualify for equal treatment only as regards access to employment in accordance with Article 48 of the Treaty and Articles 2 and 5 of Regulation No 1612/68, but not with regard to social and tax advantages within the meaning of Article 7(2) of that regulation (*Lebon*, paragraph 26, and Case C-278/94 *Commission v Belgium*, cited above, paragraphs 39 and 40).

law in considering, that the rights of job-seekers according to Article 39 should be interpreted in conjunction with the general right to equal treatment of EU citizens:

In view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 48(2) of the Treaty — which expresses the fundamental principle of equal treatment, guaranteed by Article 6 of the Treaty — a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.⁵⁵⁶

The Court was of the opinion that the residence requirement in place which conditioned the entitlement to job-seeker's allowance, was justifiable only on objective considerations, independent of the nationality of the claimant and any refusal must proportionate to the legitimate aim of the national provisions. In this vein, the ECJ therefore, considering that the applicant in fact fell within the scope of application of Article 39 EC Treaty as a national of a Member State and therefore was entitled to equal treatment in seeking employment, effectively broadening the scope of non-discrimination based on nationality.

A similar conclusion was reached in relation to tide-over allowances for students in in 2005 when the *Ioannidis*⁵⁵⁷ case was referred to the Court. After completing his secondary education in Greece, Mr. Ioannidis moved to Belgium in 1994 where he undertook studies and obtained a diploma in physiotherapy. After completing a vestibular course in France in 2001 he returned to Belgium and applied for the tide-over allowance which was refused. The question referred to the Court was whether it is contrary to Community law to refuse the tide-over allowance to a national of another Member State on the ground that he completed his secondary education in another Member State. In response to this

⁵⁵⁶ Paragraph 63.

⁵⁵⁷ *Office national de l'emploi v Ioannis Ioannidis*, Case C-258/04.

question, the ECJ, relying on *Collins*⁵⁵⁸, stated that nationals in another Member State seeking employment indeed fall within the scope of Article 39 EC Treaty and therefore can rely on the prohibition on discrimination.

From this select examination of the early case law, we note the emergence of a *Grundfreiheit ohne Markt*⁵⁵⁹, a de-economisation of the scope of the Union rights. Suffice it to say that the initial skepticism in relation to the novelty of EU citizenship no longer stands when we look to the actual role the Court is assuming in the allocation of social advantages, which prior to the introduction of EU citizenship were confined to the competence of Member States. In essence, the citizenship provisions permitted the development of an approach to equal treatment that is far removed from the initial market perspective goal.

This becomes even more apparent when it comes to Advocate General Jacob's third vein of expansion, citizenship as an independent source of rights. Moreover, it is here we begin to note the effects of this post-neo-formalism on the family in reference to the resolution of peripheral family law issues.

EU Citizenship as an independent source of rights in view of 'Family Citizens'

Recent, quite controversial jurisprudence from the Court can be interpreted in an encouraging light and with caution. The aim here is to delineate this recent case law that relates to the potential of the citizenship provisions in assuming the stance of an independent fountain of rights which could potentially create a legal space in terms of reconstructing the family even further beyond the advances made by the neo-formalist language.

⁵⁵⁸ See para 22: *The Court has already held that, in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 39(2) EC a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State (Case C-138/02 Collins [2004] ECR I-2703, paragraph 63).*

⁵⁵⁹ Wollenschlager, F. "A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration", *European Law Journal*, Vol. 17, No. 1, January 2011, pp 1-34.

(a) Towards a Citizen Rights-based Family Law

At the risk of repetition, some of the cases previously mentioned should be recalled here in introducing European Citizenship as an independent source of rights. *Baumbast*⁵⁶⁰, for example, and more specifically the Opinion of Advocate General Geelhoed recognised, for the purposes of interpreting Regulation 1612/68⁵⁶¹, the changing nature of the family and in particular the social acceptance that had occurred in terms of extra-marital cohabitation and also, at least to some extent the recognition of homosexual partnerships. As previously outlined, the central question in the proceedings did not concern the private/core dynamics of the family but rather focused on rights to education (note the peripheral nature of the reference) in the host Member State for the children and rights of residence for the children's carer. From the family law perspective though, the case brought an interesting question in relation to family relationships before the Court with the Advocate General noting that Regulation 1612/68 emanates from a time when "family relationships were relatively stable" and any provisions contained therein concerned the protection of the traditional family. However, in recognising that "*considerable social developments have occurred which are likely to have considerable influence on the view to be formed as to the nature and scope of the provisions of the Regulation*" and that the Court must consider these developments, the AG argued that "*relevant rules of law risk losing their effectiveness*". Therefore, with a view to giving content and substance to rights conferred by virtue of being an EU citizen, the Court reasoned that to deprive the parents of rights of residence would effectively deprive children of their Community right.

In another vein, let us recall the well renowned *Chen*⁵⁶² case concerning Catherine Zhu acquired Irish citizenship by virtue of the constitutional changes introduced in 1998, namely the introduction of *jus soli* after her mother travelled to Northern Ireland to give birth there. The family subsequently moved to Wales

⁵⁶⁰ *Baumbast and R v Secretary of State for the Home Department* Case C/413/99.

⁵⁶¹ Regulation No 1612/66 EEC of the Council of 15 October 1968 on freedom of movement for workers within the Community.

⁵⁶² *Chen and Zhu v Secretary of State for the Home Department*, Case C-200/02.

and applied for a residence permit which was refused. The application was appealed and referred to the ECJ. The Advocate General concluded that a young child as a national of a Member State has a right to reside in another Member State insofar as he or she has sickness insurance and sufficient resources not to become an ‘unreasonable burden’ on the host Member State. Furthermore, he said that a child’s right of residence would be yielded ineffective if the parent was denied right of residence. The reasoning of the Court is of particular concern here as the substance of the citizenship rights played a significant role in the reasoning of the Court as it took a significant step in establishing EU Citizenship as an independent source of rights.

The Court reasoned that on the basis of Article 18 of the EC Treaty, Catherine Zhu *as an EU Citizen* had an inalienable right to reside in a place of her choice in the EU and that to deny residency rights to the parents of a minor child would effectively render this right ineffective. By recognising the child’s independent rights in this case but also that these rights would be rendered ineffective without the support of parents, the Court effectively granted the right of the family to remain together based on the citizen status of the child. Contrasted with the *Carpenter* case a clear shift is appreciable.

*Ruiz Zambrano*⁵⁶³ is one of the more telling pronouncements of the Court in recent times. It exposes how primary law, citizenship provisions and the prohibition on discrimination, can grant more comprehensive protection to ‘international’ families in Europe as opposed to national legislation. The legal question revolved around whether Mr. Zambrano, as a parent of an EU citizen child, derived a right of residence by virtue of the Treaty on the Functioning of the European Union. If this question were to be answered in the affirmative, then the further question would be whether he could be exempt from having to obtain a work permit. The case was quite contentious with all the Member States that made written submissions together with the Commission arguing that the question referred represented a wholly internal situation and therefore did not

⁵⁶³ *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEM)* Case C-34/09.

come within the scope of application of EU law since the citizen children in this case had never exercised their free movement rights⁵⁶⁴. The Court however, held that the Citizens Directive was not applicable in this case and instead turned to the citizenship provisions for guidance. It recognised that EU citizenship is “*intended to be the fundamental status of nationals of the Member States*” citing Article 20(1) of the TFEU. In effect the Court, in relying on previous case law, held that Article 20 of the TFEU precludes measures that have the effect of depriving citizens of the enjoyment of their substantive rights under EU law. In applying this to the facts of the case at hand, were Mr. Zambrano to be deported then this would effectively mean that the citizenship rights of the minor children would become ineffective. The Court stated that:

Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

Not only did the Citizenship provision factor heavily in the decision making process of the Court but the rights to family life were well established by the Advocate General Sharpston in making reference to Articles 7 and 24 of the Charter of Fundamental Rights⁵⁶⁵ and relevant international provisions including Article 17 of the International Covenant on Civil and Political Rights⁵⁶⁶; Article

⁵⁶⁴ *This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members [defined as a spouse, those in registered partnerships recognised by both Member States; direct descendants under 21 and dependent direct relatives in the ascending link].*

⁵⁶⁵ Article 7 states “Everyone has the right to respect for his or her private and family life, home and communications” and Article 24.3 states “Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests”.

⁵⁶⁶ Article 17 states “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everybody has the right to the protection of the law against such interference or attacks”.

9.1 of the Convention on the Rights of the Child⁵⁶⁷; Article 8 and Article 3 of Protocol 4 to the European Convention of Human Rights⁵⁶⁸. Therefore what we witness is an expression of protection in terms of both the horizontal and vertical dynamics of the family via an attribution of substance to the citizenship provisions.

Although both these cases have been criticised for stretching the boundaries of the scope of EU law one must consider what is essentially involved here. The economic goals of the EU essentially require the free movement of goods, services and people. When people migrate they take with them their mutable and immutable characteristics, be that civil status, religion, culture etc. Moreover, for the purposes of this analysis they take with them their families and these families deserve legal protection and a legal basis upon which they can rely so they can exercise their right to family life. It is within this realm that the shifts from market to social reasoning, clearly demonstrated by *Zambrano*, take a significant step essentially recognising that movement is not a necessary prerequisite to trigger the scope of EU citizenship rules therefore expanding its scope to wholly internal situations.

The effects of this interpretation of primary law on family law therefore have the potential to be significant. Not only this, but the interpretation of the citizenship provisions in conjunction with anti-discrimination seem to indicate that there is something more to EU citizenship – a whirlpool effect as we will see

⁵⁶⁷ Article 9.1 states “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as the one involving abuse or neglect if the child by the parents, or where the parents are living separately and a decision must be made as to the child’s place of residence”.

⁵⁶⁸ Article 8 states “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. Article 3 of Protocol 4 states “No one shall be expelled, by mean either of an individual or of a collective measure, from the territory of the State of which he is a national. No one shall be deprived of the right to enter the territory of the State of which he is a national”.

in the concluding chapter. The decision itself was indeed motivated by the family law principle of unity of the family. However, this principle was essentially upheld and derivative rights granted on the basis of the citizenship provisions. Therefore, *Zambrano* goes further than previous case law like *Chen* case in which the same conclusion was reached however a condition that the family were not to become an unreasonable burden on the host Member State was imposed and in *Carpenter* when the principle of unity was actually upheld on the much criticised link between the care function of Mr. Carpenter's wife in respect to his children and his economic activity in Europe.

Therefore, it would seem that citizenship, in going beyond – or perhaps better integrating the rights parole into the neo-formalist langue - is allowing the Court to encroach in areas that were previously reserved to Member States. It is via encroachment in these areas that the Court is faced with increased instances of peripheral family law issues, very often using tools emanating from the primary law of the Union and further developed and interpreted by the Court so as to grant greater protection to migrating (and now as a result of *Zambrano*, not even migrating) families in Europe as opposed to the limited protection offered by domestic legal systems.

(b) The Dark Side of Citizenship

Even good law can have negative effects and throughout this research, we have made continuous reference to the at times unclear and precarious path the jurisprudence has taken. In terms of anti-discrimination for example, confusion still arises as to the practical effect of the use of the anti-discrimination principle. The recent *Test-Achats*⁵⁶⁹ case has once again demonstrated that the equality rhetoric echoing across Europe and more particularly its use at the European level can in fact lead to negative real effects on the ground, what can be termed here as levelling down. This is in complete contrast to the one of the original

⁵⁶⁹*Association Belge des Consommateurs Test-Achats ASBL*, Case C-236/09.

aspirations of equal treatment – integration of women in the workplace via equal treatment in order to fulfil economic goals.

In terms of the rights rhetoric that accompanies the substantiating of European Citizenship and the construction of a European society or better the furthering of a European identity, it would seem, at least to some extent, that the Court takes one step forward and two steps back resulting in difficulties in establishing what exactly is happening under the calm surface of the ‘citizenship whirlpool’.

We have above noted the potential of *Zambrano*. Bearing this potential in mind however, we turn our attention to the more recent *McCarty*⁵⁷⁰ case. Shirley McCarthy was born and had always lived in Northern Ireland. She had never worked, and received state benefits. In 2002 she married a Jamaican citizen who had no valid leave to remain in the UK. Following her marriage, she acquired an Irish passport and sought to assert her rights of free movement within the EU and those of her husband as her spouse. The Supreme Court of the United Kingdom referred the following questions to the CJEU:

- 1. Is a person of dual Irish and United Kingdom nationality who has resided in the United Kingdom for her entire life a “beneficiary” within the meaning of Article 3 of Directive 2004/38?*
- 2. Has such a person “resided legally” within the host Member State for the purpose of Article 16 of [that] directive in circumstances where she was unable to satisfy the requirements of Article 7 of [that directive]?’*

The CJEU found that Mrs McCarthy could not be considered a “beneficiary” under Article 3 of the Directive because she had never moved to another Member State. On this basis, it also purported that her husband could not therefore derive similar rights. In its reasoning, the Court considered Article 21 of the Rome Treaty which enshrines the fundamental right of freedom of

⁵⁷⁰ *McCarty v Secretary of State for the Home Department*, Case C-434/09.

movement of EU citizens across Member States. Moreover, it referred to the decision of the Grand Chamber in *Zambrano*. However, it distinguished the *Zambrano* case finding that no element of Mrs McCarthy's situation, as described by the national court, indicated that the national measure taken against her had the effect of depriving her of the genuine enjoyment of the substance of her EU rights. The ECJ argued that by contrast to *Zambrano*, the national measure at issue in the proceedings did not have the effect of obliging Mrs. McCarthy to leave the territory of the EU in that even if her husband were to be expelled, she could choose to remain in the UK. Thus, the ECJ ruled that the genuine enjoyment of the substance of her rights attached to EU citizenship had not been undermined. It would seem that the existence of children in the *Zambrano* family was a decisive factor in distinguishing Mrs. McCarthy's case in that in upholding the national decision did not "oblige her to leave the territory of the EU" as would have occurred if the negative decision had of been upheld in the *Zambrano* case.

Thus, whereas *Zambrano* gave effect to EU rights based on Citizenship of the Union even though no movement had taken place, the same citizenship logic was not engaged to enforce the rights of Mrs McCarthy. The denial of access in terms of Mrs McCarthy's EU rights did not have the same effect as a similar measure did on the *Zambrano* children. Accordingly, the court found that McCarthy's case fell outside EU law and was a matter of purely internal law within the UK.

That being said, although it has been argued that the Court took a step back in deciding as it did in *McCarthy*, it is imperative to note that it still took the all important step in *Zambrano*.

It was hoped that the *Dereci*⁵⁷¹ case would provide some clarification to the confusion that ensued these two seemingly conflicting cases. It concerned five joint applicants, each of whom was a third country national wishing to reside in

⁵⁷¹ *Dereci and others v Bundesministerium für Inneres*, Case C-256/11.

Austria with his/her Austrian family member. None of the applicants' family members had exercised their right to free movement within the Union. The specifics of each familial relationship differ. Mr Dereci, is a Turkish national who entered Austria illegally and married an Austrian citizen. He and his wife had three children, all of whom were Austrian citizens and minors. Mr Dereci, at the time of the case, was resident with his family in Austria. Mr Maduike, a Nigerian national, entered Austria illegally and married an Austrian national. He and his wife were residing in Austria at the time of the case. Mrs Heiml, a Sri Lankan national, married an Austrian national. She subsequently entered Austria as a regular migrant, and was still residing there with her husband at the time of the case despite the expiration of her residence. Mr Kokollari entered Austria legally at age of 2 with his parents, who were then Yugoslav nationals. At the time of the case, he was 29 years old and residing in Austria. He claimed to have been maintained by his mother who has assumed Austrian nationality. Mrs Stevic, a Serbian national, residing Serbia with her husband and three adult children. She sought family reunification with her father, a naturalised Austrian citizen resident in Austria, from whom she was receiving monthly financial support. All applications for resident permits were rejected by the Austrian *Bundesministerium für Inneres*. It refused to apply the provisions pursuant to Directive 2004/38/EC for family members of EU citizens on the grounds that the Union citizens concerned had not exercised their rights of free movement. It also placed weight of the fact that Mr Dereci, Mr Maduike, Mrs Heiml and Mr Kokollari had been subject to expulsion orders and individual removal orders. The Court stated⁵⁷² that Union citizens, who have never exercised free movement rights, cannot for that reason alone be assimilated to a purely internal situation since citizenship of the Union is intended to be the fundamental status of nationals of Member States. In essence, the Court was of the opinion that as long as an EU citizen can move from their Member State of origin to another Member State and exercise free movement and residence rights, then they can enjoy family reunion. Otherwise the only way an EU citizen can enjoy family reunion with a third

⁵⁷² Paragraph 61.

country national is if they simply cannot move, the only discernable example of this so far emanating from Zambrano.

In effect then, Dereci limits the Zambrano logic exceptionalising it and the rights it confers to particular family compositions and structures.

IV) Concluding Remarks

To begin with Carpenter, we can safely say that the Court based its reasoning on internal market logic in that not only did base the claim concerning the wife's right to remain on Mr. Carpenter and his economic activity with the Community but it also extended what can actually be considered as economic activity. In so doing, it incorporated and recognised the importance of the caregiving function and the fundamental right to family life but essentially, in stating that the economic activity could not be carried out without it, based its reasoning not in the unity of the family as such but rather its internal market reasoning. In other words, the fundamental right to family life was extended via Mr. Carpenter's economic freedoms:

*The Court points out that the Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty*⁵⁷³.

*It is clear that the separation of Mr and Mrs Carpenter by her deportation would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse*⁵⁷⁴.

⁵⁷³ Paragraph 38.

⁵⁷⁴ Paragraph 39.

We can see from this reasoning that the main concern of the Court here (at least that which was exposed by the judgment) was the fundamental freedom of Mr. Carpenter, not Mrs. Carpenters right, as primary caregiver, to remain in the UK with a view to protecting the unity of the family. However, this rights based approach to economic law ensured that the integrity of the family was upheld in the case.

The *Chen* case that followed, as we have seen above, concerned a different set of facts and the question rather concerned corollary rights of parents of EU citizen children. The parental right of residence in this case was seen to be necessary so that the child could benefit from her EU citizenship. In this case, we already see a change in reasoning in that by virtue of Catherine's EU citizenship, residence rights were granted to both Catherine and her mother upholding the unity of the family. The Court reasoned that Catherine is covered by adequate sickness insurance and, through the members of her family, has at her disposal sufficient resources to ensure that, during her stay, she does not become a burden on the public finances of the host Member State. Consequently, she can claim a right of residence either by virtue of the directive concerning rights of movement and residence for persons who are not economically active or by virtue of the provision of the Treaty which provides for freedom of movement and of residence as a fundamental right of citizens of the Union. It went on to state that if Mrs. Chen were to exercise a right of establishment in the United Kingdom in the name and on behalf of her daughter, but were then herself denied the right to reside in that State, that outcome would be manifestly contrary to the interests of her daughter and would contravene the principle of respect for family unity: in such a case, the young child would automatically be abandoned. Therefore, her mother must be able to invoke a right of residence deriving from that of her young child, because otherwise the latter's right would be entirely deprived of any effectiveness.

Then we come to the *Zambrano* case⁵⁷⁵ from which we can note a further shift in that the Court is now fully engaged with using the citizenship provisions as a means to uphold the unity of family ties. The reasoning of AG Sharpston is particularly telling of the direction into which citizenship reasoning is headed:

First, from the moment that the Member States decided to add, to existing concepts of nationality, a new and complementary status of ‘citizen of the Union’, it became impossible to regard such individuals as mere economic factors of production. Citizens are not ‘resources’ employed to produce goods and services, but individuals bound to a political community and protected by fundamental rights

Second, when citizens move, they do so as human beings, not as robots. They fall in love, marry and have families. The family unit, depending on circumstances, may be composed solely of EU citizens, or of EU citizens and third country nationals, closely linked to one another. If family members are not treated in the same way as the EU citizen exercising rights of free movement, the concept of freedom of movement becomes devoid of any real meaning.

Third, by granting fundamental rights under EU law to its citizens, and stating that such rights are the very foundation of the Union (Article 6(1) TEU), the European Union committed itself to the principle that citizens exercising rights to freedom of movement will do so under the protection of those fundamental rights⁵⁷⁶.

‘Over succeeding years, the EU has reinforced its policy on fundamental rights through (for example) setting up a Fundamental Rights Agency, creating an independent portfolio within the Commission responsible for fundamental rights, supporting humanitarian projects throughout the world and transforming the Charter of Fundamental Rights of the EU, first proclaimed in 2000, from a non-binding text (‘soft law’) into primary law. Fundamental rights have thus become a core element in the development of the Union as

⁵⁷⁵ Confirmed by *Dereci*.

⁵⁷⁶ Paragraphs 127-129.

*a process of economic, legal and social integration aimed at providing peace and prosperity to all its citizens*⁵⁷⁷.

What we can see from the reasoning in *Zambrano* is that although the Court considers fundamental rights arguments, it has merged them with rights ensuing from EU Citizenship. It seems to go beyond the economic logic to which it was once bound and is instead creating a citizenship space within which rights, based on the fundamental right to family life, can be expanded upon. In sum, the Court's aspirations in relation to EU Citizenship coupled with fundamental rights protection have provided conceptual support in family law cases that would otherwise be left outside the scope of the legal toolbox of the Court, developing, some might say, a sphere within which the notion of family citizens, just like consumer citizens and market citizens, can begin to emerge. However, the subsequent case law seems to narrow the enjoyment of citizenship rights to those families with children based on their need for company, care and parentage.

⁵⁷⁷ Paragraph 154.

Conclusions

I) Recalling The Hypothesis

In concluding this research, let us call to mind the principal hypothesis i.e. that *the interpretation of European Union law, both primary and secondary, is having a deconstructive effect on national family law and is reconstructing it via the European Union legal order.* This can be broken down into two elements. Has a deconstruction of traditional family law taken place? Has the family been subject to a reconstruction at the EU level? We will deal with both these questions here with a view to concluding this research.

A. The Deconstruction Process

The genealogical approach to this thesis assisted us to uncover distinct historical ideas and theoretical underpinnings that have influenced the development of modern family law. Chapter I illustrates the wall that required deconstruction in clearly setting out that as a result of the globalization of Classical Legal Thought, contract law was venerated “as the legal space in which to maximise space for the will of the parties” and family law was venerated “as its opposite, the space for the untrammelled will of the state imposing ascriptive statuses saturated with duty”⁵⁷⁸. Contract law therefore was universal according to the highly influential thoughts of Savigny while family law gave voice to the spirit of the people leading to a localisation of the foundations of family law. Contract law was characterised by a profound preference for individualism and supported a *laissez faire* ideology. In terms of equality, the equal autonomy of contract law did not extend to the family, in which patriarchal property-based subordination remained untouched. The construction of the family and the regulation of familial ties that was to ride the wave of the second globalization – The Social - was one characterised by the

⁵⁷⁸ Halley, “What Is Family Law?,” May 8, 2013.

institution of marriage, the local nature of norms, customs and traditions that governed the family, and profound inequalities between the parties to the private marital bubble which Classical Legal Thought failed to penetrate as it marched towards accommodating capitalism and the rise in global trade, the fulfilment of will and the creation of an individualist, liberal approach that disregarded the family in all but its function as a cog, an aid mechanism for the proper functioning and support of industrialization.

The Social has potential to de-exceptionalise the family from this isolated position it has been pushed towards. This potential was based on the shift from economic development as the overall goal to the idea of interdependence; from the individualism that characterized Classical Legal Thought to an increased demand for group rights and collective concerns; and the move from formal equality to social justice. We noted the shift from contract as the web and woof of life in terms of regulation to more social aspirations that emanated from the construction of societal spaces and the interaction between the state, the economy and the private sphere considering the new approach to collective concerns, values, interests and purposes⁵⁷⁹. In fact, the socialization of law during this second globalization had unprecedented effects on the structure and contours of private law particularly, as we illustrated in Chapter II, in consideration of the development of the master/servant relationship into one of employment law.

Was the same potential realized in terms of the family? To a certain extent, the answer to this question would be yes in view of the fact that during The Social, or rather towards the end of this globalization, ‘family law’ finally came to be recognized as a distinct legal field. That being said, the net it cast was limited in scope to say the least. It was recognized as a field of law that dealt with formal issues concerning marriage, and, where provided for, separation and divorce, in addition to the rights and duties between parents and legitimate children. It remained rooted in the patriarchal system that was firmly entrenched

⁵⁷⁹ Ibid pg 3.

during the globalization of Classical Legal Thought. Based on this, the constitutional process at national levels, as illustrated by the Constitutions of Ireland and Italy, placed the marital family on a pedestal disregarding other family types. Interpretation by national courts therefore was limited to local definitions of the family, essentially rooted in the formation of formal marital bonds. This, as we highlighted, left little scope for courts to socially engineer the legal position of emerging family structures, compositions and ideologies.

As argued throughout this thesis, the deconstruction process only really began with the shift in the legal language with the onset of the third globalization of legal thought – neo-formalism. We highlighted a change in the legal grammar employed in an attempt to integrate ‘*politics through law*’ via rights discourse, the emergence of identity rights and the use of law to meet a variety of ends including distributive and social functions. This, in terms of the deconstruction of the family market dichotomy was largely rooted in the notion of equality that stemmed from economic integration which cut across the tensions that persisted after the globalization of Classical Legal Thought and The Social. In more concrete terms, the development of the a body of anti-discrimination law according to the European legal order pulled the family out of the patriarchal structure to which it had been subjected (the deconstruction) and nudged it, via peripheral family law issues, towards rights-based adjudication (the reconstruction). Essentially this gave rise to solutions considered more satisfactory as opposed to the purely private or the purely social solutions that were adopted during the earlier globalizations.

B. The Reconstruction Process

Equal treatment, like many novel fields of EU law, has developed at warp-speed. In its early days, the goal of the equal pay provisions contained in the primary law was to reintroduce women into the market place prompted by the preoccupations of the French that their already established equal pay laws would place them at a competitive disadvantage. Additionally, non-discrimination based on nationality

was enshrined already in Article 69 of the ECSC Treaty.⁵⁸⁰ Today, however, we note the extensive character of anti-discrimination law at the European level and its expansive reach in many directions. Through this, and the gradual adoption of secondary legislation, the then ECJ was provided with space and much leeway in terms of developing what was already considered a worthy field of law⁵⁸¹ broadening the access path⁵⁸² in terms of issues that could be referred via the preliminary reference procedure⁵⁸³ – the swash. Through this process the Court was given the leeway to define its mandate, establish a “new legal order” and develop a constitutional doctrine⁵⁸⁴ - a clear shift from the economic based equal pay and non-discrimination based on nationality provisions.

This new legal order developed alongside a shift in aspirations – from economic to socially orientated - rendered sharp by the Treaty on the European Union. We note:

- the classical conception of the EEC in establishing an internal market thereby focused on engaging workers to facilitate the market;

⁵⁸⁰ Providing for the free movement of all workers in the coal and steel industries including a provision on the prohibition of discrimination. This prohibition however only applied to workers who were in possession of a recognised qualification in coalmining or steelmaking.

⁵⁸¹ This points to issues of legitimacy of which we cannot deal with here. Suffice to say that via equality aspirations, based on the economic constitution, the court was in some way legitimized in its march towards, what would eventually become a general principle of equality. On legitimacy, see Bartl M., *Legitimacy and European private law*, PhD Thesis, defended at the European University Institute, Florence, 2012; Scharpf, Fritz W., *Legitimate Diversity: The New Challenge of European Integration*, in Börzel, Tanja, A./Cichowski, Rachel A. (eds.): *The State of the European Union*, Vol. 6, Oxford, 2003, 79-104; Scharpf, Fritz W., *Legitimacy in the Multilevel European Polity*, in: *European Political Science Review* 1/2, 2009, 173-204; Scharpf, Fritz W., *The Asymmetry of European Integration, or why the EU cannot be a social market economy*, in *Socio-Economic Review* (2010) 8/2, 211-250.

⁵⁸² G Tridimas & T Tridimas, “National Courts and the European Court of Justice: A Public Choice analysis of the Preliminary reference Procedure, *International Review of Law and Economics*, 24, (2004) 125-145; Bobek M., “Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts” in Maurice Adams, Johan Meeusen, Gert Straetmans and Henri de Waele (eds), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice Examined* (Oxford, Hart, 2013).

⁵⁸³ In fact, according to the Court itself “...is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community” (Case C-166/73 *Rheinmuhlen*).

⁵⁸⁴ Tridimas, “Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary reference Procedure, *Common Market Law Review*, 40: 9.50, 2003; G Tridimas & T Tridimas, “National Courts and the European Court of Justice: A Public Choice analysis of the Preliminary reference Procedure, *International Review of Law and Economics*, 24, (2004) 125-145.

- to a more socially based EU - albeit still economically motivated in striving to achieve the “most efficient market economy” – engaging different actors in exchange for protection, for instance, consumer participation in the market in exchange for consumer protection
- and finally a recodification of this European social in the direction of individual rights with a stronger focus on fundamental rights and interdependency.

It is precisely here where we can pinpoint not only the reconstruction of family but also how the European legal order goes beyond the neo-formalist language in terms of European identity building. Before concluding with the issues that this necessarily conjures, let us look to the specifics of how this reconstruction affects the family.

The Specifics

Traditionally, evidenced by family law textbooks, family law dealt with the private dynamics of the relationships established on the formation of marital ties. It dealt with the unique and autonomous domain that it occupies in society based on the intimate, private and emotional relationships it governs; its quest to preserve traditional, national and customary ways of life against the upheavals of postmodernity and globalization and its derivation from values other than market rationality. By broadening the access path however, the European legal order has allowed for the consideration of peripheral family law issues, essentially de-exceptionalizing the family from the market. As we noted in Chapter IV, via an examination of the selected peripheral paths, family law concerns much more than that which traditionally was confined to the private bubble. Employment law regimes⁵⁸⁵, welfare benefits⁵⁸⁶, name

⁵⁸⁵ C-363/12, *Z. v A Government Department and The Board of management of a community school* and C-167/12, *C.D. v S.T.*

⁵⁸⁶ *Baumbast and R v Secretary of State for the Home Department* Case C/413/99; *London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department* Case C-310/08; *Maria Teixeira v. London borough of Lambeth* Case C-480/08; *Commission v Anton Pieter Roodhuijzen* Case T-58/08; *Tadao Maruko v Versorgungsanstalt der deutschen Buhen* C-267/06; *K.B. v National Health Service Pensions Agency and Secretary of State for Health* Case C-117/01; *Joseph Griesmar v French Republic* Case C-366/99 and Case C-104/09 *Roca-Alvarez v Sesa Start España ETT SA.*

registration⁵⁸⁷ in particular consideration of migration, and residence and family reunification⁵⁸⁸ all necessarily shift interpretations of the family, its structure, its ideology and its governance. The inclusion of these peripheral issues in reconceptualizing the family broadens the field in terms of breaking down the family/market dichotomy.

Second, by catapulting the family into the European legal order, anti-discrimination has served to deconstruct the patriarchal structure that persisted within family structures for so long. It has been reconstructed in accordance with the principle of equality leading to the replacement of patriarchy with a more gender-neutral approach to regulating the family. We can make reference here to Case C-104/09 *Roca-Alvarez v Sesa Start España ETT SA*⁵⁸⁹ and the equality approach that was taken in consideration of breast feeding leave.

Third, in advancing the neo-formalist language, not only through anti-discrimination but also via the developed general principle of equality and reference to fundamental rights, the court has shifted the dynamics of family law adjudication, not only in terms of the private dynamic within the family but also in terms of balancing the fundamental right to family life against policy considerations.⁵⁹⁰ As we noted in Chapter II, the globalization of The Social coincided with the constitutionalization of the family at the national level. The effects of this however were limited in scope in that the classical, therefore limited to formal bonds created on marriage and the local nature of family regulation, definition of the family was placed on a constitutional pedestal leaving little room for courts to manoeuvre, essentially

⁵⁸⁷ C-148/02 *Carlos Garcia Avello v État belge*; C-353/06 *Stefan Grunkin and Dorothee Regina Paul v Leonhard Matthias Grunkin-Paul and Standesamt Stadt Niebüll*.

⁵⁸⁸ *Carpenter v Secretary of State for the Home Department* Case C-60/00; *Chen and Zhu v Secretary of State for the Home Department*, Case C-200/02; Case C-127/08, *Metock and Others v Minister for Justice, Equality and Law Reform*; Case C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken*; *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)* Case C-34/09.

⁵⁸⁹ Case C-104/09 *Roca-Alvarez v Sesa Start España ETT SA*.

⁵⁹⁰ It must be noted however that this discourse if perhaps more advanced in terms of the Opinions of the Advocates General with the Court, understandably so, particularly in consideration of, for instance, the *CD* and *ζ* references, not always assuming the same logic. This debate goes deep into the difficulties faced in terms of implementing fundamental rights, particularly in horizontally inclined cases and is one which, in this author's opinion will gain significant momentum with increased reference to the Charter of Fundamental Rights and the Unions accession to the European Convention of Human Rights.

blocking any expansion of the family conception. The rights based interpretation, served by cross-reference between the CJEU and the ECtHR serves to widen the scope of interpretation to include non-traditional, non-classical family types.

On this very note of adjudication, it is imperative to point out how the progression from Classical Legal Thought to The Social to Neo-formalism affects the family⁵⁹¹. The hero figures of the first globalization, after Savigny of course, were the judiciary in that they deductively interpreted the already formal character of the Will Theory that underpinned this legal consciousness. In fact, this was one of the principal attacks from ‘the socializers’. The social, rather, was concerned with social engineering via legislators who drafted the multiplicity of special laws that constituted the new order, along with the administrator who produced and enforced the detailed regulations that put legislative regimes into effect. The third globalization has turned the adjudication of family law issues on its head. We noted in the Introduction to this thesis that just over one hundred years ago, not even colonial courts were prepared to interfere with local family law. Today, we are witnessing increased adjudication of family law issues at the supranational level. This very fact is incredible on its own, let alone that this shift in adjudication has led to the use of a complete alternative toolbox in terms of adjudication.

These advancements paint an attractive picture of the reconstruction of family law and indeed, if we look to increasingly inclusive pronouncements of both national and supranational courts, can certainly be noted as a welcomed momentum in terms of modernising family law. One might be tempted, particularly in relation to family law and its underdog position, to herald any advances as a step in the right direction. However, if the foundations are weak then the building will crumble and rather than construct a weak European space for family law it is preferable to build concrete foundations upon which migrating families can be supported.

⁵⁹¹ Although not dealt with here, we should recall that the EU’s calls for a broader access to justice have paved the way for the extra-judicial resolution of private law disputes. In terms of family, particularly in relation to Brussels II bis and the rise of cross-border mediation, we can perhaps note a re-privatization of the resolution of family law dispute. Additionally, and in conjunction with the point made in footnote 598 below, we may wonder to what extent adjudication of family law issues at the supranational level has already gone beyond the peripheral issues approximating them to the core.

II) Beyond Neo-Formalism

EU Citizenship, in going beyond neo-formalism in providing a space where rights can be claimed and developed in a self-standing nature, that is, as we noted in relation to the *Zambrano* case and the shift from the economic interpretation employed previously⁵⁹² towards the creation of a European society and identity building project. This can be connected back to the broad impetus of this research based on the fact that the nation state is undergoing a transformation.⁵⁹³ Even though the concepts and methodological lenses differ, we note the trend recognizing the evolving nature of the European transnational legal order in providing a forum within which both citizens and private actors can avail of increased opportunities to participate in the changing economic and political environment. This is where the EU, and more especially the CJEU, comes into difficulty. The uncertainty concerning the scope of EU Citizenship has been developed in this thesis with reference to the one step forward approach taken by the Court in *Zambrano*⁵⁹⁴ contrasted with the two steps back approach taken in *McCarthy*⁵⁹⁵ and *Dereci*⁵⁹⁶. This inconsistent approach muddies the waters and renders it difficult to ascertain the future of jurisprudential pronouncements of the Court. In connecting this back to Savigny, and his strife for a systematization of law during the first globalization, we can perhaps question the rhetoric of EU Citizenship and call for clarification in terms of the rights (and duties) it establishes. To exemplify: is EU Citizenship confined to an elite few in Europe

⁵⁹² *Carpenter v Secretary of State for the Home Department*, Case C-60/00; *Chen and Zhu v Secretary of State for the Home Department*, Case C-200/02.

⁵⁹³ We can think here about the effects of globalization on the nation state, the effects of international agreements and the establishment of international institutions, such as the World Trade Organization, but more specifically for our purposes we focus attention on the influence of the European legal order on the individual nation states as constitutive members. See Slaughter, A.M., “Global Government Networks, Global Information Agencies, and Disaggregated Democracy”, *Harvard Law School, Public Law Working Paper* No. 18.; Slaughter, A.M., *A New World Order* (Princeton University Press, 2009); Fischer-Lescano A., & Teubner G., “Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law”, 25 *Mich. J. Int’l L.* 999 (2004); Sassen S., *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006).

⁵⁹⁴ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEM)*.

⁵⁹⁵ *McCarthy v Secretary of State for the Home Department*, Case C-434/09.

who take advantage of their free movement rights i.e. EU Citizenship based on the economic foundations of the Union⁵⁹⁷, or, in another direction, is the goal to develop a citizenship that aims to connect the European polity i.e. every Member State national by virtue of being born within Europe's border thereby granting them – and their dependant and ascendants – a legal sphere within which their rights can be exercised and fulfilled?

In another vein, pre-empting increased reference to fundamental rights, particularly as a result of the Charter and the EU's accession to the ECHR, we must consider questions pertaining to institutional choice, again depending on the path, be it restrictive or liberal, that the Court decides to follow. Moreover, connected to this, we may question whether EU citizenship in conjunction with the neo-formalist language is actually moving towards the core?⁵⁹⁸

It is impossible to adequately deal with these various issues here – each perhaps deserving a thesis of its own. Suffice it to note, in posing conclusions for further research, that the 'empty' nature that characterized the citizenship provisions on their introductions can be refuted. Rather, I would argue that although the provisions themselves on first glance seem quite somber and unlikely to cause much stir⁵⁹⁹, it is now clear that behind these provisions is something more, a potential to subtly (and perhaps not even) further the scope of the EU and the rights of those persons within its borders. Like a whirlpool the provisions represented by the deceiving, still surface of the water are simply there for all to be seen. More difficult however is to gauge what is actually going on below the surface of the water in the vortex of the whirlpool.

⁵⁹⁶ *Dereci and others v Bundesministerium für Inneres*, Case C-256/11.

⁵⁹⁷ C-148/02 *Carlos Garcia Avello v État belge*.

⁵⁹⁸ Here we can think about the road not taken by the Court in reasoning the *CD* and *ζ* cases.

⁵⁹⁹ We may question whether the citizenship rules so abstract that their indeterminacy allows them to be invoked quite instrumentally?

Bibliography

Books and Book Chapters

Amram D. & D'angelo A. (eds), *La famiglia e il diritto fra diversità nazionali ed iniziative dell'Unione Europea, I quaderni della rivista di diritto civile*, (Padova, 2011).

Antokolskaia M., “Family Law and National Culture. Arguing against The Cultural Constraints Arguments”, in Boele Woelki K., *Debates in Family Law around the Globe at the Dawn of the 21st Century* (Intersentia, 2009): 37-51.

Antokolskaia A., “Comparative Family Law. Moving With The Times?”, in Örüçü E. and Nelken D. (eds.) *Comparative Legal Studies: A Handbook* (Hart 2007): 241-263.

Antokolskaia M., *Harmonisation of Family Law in Europe – A Historical Perspective*, European Family Law Series No. 13 (Intersentia, 2006).

Antokolskaia M., *Harmonisation of Family Law in Europe – A Historical Perspective*, European Family Law Series No. 13 (Intersentia, 2006).

Azoulai L., “The Case of Fundamental Rights: A State of Ambivalence”, in Micklitz H.W. and De Witte B. (eds.) *The European Court of Justice and the Autonomy of Member States* (Intersentia, 2012).

Bartl M., *Legitimacy and European private law*, PhD Thesis, defended at the European University Institute, Florence, 2012.

Becker G., *A Treatise on the Family* (Harvard University Press, 1991)

Bell M., “Constitutionalization and EU Employment Law” in Micklitz H.W., *The Constitutionalization of European Private Law* (Oxford University Press, 2014)

Bengoetxea J., *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press, 1993)

Bernini S., “The Foundation of Civilised Society: Family and Social Policy in Britain and Italy between 1946 and 1960” in Nautz J., Ginsborg P. and Nijhis T., *The Golden Chain, Family, Civil Society and the State* (Berghahn Books, 2013).

Bessone M., Alpa G., D'Angelo A., Ferrando G., Spallarossa M.R., *La famiglia nel nuovo diritto* (2002).

Bishop, J.P., *Commentaries of the Law of Marriage and Divorce, and Evidence in Matrimonial Suits*, 1st Ed, (Lettle, Brown, 1852).

Blackstone W., *Commentaries on the Laws of England*, (1765).

Bobek M., “Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts” in Maurice Adams, Johan Meeusen, Gert Straetmans and Henri de Waele (eds), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice Examined* (Oxford, Hart, 2013)

Boele-Woelki K. (ed.), *Debates in Family Law around the Globe at the Dawn of the 21st Century* (Intersentia 2009).

Boele-Woelki K. and Svedrup T. (eds.), *European Challenges in Contemporary Family Law*, European Family Law Series No. 19 (Intersentia 2008).

Boele-Woelki K., Ferrand F., González Beilfuss C., Jantera-Jareborg M., Lowe N., Martiny D., Pintens W., *Principles of European Family Law Regarding Parental Responsibilities*, European Family Law Series No. 16 (Intersentia, 2007).

Boele-Woelki K., Ferrand F., González Beilfuss C., Jantera-Jareborg M., Lowe N., Martiny D., Pintens W., *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, European Family Law Series No. 7 (Intersentia, 2004).

Brownsword R., “Freedom of Contract, Human Rights and Human Dignity”, in Friedmann D. and Barak-Erez D. (eds.) *Human Rights In Private Law* (Intersentia, 2001).

Brügge-meier G., Colombi Ciacchi A., and Comandé G., (eds.) *Fundamental Rights and Private Law in Europe* Vol. I (Cambridge University Press, 2010).

Brügge-meier G, Colombi Ciacchi A., & Comandé G., (eds.) *Fundamental Rights and Private Law in Europe* Vol. 2 (Cambridge University Press, 2010).

Busnelli F.D., *Famiglia e arcipelagofamiliare*, in *Riv. Dir. civ.*, 2002, 509 e ss.

Busnelli F.D. and Santilli M., “La famiglia di fatto”, in Oppo G., Cian G. and Trabucchi A. (eds.), *Commentario al dirittoitaliano dellafamiglia*, VI, 1, (1993).

Cardia Vonèche L. and Bastard B., “Can Co-Parenting be Enforced? Family Law Reform and Family Life in France”, in Maclean M. (ed.), *Family Law and Family Values* (Hart Publishing, 2005).

Choudhry S. and Herring J., *European Human Rights and Family Law* (Hart Publishing, 2010).

Collins H., *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International, 2008).

Collins H., *The European Civil Code: The Way Forward*, (Cambridge University Press, 2008).

Collins H., *Regulating Contracts* (Oxford University Press, 2003).

Collins H., 'Justifications and Techniques of Legal Regulation of the Employment Relation', in H Collins H., Davies P. and Rideout R. (eds.), *Legal Regulation of the Employment Relation* (2000).

Collins H., On the (In)compatibility of Human Rights Discourse and Private Law, LSE Law, Society and Economy Working Papers 7/2012.

Comandé G., "The Fifth European Union Freedom: Aggregating Citizenship...around Private Law" in Micklitz H.W., *The Constitutionalization of European Private Law* (Oxford University Press, 2014).

Cottier M., "Registered Partnerships for Same-Sex Couples in Switzerland: Constructing a New Model of Family Relationships", in Maclean M. (ed.), *Family Law and Family Values* (Hart Publishing, 2005).

D'Angelo A., *Il Bambino nella Famigliari Composta. Percorsi di Riscoperta della Solidarietà Familiare*, Ph.D. Thesis (2013), on file with the author.

Davies J., *The European Consumer Citizen in Law and Policy*, (Palgrave MacMillan, 2011)

De Vosg B.J., "The Netherlands Report" in Brüggemeier G., Colombi Ciacchi A., and Comandé G. (eds.) *Fundamental Rights and Private Law in Europe* Vol. I (Cambridge University Press, 2010).

Everson M., "The Legacy of the Market Citizen", in Shaw J. and More G., *New Legal Dynamics of European Union* (Clarendon Press, 1995).

D'Oliveria H., "European Citizenship: its Meaning, its Potential", in Dehousse R. (ed.), *Europe after Maastricht* (Law Books in Europe, 1994).

Everson M., "The Legacy of the Market Citizen", in Shaw J. and More G., *New Legal Dynamics of European Union* (Clarendon Press, Oxford, 1995).

Fortino M., *Diritto di famiglia. I valori, I principi, le regole*, (2004).

Foucault M., "Security, Territory, Population", Lectures at the College de France, 1977-1978, (2004): 203-05.

Foucault M., "Nietzsche, Genealogy, History", in Rabinow P. (ed.) *The Foucault Reader* 83 (1984).

Fraser, *Husband and Wife* (2nded 1878) Vol. 2.

Ginsborg P., “Unchartered Territories, Individuals, Families, Civil Society and the Democratic State” in Nautz J., Ginsborg P., and Nijhuis T., *The Golden Chain: Family, Civil Society and the State* (Berghahn Books, 2013).

Glendon M.A., *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* (University of Chicago Press, 1996)

Grassetti C., “I principi costituzionali relativi al diritto familiare”, in Calamandrei P. and Levi A., (eds.), *Commentario Sistematico alla Costituzione Italiana* (1950)

Habermas J., *The Crisis of the European Union: A Response* (Polity, 2012)

Hartog H., *Man and Wife in America: A History* (Harvard University Press, 2009)

Houghton W., *The Victorian Frame of Mind, 1830-1870*, (Yale University Press, 1957).

Kahn-Freund O., “Common and Civil Law – Imaginary and Real Obstacles to Assimilation” in Cappelletti M. (ed.), *New Perspectives for a Common Law of Europe*, (Springer, 1978)

Kasirer N., “The Dance Is One” in Sylvio Normand (ed.), *Mélanges offerts au professeur François Frenette: Études portant sur le droit patrimonial* (Presses de l’Université Laval, 2006)

Kelly F., *A Guide to Early Irish Law* (Dublin Institute for Advanced Studies, 1988)

Kennedy D., “Three Globalizations of Law and Legal Thought: 1850-2000”, in Trubek D. and Santos A., (eds.), *The New Law and Economic Development. A Critical Appraisal* (Cambridge University Press, 2006)

Komesar N., *Law’s Limits: The Rule of Law and the Supply and Demand of Rights*, (Cambridge University Press, 2001).

Laycock D., Picarello Jr A.R. and Fretwell Wilson R., *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Rowman and Littlefield Publishers, 2008)

Leong Wai Kum, *Family Law in Singapore: Cases and Commentary on the Women’s Charter and Family Law* (Malayan Law Journal, February 1990)

Lewis, J. “The Changing Context for the Obligation to Care and Earn” in Maclean M. (ed.), *Family Law and Family Values* (Hart Publishing, 2005)

Lyons C., “Citizenship in the Constitution of the European Union: Rhetoric or Reality?”, in R. Bellamy (ed.), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avebury, 1996)

Maclean M., *Family Law and Family Values* (Hart Publishing, 2005)

Maduro, M.P., “Europe’s Social Self: “The Sickness unto Death”” in Shaw J., (ed.), *Social Law and Policy in an Evolving European Union* (Hart Publishing, 2000)

Maduro M.P., *We, The Court: The European Court Of Justice & The European Economic Constitution*, (Hart Publishing, 1998)

Mak C., “The Lion, the Fox and the Workplace: Fundamental Rights and the Politics of Long-Term Contractual Relationships” in Grundmann S., Cafaggi F. and Vettori G. (eds.), *The organizational contract. From exchange to long-term network cooperation in European contract law* (Markets and the law) (Farnham: Ashgate 2013).

Mak C., *Fundamental Rights in European Contract Law. A comparison of the impact of fundamental rights on contractual relationships in Germany, Italy the Netherlands and England* (Kluwer Law International, 2008).

Martiny D., “Is Unification of Family Law Feasible or Even Desirable”, in Haartkamp A. et al. (eds.), *Towards a European Civil Code* (Kluwer Law International, 2004)

McGlynn C., *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press, 2006).

Micklitz H.W., *The Constitutionalization of European Private Law* (Oxford University Press, 2014).

Micklitz H.W., *The Many Concepts of Social Justice in European Private Law* (Edward Elgar Publishing, 2011).

Micklitz, H.W., “Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law” in Neergaard U., Nielsen R., and Roseberry L.M. (eds.) *The Role of Courts in Developing a European Social Model* (Edward Elgar Publishing, 2010)

Micklitz H.W., *The Politics of Judicial Co-operation in the EU – Sunday Trading, Equal Treatment and Good Faith* (Cambridge University Press, 2005)

Mill J.S., *The Subjection of Women* (1869)

Montesquieu C., *The Spirit of the Laws* 264-77 (Cohler A.M. et al. trans. eds.) (Cambridge University Press, 2009) (1748)

Mullally S., “Children Citizenship and Constitutional Change”, in Fanning B., (eds.) *Immigration and Social Change in Republic of Ireland* (Manchester University Press, 2007)

Nietzsche F., *The Genealogy of Morals* (Horace B. Samuel trans., Boni & Liverwright 1913) (1887)

Nozick R., *Anarchy, State, and Utopia* (Basic Books, 1974)

Pérez A. T., *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication*, (Oxford University Press, 2009)

Plender R.O., “An Incipient Form of European Citizenship”, in: Jacobs F.G., (ed.), *European Law and the Individual* (North-Holland, 1976)

Safjan M., “The Horizontal Effect of Fundamental Rights in Private Law—On Actors, Vectors, and Factors of Influence”, in Purnhagen K., & Rott P. (eds), *Varieties of European Economic Law and Regulation, Liber Amicorum for Hans Micklitz*, (Springer International Publishing, 2014).

Sandulli A.M., “Rapporti etico-sociali, art. 29”, in Cian G., Oppo G., Trabucchi A. (eds.), *Commentario al diritto italiano della famiglia*, (1992)

Scharpf, Fritz W., Legitimate Diversity: The New Challenge of European Integration, in Börzel, Tanja, A./Cichowski, Rachel A. (eds.), *The State of the European Union*, Vol. 6, Oxford, 2003, 79-104.

Schiek D., Waddington L., and Bell M., (eds.) with the collaboration of Choudhury T., De Schutter O., Gerards J., McColgan A., and Moon G., *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007)

Douglas-Scott A., *Constitutional Law of the European Union*, (Longman, 2002)

Sassen S., *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006)

Scherpe J.M. (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing, 2012)

Scherpe J.M., “From ‘Odious Crime’ to Family Life – Same-Sex Couples and the ECHR” in Verbeke A.L. et al. (eds.) *Confronting the Frontiers of Family and Succession Law*. Liber Amicorum Walter Pintens, (Intersentia 2012): 1225-1240

Schmidt V. A., *Democracy in Europe: The EU and National Politics* (Oxford University Press, 2006)

Shapiro J., “Changing Ways, New Technologies and the Devaluation of the Genetic Connection to Children” in Maclean M. (ed.), *Family Law and Family Values*, (Hart Publishing, 2005)

Shatter A., *Shatter's Family Law*, 4th ed., (Butterworths, 1997)

Slaughter A.M., *A New World Order* (Princeton University Press, 2009)

Smits J.M., “European Private Law: A Plea for a Spontaneous Legal Order” in Curtin D.M., Smits J.M., Klip A. and McCahery J.A., *European Integration and Law; Four Contributions on the Interplay between European Integration and European and National Law to Celebrate the 25th Anniversary of Maastricht University's Faculty of Law* (2006): 55-107

Smits J.M., “Private Law and Fundamental Rights: A Sceptical View” in Barkhuysen T. and Lindenbergh S. (eds.), *Constitutionalisation of Private Law* (Brill, 2006)

Stalford H., *Children and the European Union. Rights, Welfare and Accountability* (Hart Publishing, 2012)

Stein T., “The Notion of the Term Family on European Level with a Focus on the Case Law of the European Court of Human Rights and the European Court of Justice”, in Verbeke A.L. et al. (eds.), *Confronting the Frontiers of Family and Succession Law*. Liber Amicorum Walter Pintens (Intersentia 2012).

Von Savigny F.K., and Holloway W., *System of the Modern Roman Law* (Madras: J. Higginbotham, 1867)

Watson A., *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974)

Journal Articles

Abrams K., and Brooks P., “Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation”, *Yale Journal of Law and the Humanities*, Vol. 21, No. 1, (2009)

Amram D., “Homosexuality and Child Custody through the Lenses of Law: Between Tradition and Fundamental Rights”, *Electronic Journal Of Comparative Law*, Vol. 15, (December 2011): 1

Azoulai L., “The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization”, *Common Market Law Review* Vol. 45, No. 5, (October, 2008)

Azoulai L., “Comment on the Ruiz Zambrano judgment: a genuine European integration”, (March, 2011), available at, <http://eudo-citizenship.eu/>

Baraldi, M.B., “Different Families, Same Rights? Freedom and Justice in the EU: Implications of the Hague Programme for Lesbian, Gay, Bisexual and Transgender Families and their Children”, *ILGA Europe* (2007)

Barnett R.E., “A Consent Theory of Contract”, 86 *Colum. L. Rev.* 269 (1986)

Becker G. and Lewis H., “On the Interaction between Quantity and Quality of Children”, *Journal of Political Economy* 81 (1973) 279-288

Bertelsmann K., “Who’s Afraid of the European Court of Justice? A Guide to the Preliminary Reference Procedure for National Courts”, *European Anti-Discrimination Law Review*, Issue No. 2, (October 2005)

Bradley D., “Convergence in Family Law: Mirrors, Transplants and Political Economy”, *Oxford University Comparative Law Forum* 2 (2001)

- Bulvinante I., “Union Citizenship and its Role in the Free Movement of Persons Regimes”, 5 *Web JCLI* (2003)
- Busnelli F.D., “La famiglia e l’arcipelagofamiliare”, *Rivista di dirittocivile* (2002)
- Cambien N., “Case C-127/08, Blaise, Baheten, Metock and Others v Minister for Justice”, Equality and Law Reform, *Colum. J. Eur. L.* 15 (2009): 321
- Caruso D., “Private Law and State-Making in the Age of Globalization”, 38 *N.Y.U. J. Int’l L. & Pol.* (2007)
- Closa C., “The Concept of Citizenship in the Treaty on European Union”, *CMLRev.* 29 (1992): 1137
- Cohen M., “The Basis of Contract”, 46 *Harv. L. Rev.* 553, 575 (1933)
- Comandé G., “Discrimination and Reasonable Accommodation: ‘Insights’ for a (Non) Zero Sum Game”, *Opinio Juris In Comparatione*, 2 (2010):1-39
- Conneely S., “Researching the Irish Family Mediation Service: Women in Mediation”, 5(2) *IJFL* 10, (2002)
- Costello C., “Metock: Free movement and “Normal Family Life” in the Union”, *Common Market Law Review* 46 (2009): 587-662
- Davies J., “Entrenchment of New Governance in Consumer Policy Formulation: A Platform for European Consumer Citizenship Practice?” *Journal of Consumer Policy* 32 (2009): 245-267
- Deakin S., “The Changing Concept of ‘Employer’ in Labour Law”, 30 *Indust.L.J.* 72 (2001)
- Douglas-Scott A., “A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*” 42, *Common Market Law Review*, Issue 3 (2006): 629-665
- Eriksson A., “European Court of Justice: Broadening the Scope of European Non Discrimination Law”, *International Journal of Constitutional Law* 7 (2009)
- Erickson A. L., “Coverture and Capitalism”, *History Workshop Journal* 59 (2005): 9
- Everson M. and Joerges C., “*Consumer Citizenship in Postnational Constellations?*” EUI Working Papers, LAW No. 47 (2006)
- Fahey E., “Going Back to Basics: Re-Embracing the Fundamentals of the Free Movement of Persons in Metock”, (2009) available online at SSRN: <http://ssrn.com/abstract=1371516>

Farrar J. and Atiyah P. S., “The Rise and Fall of Freedom of Contract,” *British Journal of Law and Society* 8, No. 2 (1981): 277

Finch N., “Family Policy in the UK, Welfare Policy and Employment In The Context Of Family Change”, *Social Policy Research Unit*, University of York.

Fischer-Lescano A., & Teubner G., “Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law”, 25 *Mich. J. Int’l L.* 999 (2004)

Gerencser A.E., “Family Mediation: Screening for Domestic Abuse”, 23 *Fla St U L Rev* 43 (1995)

Giorgi F. and Triart N., “National Judges, Community Judges: Invitation to Journey through the Looking Glass—On the Need for Jurisdictions to Rethink the Inter-Systemic Relations Beyond the Hierarchical Principle”, *European Law Journal*, Vol. 14, No. 6 (2008)

Halley J., “What Is Family Law?: A Genealogy Part I,” *Yale Journal of Law & the Humanities* 23, No. 1 (May 8, 2013)

Halley J., “What Is Family Law?: A Genealogy Part II,” *Yale Journal of Law & the Humanities* 23, No. 2 (May 8, 2013).

Halley J. and Rittich K., “Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism. Introduction to the Special Issue on Comparative Family Law”, *The American Journal of Comparative Law* 58, No. 4 (October 1, 2010): 753–75

Harding A., “Global Doctrine and Local Knowledge: Law in South East Asia” *The International and Comparative Law Quarterly* Vol. 51, No. 1 (January, 2002): 35- 53

Hayek, “Competition as a Discovery Procedure” *The Quarterly Journal of Austrian Economics* Vol. 5, No. 3 (Fall 2002): 9-23

Hesselink M.W., “A Toolbox for European Judges”, *European Law Journal* 17(4) (2011): 441-469

Hesselink M.W., “European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?” *European Review of Private Law*, 15(3) (2007): 323-348

Héritier F., “Quel Sens Donner aux Notions de Couple et de Mariage? A la Lumiere de L'antropologie”, *Information Sociales* No. 122 (2005): 6-15

Herzog R., and Gerken L., “Stop the European Court of Justice”, available at <http://euobserver.com/9/26714/?rk=1>

Hurwitz B., “Learning from Primary Care Malpractice: Past, Present and Future”, *QualSaf Health Care* 13 (2004) 90-91

Jacobs F.G., “Citizenship of the European Union-A Legal Analysis”, *European Law Journal*, Vol. 13, No. 5 (September, 2007): 591–610

Jemolo C.A., “La Famiglia e Ildiritto”, in *Ann. Sen. Giur. Università di Catania*, III (1948)

Kahn-Freund O., “On Uses and Misuses of Comparative Law”, *Modern Law Review* Vol. 37, No. 1 (1974)

Kennedy D., “Savigny’s Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought”, 58 *American Journal of Comparative Law* 811 (2011)

Kennedy D., “From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s Consideration and Form”, 100 *Colum. L. Rev.* 94 (2000)

Kiernan K., “The Diversity Initiative—Welcoming the Diversity of Family Life in Ireland’, Submission to Department of Social & Family Affairs on the Proposed ‘Strategy for Strengthening Families” (2004)

Kilkelly U., “The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights. Human Rights Handbook, No. 1” (2003)

Kochenov D., “Citizenship without Respect: The EU’s Troubled Equality Ideal”, Jean Monnet Working Papers 8 (2010), available at, <<http://centers.law.nyu.edu/jeanmonnet/papers/10/100801.html>>

Kochenov D., ‘Ius *Tractum* of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights”, *Columbia Journal of European Law* (2009).

Laffan B., “The Politics of Identity and Political Order in Europe”, 34 *J. Common Market Studies* 81, 83 (1996)

Lando O., “Can Europe Build Unity of Civil Law Whilst Respecting Diversity?” *Europa e Diritto Privato* (2006)

Legrand P., “Against a European Civil Code”, 60, *Modern Law Review* (1997): 44

Legrand P., “The Impossibility of “Legal Transplants””, 4 *Maastricht Journal of European & Comparative Law* 111 (1997)

Legrand P., “European Legal Systems are not Converging”, 45 *International and Comparative Law Quarterly* (1996): 52

Lo Scalzo A, Donatini A, Orzella L, Cicchetti A, Profili S, Maresso A. *Italy: Health system review. Health Systems in Transition* (2009): 13

MacCormick N., “Beyond the Sovereign State”, *Modern Law Review* 56 (1993): 1-18

Mack K., "Alternative Dispute Resolution and Access to Justice for Women", 17 *Adel LR* 123 (1995)

Mak C., "The one and the many: Translating insights from constitutional pluralism to European contract law theory", *European Review of Private Law* 21(5/6) (2013): 1189-1210

Mak C., "Europe-Building through private law. Lessons from Constitutional Theory" in S. Grundmann (ed.), *Seminar 'Private law and nationalism' organised by the CESL on 3 February 2012 in Amsterdam Vol. 8/3. European Review of Contract Law* (De Gruyter, 2012): 326-341

Mak C., "Hedgehogs in Luxembourg? A Dworkinian Reading of the CJEU's Case Law on Principles of Private and Some Doubts of the Fox" *European Review of Private Law* 20(2) (2012): 323-345

Maduro M.P., "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism", *European Journal of Legal Studies*, Vol. 2, No. 2 (2007)

Mattei U., "Why the Wind Changed: Intellectual Leadership in Western Law" 42 *am.j comp l* 195 (1994)

Micklitz H.W. and European University Institute, "A Self-Sufficient European Private Law: A Viable Concept?" EUI Working Papers, 2012/31 (European University Institute, 2012)

Micklitz H.W. and European University Institute, "The Visible Hand of European Regulatory Private Law: The transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation", EUI Working Papers 2008/14 (European University Institute, 2008)

Muldrew C., "'A Mutual Assent of her Mind'? Women, Debt, Litigation and Contract in Early Modern England", *History Workshop Journal* 55 (2003): 49

Mueller-Freienfels W., "The Emergence of Droit de Famille and Familienrecht in Continental Europe and the Introduction of Family Law in England", *Journal of Family History*, Vol. 28, No. 1, (2003): 31-32

Mueller-Freienfels W., "The Unification of Family Law", *American Journal of Comparative Law* 16 (1968)

Nicola F.G., "Family Law Exceptionalism in Comparative Law" 58 *Am. J. Comp. L.* 777 (2010): 787

O'Leary S., "Putting Flesh on the Bones of European Union Citizenship" 24 *ELRev* 68 (1999)

O'Leary S., "Nationality Law and Community Citizenship: A tale of Two Uneasy Bedfellows" *YBEL* 12 (1992): 353

- O'Connell, H., "A Raking Pot of Tea': Consumption And Excess In Early Nineteenth-Century Ireland," *Literature and History* 21(2) (2012): 32-47
- Olsen F.E., "The Family and the Market: A Study of Ideology and Legal Reform," *Harvard Law Review* 96, no. 7 (May 1, 1983): 1497–1578
- O'Neill P. and Sandler S.R., "The EU Citizenship Acquis and the Court of Justice: Citizenship Vigilante or Merely Vigilant Treaty Guardian?," *7 Rich J. Global L. & Bus* (2008): 205
- Pollicino O., "Legal Reasoning of the Court of Justice in the Context of the Principle of Equality between Judicial Activism and Self-Restraint", *German Law Journal* Vol. 5, No. 3, (2004)
- Prechal S., "Equality of Treatment, Non Discrimination and Social Policy Achievements in Three Themes", *Common Market Law Review* 41 (2004): 533-551
- Prechal S. and Masselot, "Legal Impact Assessment of the Equality Directives, A Report to the Commission", Tilburg/Leeds (2003)
- Ronfani P., *Il Diritto e le Nuove Famiglie: Una Lettura Sociologica di un Rapporto Complesso*, Min. e giust., Rome, 2, (2008): 13-26
- Ryan F.W., "Marriage at the Boundaries of Gender: The Transsexual Dilemma Resolved?" *Irish Journal of Family Law*, 1(2004)
- Ryan F. W., "Sexuality, Ideology and the Legal Construction of Family: Fitzpatrick v Sterling Housing Association", *3 Irish Journal of Family Law* (2000)
- Sacco R., "Legal Formants: A Dynamic Approach to Comparative Law" *37 Am J Comp L* 1, 240 (1991)
- Safjan M., "Between Mangold and Omega: Fundamental Rights versus Constitutional Identity", (2012) *3 Il diritto dell'Unione europea* 442-449.
- Scharpf, Fritz W., Legitimacy in the Multilevel European Polity, *European Political Science Review* 1/2, 2009, 173-204
- Scharpf, Fritz W., The Asymmetry of European Integration, or why the EU cannot be a social market economy, in *Socio-Economic Review* (2010) 8/2, 211-250.
- Scott C., "'Transnational Law' as Proto-Concept: Three Conceptions", *German Law Journal* Vol. 10, No. 7 (2009): 877
- Shaw J., "European Citizenship: The IGC and Beyond European Integration" online paper Vol. 1 No. 3 (1997)
- Skevik, A. "Children of the Welfare State: Individuals with Entitlements, or Hidden in the Family?" *Jnl Soc. Pol.* 32.3 (2003): 423–440

Slaughter A.M., “Global Government Networks, Global Information Agencies, and Disaggregated Democracy” *Harvard Law School Public Law Working Paper* No. 18.

Smits J.M., “Law Making in the European Union: On Globalization and Contract Law in Divergent Legal Cultures”, *Louisiana Law Review* 67.4 (2007): 1181-1203

Teubner G., “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences” 61 *Modern Law Review* 12 (1998)

Teubner G., “Substantive and Reflexive Elements in Modern Law”, 17 *Law and Society Review* (1983): 239-285

Timothy G.W. and Jochen S., “Incentives that Saved Lives: Government Regulation of Accident Insurance Associations in Germany, 1884-1914” *Yale University Economic Growth Center Discussion Paper* No. 1013; Yale Economics Department Working Paper No. 104. (August 9, 2012)

Toggenburg G. N., “LGBT go Luxembourg: on the stance of Lesbian Gay Bisexual and Transgender Rights before the European Court of Justice” (Judgment in the Case C-267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, CJEU April 1, 2008) *European Law Reporter* 5 (2008)

Tridimas T., “Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary reference Procedure”, *Common Market Law Review*, 40: 9.50, (2003)

Tridimas G. and Tridimas T., “National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure”, *International Review of Law and Economics*, 24, (2004): 125-145

Van Elsuwege P. and Kochenov D., “On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights”, *European Journal of Migration and Law* 4 (2011): 443

Waldman E.A., “What Do We Tell the Children?”, *Capital University Law Review*, Vol. 35, No. 2. (2006)

Weiler J., “To be a European Citizen—Eros and Civilisation” Madison Working Paper Series in European Studies 41-42 (1998)

White G.E., “From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America”, 58 *Va. L. Rev.* 999 (1972)

Wilhelmsson T., “Varieties of Welfarism in European Contract Law”, *European Law Journal* 10(6) (2004): 712

Wollenschlager, F., “A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration”, *European Law Journal*, Vol. 17, No. 1, (January, 2011): 1-34

Case Law

Court of Justice of the European Union

Baumbast and R v Secretary of State for the Home Department, Case C/413/99

Betray v Staatssecretaris van Justice, 1989, Case C-344/87

Bidar v London Borough of Ealing, Case C-209/03

Metock and Others v Minister for Justice, Case C-127/08

Boukhalfa v BRD, Case C-214/85

Carlos Garcia Avello v Étatbelge, Case C-148/02

Carpenter v Secretary of State for the Home Department, Case C-60/00

Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, Case C-54/07

Chen and Zhu v Secretary of State for the Home Department, Case C-200/02

Christine Goodwin v the United Kingdom, Application No. 28957/95

Collins v Secretary of State for Work and Pensions, Case C-138/02

Deutsche Telekom, Case C-50/96

D'Hoop v Office Nationale de l'Emploi, Case C-224/98

Erich Stauder v City of Ulm, Case C-29/69

Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, Case C-112/00

Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM), Case C-34/09

Grunkin-Paul v Standesamt Niebuhr, Case C-353/06

Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, Case C-184/99

Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case C-11/70

James Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions, Case C-164/07

J. McB. v L. E., Case C-400/10

Johannes van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, 1974, Case 33/74

Konstantinidis v Stadt Altensteig und Landratsamt Calw Ordnungsamt, Case C-168/91

Laval, Case C-3341/05

London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department Judgment of the Court (Grand Chamber), Case C-310/08

Luisi and Carbone v Ministero del Tesoro 1984, Case 286/82 and 26/83

Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department, Judgment of the Court (Grand Chamber), Case C-480/08

Martinez Sala v Freistaat Bayern, Case C-85/96

Metock and Others v Minister for Justice, Equality and Law Reform, Case C-127/08

Netherlands v Reed, Case C-59/85

Office national de l'emploi v Ioannis Ioannidis, Case C-258/04

Omega Spielhallen – und Automatenaufstellungs-GmbH v. Oberbürger-Meisterin der Bundesstadt Bonn, Case C-36/02

Parliament v. Council [2006] ECR I-05769, par. 38, Case C-540/03

R v Immigrations Appeal Tribunal ex parte Antonissen 1991, Case C-292/89

Rhimou Chakroun v Minister van Buitenlandse Zaken, Case C-578/08

Roca Alvarez v Sesa Start España ETT SA, Case C-104/09

Seda Kucukdeveci v Swedex, Case C-555/07

Shingara v Radiom, Case -65 and 111/95

Stefan Grunkin and Dorothee Regina Paul v Leonhard Matthias Grunkin-Paul and Standesamt Stadt Niebüll, Case C-353/06

Tadao Maruko v Versorgungsanstalt der deutschen Bühnen, Case C-267/06

Viking, Case C-438/05

Werner Mangold v Rüdiger Helm, Case C-144/04

European Court of Human Rights

Abdulaziz, Cabales, and Balkandali v United Kingdom, Application Nos. 9214/80; 9473/81; 9474/81

Andrle v the Czech Republic, Application No. 6268/08

Berrehab v The Netherlands Application No. 10730/84

Boughanemi v France, Application No. 22070/93

Cusan and Fazzo v Italy, Application No. 77/07

Fawzie v Greece, Application No. 40080/07

Guichard v France, Application No. 56838/00

Guillot v France, Application No. 22500/93

Khan v United Kingdom, Application No. 47486/06

Labassee v France Application No. 65941/11

Lebbink v Netherlands, App. No. 45582/99

Marckx v Belgium, application No. 6833/74

Menesson v France Application No. 65192/11

Muñoz Díaz v Spain, Application No. 49151/07

Nuutinen v Finland, Application No. 45830/99

Saidoun v Greece, Application No. 40083/07

Schalk and Kopf v Austria, Application No. 30141/04

Şerife Yiğit v. Turkey, Application No. 3976/05

Sterjna v Finland, Application No. 18131/91

Tyrer v The United Kingdom, Application No. 5856/72

X and Y v the Netherlands, Application No. 8978/80

X, Y and Z v The United Kingdom, Application No. 21830/93

National

Chappell v. Trent, 19 S.E. 314, 338 (1893)

Corte Costituzionale, ord. 15 April 2010, n. 138

Dalrymple v. Dalrymple(1811) 2M Hag. Con.54, (1814) 2 Hag. Con. 137n.

Duncan v Cumming 1714 5 Broun's Supplement 104

EM (Lebanon) [2008] UKHL 6, [2009] 1 AC 1198

G v An Bord Uchtala (1980) IR 32

Fajjonu v Minister for Justice (1990) IR 151; (1990) ILRM 234

Farquar v Murray, 3F, 859-64

Forster v. Forster (1864) 33 L.J.C.P. 150

Hogg v. Gow May 27, 1812, F.C

H.P. Bulmer Ltd v J. Bollinger SA [1974]

Hyde v. Hyde (1866) L.R. 1 P & D 130

In the Matter of Choo Eng Choon, Deceased (1908) 12 SSLR 120

L. and O. v Minister for Justice, Equality and Law Reform (2003) IESC 1

Mc D. v L. & Anor(2009) IESC 81

Mc D. v L. & Anor (2008) IEHC 96

McGee v. The Attorney General (1974) IR 28

McGeever v McFarlane (1951) 67 Sh Ct Rep 48

McGuire v McGuire ,157 Neb. 226, 59 N.W.2d 336 (1953)

Murphy v. Attorney General [1982] IR 241

North Western Health Board v HW and CW (2001) 3 IR 622

R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others (United Synagogue) (Appellants), [2009] UKSC 15

R v Willans (1856) 3 Ky 16

Ryan v The Attorney General (1965) IR, 294, 350

The State (Nicolaou) v AnBordUchtala (1966) IR 567

WO'R & EH v An Bord Uchtala (1996) 2 IR 248, 286