



---

## THE JEAN MONNET PROGRAM

*Professor J.H.H. Weiler*  
*European Union Jean Monnet Chair*

in cooperation with the



UNIVERSITÀ DEGLI STUDI DI TRENTO  
Dipartimento di Scienze Giuridiche  
Facoltà di Giurisprudenza

*Professor Roberto Toniatti*  
*Dipartimento di Scienze Giuridiche*

EUROPEAN LEGAL INTEGRATION: THE NEW ITALIAN SCHOLARSHIP

Jean Monnet Working Paper 13/08

Davide Strazzari

**The New Functionalist Approach of the ECJ Towards the European Freedom of  
Movement and Residency: Some Lessons from a Constitutional Comparative Survey**

All rights reserved.  
No part of this paper may be reproduced in any form  
without permission of the author.

ISSN 1087-2221  
© Davide Strazzari 2008  
New York University School of Law  
New York, NY 10012  
USA

Publications in the Series should be cited as:  
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

## **European Legal Integration: The New Italian Scholarship (ELINIS)**

This Working Paper is part of the ELINIS project: *European Legal Integration: The New Italian Scholarship* – Second Series. The project was launched in 2006 on the following premise. Even the most cursory examination of the major scientific literature in the field of European Integration, whether in English, French, German and even Spanish points to a dearth of references to Italian scholarship. In part the barrier is linguistic. If Italian scholars do not publish in English or French or German, they simply will not be read. In part, it is because of a certain image of Italian scholarship which ascribes to it a rigidity in the articulation of research questions, methodology employed and the presentation of research, a perception of rigidity which acts as an additional barrier even to those for whom Italian as such is not an obstacle. The ELINIS project, like its predecessor – the New German Scholarship (JMWP 3/2003) – is not simply about recent Italian research, though it is that too. It is also new in the substantive sense and helps explode some of the old stereotypes and demonstrates the freshness, creativity and indispensability of Italian legal scholarship in the field of European integration, an indispensability already familiar to those working in, say, Public International law.

The ELINIS project challenged some of the traditional conventions of academic organization. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions to ELINIS were not limited to scholars in the field of “European Law.” Such a restriction would impose a debilitating limitation. In Italy as elsewhere, the expanding reach of European legal integration has forced scholars from other legal disciplines such as labor law, or administrative law etc. to meet the normative challenge and “reprocess” both precepts of their discipline as well as European law itself. Put differently, the field of “European Law” can no longer be limited to scholars whose primary interest is in the Institutions and legal order of the European Union.

The Second Series followed the same procedures with noticeable success of which this Paper is an illustration.

ELINIS was the result of a particularly felicitous cooperation between the Faculty of Law at the University of Trento – already distinguished for its non-parochial approach to legal scholarship and education and the Jean Monnet Center at NYU. Many contributed to the successful completion of ELINIS. The geniality and patience of Professor Roberto Toniatti and Dr Marco Dani were, however, the leaven which made this intellectual dough rise.

The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

*J.H.H. Weiler*

*Director, Jean Monnet Center for International and Regional Economic Law & Justice*

# **The New Functionalist Approach of the ECJ Towards the European Freedom of Movement and Residency: Some Lessons from a Constitutional Comparative Survey**

By Davide Strazzari\*

## **Abstract**

Based on a constitutional comparative analysis, with reference to the Canadian and the American experiences concerning the legitimacy of durational residency requirements, the paper suggests that in a territorial pluralistic legal order the free movement and the equal treatment principle between nationals can be evaluated according to an individual right perspective or, alternatively, as functional interests. This means that limitations to free movement and equal treatment can be accepted to the extent that they reflect a fair compromise between national cohesion and self-government interests, a balance usually struck by intergovernmental relations.

This pattern is applied to the EU framework. Despite some statements suggest a fundamental right nature to both free movement and equal treatment, the relevant ECJ case law seems to maintain a functional reading of the above mentioned principles. It has changed, however, the usual frame of reference: no longer a freedom instrumental to market integration, but rather to the construction of a supranational polity.

---

\* Post-doctoral Researcher in Comparative Public Law, Trento University, Faculty of Law. E mail: [strazzari@jus.unitn.it](mailto:strazzari@jus.unitn.it).

**TABLE OF CONTENTS:** 1. Introduction. – 2. Assessing the Residency Requirement Issue: a Fundamental Right Based Approach vs. a Functionalist One. – 3. The Case of US: the Interstate Travelling as a Fundamental Rights Stemming from the Federal Structure. – 4. The Canadian Case and the Room for Political Compromises. – 5. Residence Instead of Nationality? European Citizenship, the ECJ Case Law and the Political Discretion of the EU Legislator. – 6. Concluding Remarks. Toward a New Functionalist Reading of the European Freedom of Movement.

### *1. Introduction*

One of the issues currently debated in the EU context is certainly the ECJ case law with reference to the EU citizenship concept. The Court of Justice, relying on art. 18 and 12 TEC, has focused on recognizing to the Union citizen as such, whether economically active or not, a right to freely move and reside within Europe and, consequently, a right to be treated equally with the nationals of the host Member State in all areas falling within the material scope of the Treaty. However, although the ECJ has expressly called for a sort of solidarity among M. States, it has also reaffirmed, in line with art. 18 TEC, that free movement and residency must be allowed according to the European secondary law provisions, which in principle exclude needy persons at least from residency right.

Some have argued that these limitations, reaffirmed by the ECJ, are consistent with the non-state nature of the EU since in a federal legal system the freedom of movement and the right to equal treatment are considered as rights inherent to the federal citizen status. But is it really true that the very nature of the federal system forbids the States from deterring the movement of the poor among the States themselves?

In order to answer this question, it is interesting to investigate the subject of the durational residency requirements as a means of selecting beneficiaries of public social benefits. In a territorial pluralistic legal order, they are emblematic of the clash between the cohesion and unity principles and the degree of differentiation to be recognized to the territorial units of the State.

Balancing the two interests implies a value-driven solution which may reflect the political and social characters of a given legal order and the role of the judiciary in shaping the intergovernmental relations. While in the case of the U.S. Supreme Court, the existence of a federal right to move and to reside and to be treated equally in a host State is considered inherent to the federal structure, in the Canadian legal order such a principle, although affirmed, is

submitted by the Charter of Fundamental Rights to derogations and limitations, thus allowing the Provinces to restrain it.

We suggest, then, that it is not the federal system itself which necessarily leads to forbids territorial units to limit the rights to move and to reside of a federal citizen. Rather, it is important to consider the degree of cohesiveness of the polity. When the latter presents a high degree of cohesion, the freedom of movement and to reside tend to be assessed according to a fundamental rights perspective. On the contrary, when the collective identity of the given federal system is weakened, a functional reading of these freedoms emerges.

This understanding of the freedom of movement and equal treatment will be applied to the EU legal system. We suggest that the ECJ is supporting a functional reading of the freedom of movement, despite the difference in final target: i.e. no longer market integration but political integration. In carrying out this task, however, the Court encroaches upon the political discretion of the European legislator (and M. States), thus raising some concerns.

## *2. Assessing the residency requirement issue: a fundamental right based approach vs. a functional interest one.*

Citizenship may be conceived as the interaction of an individual with the political and institutional *milieu* of a given territory or as the bond that this individual has with a given community.

Highlighting the first element – the relation with the political and institutional context of a legal order – or alternatively the second – the bond with the community of people composing the State itself – leads to different perceptions of what citizenship is and what grounds it should be based on. In the first case, it is common to speak of a “civic” form of citizenship: here the personal element of the State is defined in terms of “*demos*”. Being part of a *demos* is not a question of sharing a common ethnic heritage but rather of voluntarily adhering to a community<sup>1</sup>.

---

<sup>1</sup> The “ethnic” and “civic” notions of citizenship are highlighted, in the Italian literature, by E. Grosso, *Le vie della cittadinanza*, Padova, 1997, 187 ss; S. Bartole, *La cittadinanza e l'identità europea*, in *Quad. cost.*, 2000, 39 ss. For an overview of the citizenship issue in the Italian legal scholarship see D. Zolo (ed.), *La cittadinanza. Appartenenza, identità, diritti*, Roma-Bari, 1994, C. Amirante, *Cittadinanza (teoria generale)*, in *Enc. Giur.*, 2003, *ad vocem*; G. Cordini, *Elementi per una teoria giuridica della rappresentanza*, Padova 1998, G.U. Rescigno, *Cittadinanza. Riflessioni sulla parola e sulla cosa*, in *Riv. dir. cost.*, 1997, 37 ss; G. U. Rescigno, *Note sulla cittadinanza*, in *Dir. Pubbl.*, 2000, 751 ss; G. Berti, *Cittadinanza, cittadinanze e diritti fondamentali*, in *Riv. dir. cost.*, 1997, 3 ss, E.

This is the outset that developed in the French legal culture, expressed in the concept that being part of a community is a daily decision by accepting and sharing common values of a given political institution<sup>2</sup>. More recently, the idea of “a value driven citizenship” is expressed by M. Tushnet, according to whom anyone accepting the American Declaration of Independence should be citizen of the US<sup>3</sup>.

On the contrary, the other idea of citizenship is based on the concept of “belonging”, i.e. on the existence of a bond between the individual and the other members of a community based on ascriptive factors such as birth, language, common origins, etc. In this case, the personal element of the State is defined in terms of *ethnos*.

The different concepts of citizenship usually live to some extent together in the national provisions which regulate the awarding of citizenship, despite the fact that one of the two approaches tends to dominate. The classical example is the case of *jus sanguinis* or *jus soli* as a preferred criterion of appointing the status of citizen.

Citizen status is still an important condition for being entitled to rights and duties provided by the national state. Some have argued that citizenship, as a criterion for determining who is entitled to rights, is a recessive phenomenon since modern constitutionalism tends to recognize rights not to the citizens but to the itself person<sup>4</sup>.

Despite this universalistic idea of fundamental rights, it should be noted that citizenship status is still relevant: not only is this the case for political rights but above all it regards the right to freely enter and reside in a state territory<sup>5</sup>. The power still retained by the State to decide on what basis an alien may enter and/or reside in a territory is one of the main differences between the status of citizen and non citizen. Since the State maintains, according to a well established principle of international law, wide discretion over entry, residence and expulsion of aliens, the latter have no power to decide what foreign country to live in.

With reference to the nexus an individual may have with a given polity, we should also consider the case of national legal orders, based on the institutional foundation of territorial

---

Castorina, *Introduzione allo studio della cittadinanza*, Milano, 1997; F. Cerrone, *La cittadinanza e i diritti*, in R. Nania, P. Ridola, *I diritti costituzionali*, v. I, Torino, 2001, 209 ss, P. Costa, *Cittadinanza*, Bari, 2005.

<sup>2</sup> The reference is to the E. Renan’s idea of citizenship as a “plebiscite de tous les jours”. See E. Renan, *Qu’est-ce qu’une nation?*, 1882, Paris.

<sup>3</sup> M Tushnet, *Taking the Constitution away from the Courts*, 1999, 189.

<sup>4</sup> See M. Cuniberti, *La cittadinanza*, Padova, 1997, 127 ss. To this regard, section 2 of the Italian Constitution states that «The Republic recognizes and guarantees the inviolable rights of the *person*».

<sup>5</sup> See G. U. Rescigno, *Cittadinanza. Riflessioni sulla parola e sulla cosa*, cit., 41.

pluralism, a principle which implies the recognition to the territorial units of a certain degree of self-government, which can be expressed in some cases through the passing of legislative acts. This is a condition that characterizes not only federal states but also “regional” ones such as Italy and Spain.

In a federal legal system, the ties of an individual to a given sub-national unit is sometimes expressed through the notion of “state citizenship” as opposed to “federal citizenship”, whereas in the regional legal order such an idea does not occur<sup>6</sup>. However, both in the federal and in the regional legal order there is a need to somehow delimitate “the people who pertain to the subnational territorial units”, at least for the sheer purpose to determine in some cases the personal scope of the legislative acts passed by the sub-national territorial units.

To this extent, residency is the main criterion used. We may say, then, that residency is the functional equivalent of a sort of “regional” citizenship<sup>7</sup>. There is actually an intrinsic difference between the federal or national notion of citizenship and the “regional” form of citizenship: only the possession of the national/federal citizenship is a pre-requisite for the free entry and stay in the Country, whereas “regional citizenship” cannot be used to prevent the entry of nationals coming from other parts of the States or even of aliens, provided that they legally enter the Country. Being otherwise, we shall conclude that the sub-national territorial units are in fact sovereign and independent states.

“Regional” citizenship is normally based on residency. It is often said that residency, as a criterion for awarding citizenship, is the most suitable tool in order to support a civic concept of citizenship since it sets aside any ascriptive factor and highlights the voluntary acceptance of an individual to be part of a given community<sup>8</sup>.

But what if the sub-national territorial unit develops a sense of autonomous and distinct community, eventually based on the common sharing of ascriptive factors rather than on the acceptance of civic values, and wants to preserve this social integrity?

Such a possible move becomes more evident when the territorial units decide to allocate resources in the welfare field. The idea of a public welfare system requires redistributive policies: in the name of a higher idea of justice, the public sphere takes tax-money from richer

---

<sup>6</sup> See P.H. Schuck, *Citizenship in Federal Systems*, in *The American Journal of Comparative Law*, 2000, 2, 195 ss.

<sup>7</sup> The term “regional citizenship” is referred, here, both to the state citizenship notion and to the resident status in a subnational unit of a regional legal order or of those federal systems where the state citizenship notion is not used.

<sup>8</sup> D. Kostakopoulou, *European Union Citizenship: Writing the Future*, in *E.L.J.*, 2007, 643.

people and passes it onto more indigent persons. However, solidarity reasons supporting the social protection systems are usually stronger, the more cohesive the community is, so that the lack of a sense of collective identity and consequently, an insufficient popular support may be a serious obstacle to the enactment of such policies.

In the case of a sovereign state, the possession or not of the status of citizen – and consequently the right to freely enter the Country – is the instrument for preventing needy aliens from entering the Country. But in the case of sub-national territorial units, the lack of “regional” citizenship cannot be an instrument for preventing needy national people from coming and taking advantage of more generous welfare standards<sup>9</sup>.

The only legal possibility that remains in territorial units of a federal/regional state is to make welfare benefits restricted to the length of the residency in a given territory.

Although durational residency requirements may also be seen as a tool in order to verify the real will of an individual to be part of a given community – in this sense they can be considered not as completely inconsistent with the civic idea of citizenship – nonetheless they often favor those who, by birth, already belong to the community. In other words, durational residency requirements are frequently a surreptitious instrument by means of which territorial units favor a sort of “ethnic” regional citizenship, thus creating what a legal American scholar calls “affective communities”, i.e. «culturally or socially homogeneous communities united by deep affective ties that exclude other persons from different social classes or cultures»<sup>10</sup>.

That explains why durational residency requirements are considered with suspicion by national/federal states, if not forbidden at all. Since they disfavor internal migration and circulation, residency requirements are seen as having an intrinsic anti-integrationist meaning and as undermining the sense of belonging to a national community.

This view often supposes a reading of the freedom of movement and equal treatment in terms of fundamental rights whose grounding relies either on the federal structure of the legal system

---

<sup>9</sup> See A.P. van der Mai, *Freedom of Movement for Indigents. A Comparative Analysis of American Constitutional Law and European Community Law*, in *Ariz. J. Int. Comp. Law*, 2002, 803, noting that «States are entitled to use the financial status of non-internationals as a criterion for immigration purposes. International law imposes only a few limitations on the power of states to decide the conditions under which non-nationals will be admitted to their territories. However, the same is not necessarily true for states joined together in federations and states that have joined international organizations run by multi-tiered systems of government. The constitution or treaties on which such entities are based often confer upon individuals the rights to travel and move freely among the Member States».

<sup>10</sup> See, R.M. Hills Jr., *Poverty, Residency and Federalism: States' Duty of Impartiality Toward Newcomers*, in *Sup. Ct. Rev.*, 1999, 280.

itself or on a human right conception. To this extent, it may be noted that art. 13 of the *Universal Declaration of Human Rights* states: «Everyone has the right to freedom of movement and residence within the borders of each State»<sup>11</sup>.

The consequences of a fundamental right approach is that the freedom of movement and the equal treatment are interpreted extensively and, by contrast, derogations are narrowly constructed by the judiciary. Thus, durational residency requirements are often considered as severe violations of the free movement and equal treatment rights.

This element comes to play a meaningful role especially in the case of public welfare benefits. Since they are costly, there is an interest by the sub-national territorial units to recognize the eligible people in favor of those having a genuine link to the territory, not only because there is a natural tendency to favor the members of one's own community, but also because a high welfare standard may become financially unsustainable if a conspicuous number of needy individuals are attracted to the idea of benefiting from more favorable welfare conditions.

The “welfare magnet theory” is very often used by the public administrators to justify the use of residency requirements<sup>12</sup>. According to them, in fact, it would otherwise being impossible to maintain high welfare levels due to the relevant number of new comers attracted to the perspective of a better life. The prohibition of residency requirements would then lead to a sort of “race to the bottom” in defining the social welfare standard: in order to avoid the attraction of indigent people from all over, the local administrations keep their welfare standards low.

Many studies emphasize that the welfare magnet theory is of limited value. Indigent migrant people are not often aware of the rules concerning the welfare system; they may be more inclined to stay close to their families or friends rather than moving to a new place; furthermore, higher welfare benefits that some territorial units do offer are usually counterbalanced by a higher cost of living. This leads some authors to conclude that «the effect alleged in the magnet thesis, migration toward higher benefit states, is an exceedingly rare phenomenon»<sup>13</sup>. The financial sustainability argument, as a reason to justify residency requirements, is cautiously considered by the judiciary and is rarely accepted.

---

<sup>11</sup> The human rights dimension, in assessing the “mobility rights”, is emphasised by the Canadian Supreme Court in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, p. 58.

<sup>12</sup> See P.E. Peterson, M.C. Rom, *Welfare Magnets: A New Case for National Standards*, Washington, 1990.

<sup>13</sup> S. Schram, L. Nitz, G. Krueger, *Without Cause or Effect: Reconsidering Welfare Migration as a Policy Problem*, in *Am. J. Pol. Sc.*, 1998, 1, 210 ss; S. F. Schram, J. Soss, *Making Something Out of Nothing: Welfare Reform and a New Race to the Bottom*, in *Publius: The Journal of Federalism*, 1998, 3, 82.

However, the resolution of the clash between the unitary vision and the self-government principle is not necessarily in favor of the former. If we approach residency requirements through the autonomy principle, rather than through a fundamental right perspective, we might consider them more favourably: a legitimate vehicle through which sub-national territorial units adjust their public policies to the needs of the community of reference. But, above all, if we make such a conceptual shift, what it really matters is that we ought to address the topic being aware of the dynamics that characterize the intergovernmental relations.

The perspective, in other words, acquires a profile that tends to be assessed both in legal and political terms since in order to understand the interrelations of different territorial levels of government it is not enough to simply consider the law presiding the division of powers: attention should be paid to the different systems of governance and political compromises. In such a context, the actors or, better, their roles could intensively vary and the judiciary may not have the decisive role.

From this point of view, we may observe that unitary reasons and the equal treatment of citizens, despite their place of origin, may be expressed in a less assertive way. This is especially the case where the legal system is composed of sub-national units with social, cultural or linguistic differences that may seriously question the degree of cohesiveness of the legal system. Under these circumstances it may be unwise to pursue a radical integrationist approach.

A functional reading of the freedom of movement and of the equal treatment of citizens is highlighted. This means that the enjoyment of these rights is not unconditional and limitations can be accepted to the extent they further the national interests. Asymmetrical territorial response can take place depending on the ability of the local political institutions to bargain with the federal representatives, provided that the agreed compromise does not severely impinge upon the national cohesion. In such a scheme, the political nature of the values at stake (i.e. national cohesion, degree of self government, differentiation between territories in the enjoyment of the autonomy) suggests that the task to strike the balance should be primarily conferred to the federal and to the states governments. The judiciary is called to a less influential role, limited to a *rationale* based review.

These two different approaches, namely a cohesive, fundamental right based opposed to a more functional attitude, are respectively reflected in the experience of the two federal systems, US and Canada. The next two paragraphs focus on their legal analysis. The EC experience will be evaluated from

this former background.

3. *The US case: the interstate travelling as a fundamental right derivng from the federal structure.*

Durational residency requirements, as a means of selecting beneficiaries for public welfare benefits, are a well spread phenomenon in the US history. This is strictly connected to the fact that welfare assistance was considered as a question of state or local government responsibility, according to a well rooted principle which can be traced back to the Elizabethan English poor law. Local communities had to take care of their own disadvantaged people, who were regarded as a “moral pestilence”, to be helped not for solidarity reason but, rather, to avoid the rising of crime and beggary<sup>14</sup>.

In the 1930’ the Great Depression radically changed the whole situation. About four million Americans are believed to have migrated towards the welthiest states of the Union<sup>15</sup>. That enormous flow of indigents revealed all the inadequacies of the previous welfare system: local communities were no longer able to handle on their own a problem that had acquired a national dimension and a more structured, not private-based, welfare administration system was needed.

A federal intervention took place in the form of federal funding to be transferred to the States in order to guarantee a sufficient income to the most essential everyday needs of specific target groups. These included the elderly, the blind, the disabled, and the families with dependent children. Federal funds were granted upon detailed requirements set by the federal tier of government. In 1973 some changes were brought in the above described framework. The administration and the funding of the programs addressed to the elderly, the disabled and the blind shifted under the sole Federal responsibility. As far as the Aid to Families with Dependent

---

<sup>14</sup> On the origins of the American welfare system, see W. Trattner, *From Poor Law to Welfare State: History of Social Welfare Law in America*, 1989. In the Italian literature, see: A. Pierini, *Federalismo e Welfare State nell’esperienza giuridica degli Stati Uniti*, Torino 2003; G.F. Ferrari, *Localismo ed eguaglianza nel sistema americano dei servizi locali*, Padova, 1984.

<sup>15</sup> E. Adams, Note. *State Control of Interstate Migration of Indigents*, in *Mich. L. Rev.*, 1942, 711, quoted by A.P. van der Mei, *Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law*, in *Ariz. Journ. Int. Comp. Law*, 2002, 806.

Children program (AFDC) was concerned, it continued to be funded by the Federal units and yet run by the States<sup>16</sup>.

In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (PWORA) replaced the AFDC program with the Temporary Assistance for Needy Families (TANF) program. The PRWORA is generally seen as a means of giving the States more power in determining whether and under what conditions welfare benefits are available. This is achieved by changing the access system to the welfare benefits and by altering the way according to which money is allocated – i.e. block grants are annually transferred to the States, instead of directly to the beneficiaries<sup>17</sup>.

The result is a multi-tiered system of interventions where responsibility is dependent on the category of beneficiaries. The federal unit is responsible for the elderly, the blind, and the disabled by guaranteeing them an equal income nationwide. Needy families with dependent children are supported by the TANF program, partly funded by the Federal Government but administered by the States. The latter enjoy a wider margin of discretion on the standard of the service to be provided. Finally, there is a local dimension in the welfare system which is not funded at the Federal level<sup>18</sup>.

It was common for the US States to discourage immigration of indigents from other States. Residency requirements were one of the most suitable tools to do so. In *Mayor of New York v. Miln*, the US Supreme Court appeared to indirectly admit the legitimacy of such kind of measures, holding that it is «as competent and as necessary for a state to provide precautionary measures against the moral pestilence, vagabonds and possibly convicts»<sup>19</sup>.

However the economic recession in 1930 changed the perception of indigents, no longer seen as criminals but rather as victims of economic dynamics. Moreover, federal intervention developed a higher sense of national solidarity, thus going well beyond the idea that welfare was essentially a local problem.

---

<sup>16</sup> For further details on the US Federal interventions in the welfare field see A.P. van der Mei, *Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law*, cit.

<sup>17</sup> See A. Pierini, *Federalismo e welfare state nell'esperienza giuridica degli Stati Uniti*, cit.

<sup>18</sup> See A.P. van der Mei, *Freedom of Movement for Indigents*, cit., 806.

<sup>19</sup> *Mayor of New York v. Miln*, 36 U.S. 102, 1837, 142-143.

Such a historical and political change in the perception of the public role in questions of welfare rights<sup>20</sup> explains the change of attitude in the S. Court decision *Edwards v. California* of 1941<sup>21</sup>. The S.C. held unconstitutional a Californian statute that considered a misdemeanour «to bring or assist in bringing into the state any indigent person who is not a resident of the state knowing him to be an indigent person». The decision overruled the findings of *Mayor of New York v. Miln* case and based its reasoning on the radical changes occurred in the perception of indigent status and the role of the institutions in the welfare fields<sup>22</sup>. The strong reliance on the solidarity reasons that should bound a nation especially in uneasy moments led the Court to conclude that the States are no longer vested with the power to interfere with the cross-border movement of persons including indigents.

Although *Edwards* seemed to seriously undermine the legitimacy of durational residency requirements, the issue was not directly addressed by the Court. Moreover, the economically dramatic moments lived by the US in those years could be considered a reasonable justification to limit the scope of the Court's ruling. In any case, even after *Edwards*, many States continued to make use of durational residency requirements, arguing they still needed them to be protected by indigent migration.

It was only in the *Shapiro v. Thompson* case decided in 1969, that the US Supreme Court addressed explicitly the issue of the constitutionality of durational residency requirements as a precondition to be eligible for welfare benefits<sup>23</sup>. The Court held unconstitutional some States' provisions denying welfare assistance to residents who did not reside within their jurisdictions for at least one year immediately preceding their applications for such assistance.

The Court observed that the States' provisions created two classes of needy citizens. Only the first one was granted welfare benefits. This classification was considered in disagreement with the Equal Protection Clause.

---

<sup>20</sup> Bruce Ackerman, *We the People. Transformations*, Cambridge Mass., 1998, considering the *New Deal* as one of the turning points of the US constitutional history, i.e. an institutional transformation of the founding principles of the American legal system taking place in absence of any formal constitutional amendment.

<sup>21</sup> *Edwards v. California*, 314 U.S. 160, 177 (1941).

<sup>22</sup> *Edwards v. California*, 314 U.S. 160, 177 (1941), «Recent years, and in particular the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character. The duty to share the burden, if not wholly to assume it, has been recognized not only by state governments, but by the federal government as well».

<sup>23</sup> *Shapiro v. Thompson*, 394 U.S. 618, (1969).

To justify the legitimacy of these provisions, the States enumerated several interests that the challenged provisions were meant to pursue.

The first justification held by the States relied on the preservation of the fiscal integrity of State public assistance programs. A one year waiting period condition was, according to the State, a well suited device “to discourage the influx of poor families in need of assistance”. The Court found that such a reason cannot constitutionally be promoted by the State: forbidding migration of needy persons to the State not only contravened to an important instrument of national unity, as the right to interstate travel was, but it also impinged upon the personal liberty of the individual to freely pursue his own interest and to lead his own life as he deems proper.

Another issue brought up by the States was that residency requirements were a legitimate tool to deter those indigents who would enter solely to obtain larger benefits. Implicitly, in the reasoning of the State, there was the view that it would be permissible to limit welfare benefits to those residents who had a genuine link with the given community and wanted to become part of it apart from the better welfare conditions.

But even this objective was considered illegitimate since it was aimed to worsen the treatment of those indigents who wanted to enter a state with the hope of securing higher welfare benefits, almost as if they were somehow less deserving than indigents who did not make this consideration.

A third point was based on the so called “past contribution” analysis: differentiating between old and new citizens was admissible since the latter have contributed less to the financing of the country through the payment of the taxes. The Court found this objective illegitimate too, by considering that such reasoning would allow the State to bar new residents from schools, parks and libraries. The reduction of welfare costs, the US Court said, cannot justify an invidious distinction between classes of citizens.

The three main justifications held by the State to defend durational residency requirements, i.e. the fiscal integrity, the disfavouring of those with no genuine link to the community, and the “past contribution” argument, were then deemed illegitimate by the Court.

Other justifications were considered legitimate. This permits the Court to disclose the second stage of the equal protection test, i.e. the proportionality review of the measures adopted. The Court found that the right that was at stake –the right to interstate travel – was a constitutional one, so that «any classification which serves to penalize the exercise of [it], unless shown to be

necessary to promote a compelling governmental interest, is unconstitutional». By applying a severe scrutiny standard, similar in fact to the strict scrutiny test, none of the justifications advanced by the States survived and the provisions were declared unconstitutional.

Although the fundamental right that triggered the strict scrutiny was the right to interstate travel, *Shapiro* is often seen as an interpretive attempt to use the equal protection clause as a tool to remedy economic inequalities and force the Government to act in the welfare field<sup>24</sup>. According to this egalitarian perspective, *Shapiro* is part of an attitude of the Supreme Court to “constituzionalise” a right to welfare protection<sup>25</sup>. Such a move was not taken by explicitly guaranteeing a right to welfare protection, incorporating it into the Constitution, but indirectly by protecting the right to interstate travel as long as this turned out to be a guarantee of welfare entitlements for indigent people.

Such an interpretation of *Shapiro* has been based on several elements.

In an *obiter dicta* of the Court opinion delivered by Justice Brennan it was observed that the classification of the State legislator, based on the length of residence, had as a consequence to deny «welfare aid upon which may depend the ability of the families to obtain the very means to subsists – food, shelter and other necessities of life».

In a footnote J. Brennan observed that the decision taken in *Shapiro* did not necessarily mean the illegitimacy of other waiting period conditions. Such conditions «may not be penalties upon the exercise of the Constitutional right of interstate travel» whenever applied to the eligibility to obtain a licence or tuition to free education, to practice a profession, to hunt or to fish.

Finally, Justice Harlan dissenting opinion explicitly criticized the approach taken by the Court and «the cryptic suggestion that the “compelling interest” test is applicable merely because the result of the classification may be to deny the appellees “food shelter and other necessities of life”».

All of these elements seemed to suggest that the application of the strict scrutiny test was somehow dependent on the nature of the benefits whose allocation was made conditional upon the respect of durational residency requirements. Whenever the latter had the effect to determine

---

<sup>24</sup> G. Gunther, K.M. Sullivan, *Constitutional Law*, Westbury NY,, 1997, 910. The issue has been addressed by F.I. Michelman, *The Supreme Court 1968 Term-Foreword: On Protecting the Poor Through the Fourteenth Amendment*, in *Harv. L. Rev.*, 7, 1969; *ibidem*, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ theory of Justice*, in *U. Pa. L. Rev.*, 1973, 962.

<sup>25</sup> L. H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future – or Reveal the Structure of the Present?*, in *Harvard L. Rev.*, 1999

a substantial deviation in the distribution of essential life conditions, the strict scrutiny applied. In this sense, the main concern of the Court was not the equal treatment amongst citizens, irrespective of the place of their previous residence, but rather guaranteeing social protection<sup>26</sup>.

The view that *Shapiro* was influenced by a sort of a solidarity vein can be noticed even in the subsequent case law of the US Supreme Court.

In the *Memorial Hospital v. Maricopa County* case, the Supreme Court invalidated an Arizona requirement of a year's residency in a county as a condition for indigents to receive free non emergency hospitalization or medical care<sup>27</sup>.

Justice Marshall, delivering the Opinion of the Court, observed that under *Shapiro* not all residency requirements were impermissible but only those which constituted a penalty for the exercise of the interstate mobility right. Although claiming that the "penalty test" should be aimed to consider whether or not the residence condition has constituted an actual deterrence to migration, ultimately the Court's analysis rests on the nature of the benefits made conditional by the durational residency requirements : the more the benefit is a necessity for living, the more the constitutional review test is severe<sup>28</sup>.

This approach seems to imply that when at stake there are no, or little, vital government benefits, residence requirement condition may be validated. Such a view seems to be supported by others subsequent decisions of the US Supreme Court. In *Sosna v. Iowa* the Court upheld a requirement for a one year residency before a citizen could bring a divorce action against a non resident<sup>29</sup>. Likewise, the Court upheld a residency requirement as a condition for tuition preference for local students at state universities<sup>30</sup>.

---

<sup>26</sup> The point is highlighted by L. H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future – or Reveal the Structure of the Present?*, cit.; G. Gunther, K. M. Sullivan, *Constitutional Law*, cit., 907

<sup>27</sup> *Memorial Hospital v. Maricopa County*, 415 US 250,1974. It is worth noting that in *Maricopa* the challenged residence measure was applied in the framework of a local funded welfare program. The decision clarifies that the strict scrutiny test applies to residency requirements even if it is the local Government to fund the benefit.

<sup>28</sup> As noted by G. Gunther, K. M. Sullivan, *Constitutional Law*, cit., 907. Justice Marshall observed, in delivering the opinion of the Court, «The Court in *Shapiro* found denial of the basic "necessities of life" to be a penalty. [...] Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much "a basic necessity of life" to an indigent as welfare assistance. And, governmental [benefits] necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements». This implies, according to Justice Marshall, that «the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents».

<sup>29</sup> *Sosna v. Iowa*, 419 U.S. 393, (1975).

<sup>30</sup> *Starns v. Malkerson*, 326 F.Supp. 234, aff'd, 401 US 985 (1971), *Vlandis v. Kline*, 412 U.S. 441 (1973), although declaring the residence requirement measure illegitimate on other grounds.

After the *Shapiro* decision, many States repealed their residence requirement policies. However since the late 80s in concomitance with the budget crisis and the cuts on the welfare federal transfers, there was a resurgence in the use of durational residence requirement by the States<sup>31</sup>.

The federal Government did not try to oppose such state conducts: in many cases, residency requirement conditions were approved by the Federal Government, not finding them in contradiction with the federal specifications which actually bound the reimbursement for the AFDC program.

Finally in 1996, the PRWORA, replacing the AFDC program with the TANF program, explicitly authorizes any State receiving a block grant under TANF to grant a family that had moved from one State to an other and that had resided in the new State for less than 12 months, the same benefit amount payable by that same family's prior residency State<sup>32</sup>.

A Californian statute implemented the authorization explicitly set out in the PRWORA Act and introduced a requirement for a one year previous residency requirement, in order to be eligible for welfare benefits on equal terms with the other Californians. The new residents, who had lived in the State for less than 12 months, were not excluded by the State welfare assistance, as it was according to the California statute struck down in *Shapiro*; rather, they were entitled to the same standard assistance they would receive from their State of origin.

The constitutionality of the Californian statute was taken under examination by the US Supreme Court in *Saenz v. Roe* in 1999. The Court found the statute illegitimate, reaffirming *Shapiro* but at the same time following a different *rationale*.

The Court observed that the "right to travel" included at least three components and each of them had a different constitutional grounding. First of all, the right to travel protected the right of a citizen of one State to enter and to leave another State. As such, this right is not explicitly mentioned by the Constitution but it may be considered as inherent to the federal structure of the 1787 Constitution. Secondly, the right to travel is the right to be treated as a welcome visitor rather than an unfriendly alien. The constitutional ground for this dimension of the right to travel is found in the *Privileges and Immunities clause* of art. 4 of the US Constitution.

---

<sup>31</sup> See A.P. van der Mei; *Freedom of Movement of indigents*, cit.; T. Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike*, in *Val. U.L. Rev*, 1997, 895 ss.

<sup>32</sup> 42 U.S.C.A. 604 c. See W. Allard, *Revisiting Shapiro: Welfare Magnets and State Residency Requirements in the 1990s*, in *Publius: the Journal of Federalism*, 1998, 45 ss.

None of the above mentioned were applicable to the case, since the California statute provided a different treatments between the citizens and the “neo” citizens of the State. The Court observed that this situation involved the third aspect of the right to travel – the right of the newly arrived citizens to the same privileges and immunities enjoyed by the other citizens of the same State – and it is protected by the *citizenship clause* of the XIV Amendment.

The Court held that whatever it may be the interpretative views concerning this clause, it has always been common ground that one of the privileges conferred by the Clause «is that a citizen of the US can, of his own volition, become a citizen of any state of the Union by a *bona fide* residence therein, with the same rights as other citizens of the State (quoting J. Miller in the *Slaughter-House* cases 16 Wall. 36 (1873))». A citizen of the US, then, may choose to reside in a new State and claim the constitutional right to be treated equally as any other citizen of the same state. A statute that discriminates between classes of citizens should be reviewed according to a strict scrutiny standard.

Having said so, the Court took into consideration the justification advanced by the state to justify the statute. The first argumentation was based on the principle established in *Shapiro* that only classifications which penalizes the right to travel is forbidden, unless necessary to promote a governmental interest. Since the statute guaranteed the new comers the same level of social assistance they would have enjoyed in the previous residency state, it followed that the act impinged upon the right to travel only incidentally.

The Court set aside the “penalty analysis” established in *Shapiro* and did not investigate the actual deterrence effect of interstate migration supposedly created by the statute. Rather, the Court asserted that «since the right to travel embraces the citizen’s right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty».

The Court further rejected all other justifications advanced by the State to support the constitutionality of the statute.

The purpose of deterring welfare applicants from migrating to California is not allowed as such (as held in *Shapiro*). But even if the statute was introduced with the aim to dissuade those individuals motivated only by the purpose of obtaining a higher level of social assistance, it would still be a too disproportionate measure. Evidence show that the number of such persons is quite small, if one takes into account the higher cost of living in California.

Even the second justification advanced by the State – the fiscal integrity and the saving of 10,9 \$ million a year – cannot be accepted by the Court according to which the State may reach the same saving results by proportionally decreasing the amounts of the benefits available to all welfare recipients. In any case, the State can not create different degrees of citizenship based on the length of residency, because forbidden by the Citizenship clause of the XIV Amendment.

It has been argued that the logic in the *Saenz* decision, relying on the citizenship clause of the XIV Amendment rather than on the equal protection clause, as *Shapiro* had been, would reflect a different perception of the right to interstate travel. The latter should not be assessed in terms of a fundamental right inherent to the individual but rather as a federalist restriction on the power of the States to be derived directly from the federal nature of the state itself<sup>33</sup>.

L. Tribe noted to this regard that «the holding of *Saenz* reflected the Court’s vision of governmental design in a federal Union of states and not primarily the Court’s perception of a personal right ineluctably flowing from constitutional text. [...] To be accorded constitutional recognition, the right [to interstate travel] must be inferred from the structures of self-government that underlies our constitution’s architecture and its animating premises»<sup>34</sup>.

Following a similar perspective it has been suggested that the right to travel should be assessed as a “surrogate right”, that is an interest «asserted by the individual against the state to protect values that are essential to the existence of one union, as opposed to values that presume there are certain liberties inherent to the individual upon which the state may not infringe»<sup>35</sup>. This conceptual shift – leading to consider the right to interstate travel not as a fundamental right but rather as a functional interest to be used to foster the political and economic union – consequently implies a weakening of the right to travel as a fundamental right

According to Nzelibe, such an approach should open the door to a more lenient standard of review and consequently to consider illegitimate only those limitations to the right of interstate travel which presents a serious risk for the maintenance of the political and economic Union<sup>36</sup>. It

---

<sup>33</sup> L. H. Tribe, *Saenz Sans Prophecy*, cit., 154.

<sup>34</sup> L. H. Tribe, *Saenz Sans Prophecy*, cit., 154.

<sup>35</sup> J. Nzelibe, *Free Movement: a Federalist Reinterpretation*, in *Am. Un. L. Rev.*, 1999, 469.

<sup>36</sup> J. Nzelibe, *Free Movement*, cit., 455 A different view is expressed by R.M. Hills Jr., *Poverty, Residency, and Federalism: State’s Duty of Impartiality Towards Newcomers*, in *Sup. Ct. Rev.*, 1999, 277, noting that «there is nothing illegitimate about states efforts to prevent other states from “free riding” off of their redistributive tax efforts by limiting access to the fruits of that effort». However, since States might exclude indigent persons «to perpetuate the state’s current demographic composition for the sake of social and cultural cohesion», the Courts must always forbid such exclusions, being impossible for the Court to distinguish between legitimate and illegitimate motives for discriminating against indigent newcomers.

also implies that it should be primarily up to the Federal Government to decide whether and to what extent M. States are allowed to introduce such since «it is Congress, not the Courts, that is better positioned to weight the trade off between a compromise in certain federalist restrictions against the states and a countervailing need to promote other national policy goals, such as the disbursement of welfare benefits»<sup>37</sup>.

A similar view emerged in *Saenz*, sustained by the US government, participating as an *amicus* party in the case, but was refused by the S. Court. The US government claimed that although a State measure, affecting the right to interstate travel, should be usually reviewed under strict scrutiny, a more lenient standard should be applied to the case before the Court. According to the Government, the Californian statute was consistent with the provision contained in the PRWORA, thus allowing the States to differentiate, to some extent, between citizens and new citizens in benefiting from welfare. The congressional authorisation had to be seen as a guarantee against a possible abuse of the state power to inhibit immigration, while at the same time reflecting the Congress view that the national welfare policy requires state flexibility in order to enhance federal goals<sup>38</sup>. Consequently, the Court was required to apply an intermediate level of scrutiny.

However, the categorical refusal of the US S. Court to follow such a reasoning – by affirming that Congress may not authorise a State to violate the XIV Amendment – seems to be consistent with the view that the right to travel is a right inherent to the individual and not to a functional interest and as such limitable by the political will of federal and state governments<sup>39</sup>.

To this extent, it may be agreed that although altering the legal grounding for reviewing durational residency requirements, the S. Court in *Saenz* did not changed its previous extremely cautious approach regarding their constitutionality<sup>40</sup>.

There is a last issue to be discussed in the analysis of *Saenz*. Although recognising the existence of a constitutional right of the newly arrived citizens to the same privileges and

---

<sup>37</sup> See J. Nzeli, *Free Movement*, cit., 468.

<sup>38</sup> See M.F. Davis, *The Evolving Right to Travel: Saenz v. Roe*, in *Publius. The Journal of Federalism*, 1999, 99.

<sup>39</sup> See J. Nzeli, *Free Movement*, cit., 465, observing: «[...] the Court held that federal permission for states to implement durational residence schemes was of no consequence because it “had consistently held that Congress may not authorize the States to violate the Fourteenth amendment”. In theory, the Court’s analysis is consistent with its prior decision that the right to travel is a right inherent to the individual. But when viewed as a limitation on interstate conflict, it is illogical to construe the free movement principle also as a limitation on the powers of the national government».

<sup>40</sup> In similar terms, A.P. van der Mei, *Freedom of Movement*, cit., 828.

immunities enjoyed by the other citizens of the same state, the Court affirmed that such a right is conferred only to *bona fide* residents. Whether the durational residence requirement can be a suitable tool to determine if he or she is a *bona fide* resident is an issue not explicitly considered by the Court. However, as pointed out by J. Rehnquist's dissenting opinion, to evaluate such a condition is essentially a fact-based inquiry. An unconditional one year residency requirement appears a too disproportionate means to achieve the aim, since it creates a sort of irrefutable presumption that all newcomers are likely to be profiteers.

At the same time, however, the S. Court seems to suggest that if the residency requirements are placed as a condition to enjoy "readily portable benefits", such as a divorce decrees or college education, they might be constitutional<sup>41</sup>. The nature of the benefits creates a sort of legal presumption that the accipients (students, hunters, those seeking a divorce decree) are less likely to be *bona fide* residents.

Such a view does not appear consistent with the idea that the right of newly arrived citizens to be treated as the other citizens is an attribute incidental to the Union citizenship. This, in my opinion, should support an unconditional right to equal treatment, irrespective of the "readily portable" nature of the benefit itself. In fact, to admit that the equal treatment is excluded whenever the benefit has a "readily portable nature" means to implicitly recognize the existence of a relation between solidarity and membership: only a full membership with the community permits the individual to claim the full range of benefits. However, once it is accepted the idea that the material scope of the equal treatment has to be proportionate to the length of residency, it is questionable why such an incremental approach to equal treatment should be applied only with reference to some specific benefits and not as a general rule.

#### *4. The Canadian case and the room for political compromise*

There is at least one reason to consider the case of Canada in addressing the issue of residency requirements from a constitutional comparative perspective: the *Canadian Charter of Rights and Freedoms* – the Canadian Bill of Rights – contains a specific section dealing with "residency

---

<sup>41</sup> *Saenz v. Roe*, 526 U.S. 489, (1999), «Moreover, because whatever benefits they receive will be consumed while they remain in California, there is no danger that recognition of their claim will encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit, such as a divorce or a college education, that will be enjoyed after they return to their original domicile».

requirements practice”, a fact in itself worth noting, being not common in constitutional texts, even with reference to federal legal systems. Furthermore, the Canadian experience in relation to residency requirements is a meaningful instrument for evaluating, at least to some extent, the complex dynamics of Canadian federalism.

It is worth noting that the above mentioned provision on residency requirements is part of a broader section of the Charter, called “mobility rights”, whose aim is to allow Canadians, and permanent residents as well, to move to and work in other regions, without being singled out because of their area of origin<sup>42</sup>.

The inclusion of the “mobility rights” section in the *Canadian Charter* is coherent with the overall “mission” pursued by the Charter itself: the strengthening of the human rights protection – by submitting both federal and provincial legislative acts to judicial review – and the promotion of a national unity; the latter goal being also pursued through the so called repatriation of the Canadian Constitution. The two dimensions appear to be strictly connected since human rights declarations are important to define the basic and founding values of a given polity.

The constitutional changes represented by the patriation of the Canadian Constitution<sup>43</sup> and the adoption of the Charter did not encounter the favor of the provinces, who feared that the safeguarding of rights and freedom through a federal constitution act and a judicial review of legislation extended to a human rights profile would undermine their powers. Quebec strongly opposed the proposal made by the federal government. Despite the Quebec dissent, in 1982 the *Constitution Act 1982* whose part I is the *Canadian Charter of Rights and Freedoms*, was passed.

The tension that surrounded the adoption of the Charter is reflected, and in part can explain, the compromising nature of the provisions in the “mobility rights” section.

---

<sup>42</sup> Sec. 6 (2) of the Charter: «Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right - a) to move to and take up residence in any province; and - b) to pursue the gaining of a livelihood in any province. 6.(3) The rights specified in subsection (2) are subject to a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence and b) any law providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services». For a commentary on sec. 6 see P. Blache, *Mobility Rights*, in G.A Beaudoin, E. Mendes (ed.s), *The Canadian Charter of Rights and Freedoms*, Toronto, 3rd ed., 1996, 303 ss; R.J. Sharpe, K. E. Swinton, K. Roach, *The Charter of Rights and Freedoms, Mobility Rights*, Toronto, 1998,172 ss.

<sup>43</sup> The patriation of the Canadian Constitution was accomplished by the *Canada Act 1982*, a British statute by means of which the Uk Parliament terminates its legal authority to legislate for Canada.

The political relevance of the mobility section is represented by the decision itself to insert it in the Charter. In fact, the right to move and to take up residency in any province has always been allowed, since it is inherent to the federal structure of the Canadian legal system. Besides, sec. 33 of the Charter – the “notwithstanding clause” permitting National Parliament or provincial legislature to declare an act effective, in spite of its contrariety with the Charter – does not apply to this section, a fact that supports the founding value of this provision. No political compromise is admissible when this grounding principle is being impinged upon.

At the same time, however, the integrationist values established in the mobility section are somehow questioned by the derogations the section allows<sup>44</sup>.

The first derogation is particularly broad. In fact, sec. 6.3.a, though forbidding the Provinces to discriminate primarily based on Province present or previous residency, clearly states that all the general rules applicable to existing provincial residents (for example certifications, occupational qualifications, licensing requirements) – which appear neutral (in the sense of not introducing distinction based on residency status) but affect more those coming from outside, thus constituting a potential barrier to personal mobility – are not covered by section 6. We may say that section 6.3.a prohibits only direct discrimination on the grounds of previous or present residency status, not indirect discrimination.

But even discrimination based upon residency may be admitted according to sec. 6.3.b, if it is aimed to select people eligible for public social services. The provision explicitly allows Provinces to set residency requirement as a condition for being beneficiaries of welfare benefits, provided that they are “reasonable”. It should be noted that the reasonable clause of sec. 6.3.b is not expressed in the same terms as section 1 of the Charter – the general clause permitting to justify a law that introduces reasonable limits to the application of the Charter rights, provided they are justified *in a free and democratic society*. It is hard, however, to say whether the lack of reference to the “free and democratic society” can give reason for a broad interpretation of section 6.3.b, since, as noted by P. Hogg, «what is reasonable depends a good deal on the weight to be attributed to the right of interprovincial travel»<sup>45</sup>.

---

<sup>44</sup> See sec. 6.3.(a) e 6.3.(b) of the Charter. See also sect. 6.4 according to which «Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada».

<sup>45</sup> P. Hogg, *Constitutional Law of Canada*, Toronto, 2002, 969.

If we consider the S. Court decision related to the topic, they reveal a formalistic approach that has not always served the interest of enhancing the federal union.

This attitude is well represented by an important case dealing with the derogation provided in paragraph 6.3.a. In the *Canadian Egg Case*, the constitutionality of an interlocking federal and provincial egg marketing scheme, which prevented Northwest Territories egg producers from trading and exporting on a inter-provincial scale, was under question<sup>46</sup>. The Supreme Court didn't find the scheme to be in breach of section 6, since primarily it did not discriminate on grounds of residency, nor its purpose was to discriminate against the Northwest Territories producers, but rather to ensure a quota based on the egg production system.

The Court made clear that the findings of a discriminatory effect towards non or new residents is important to the extent that it may infer a discriminatory intent by the legislator. However, it does not serve to claim a situation of indirect discrimination. In other words, if a provincial law is passed to regulate an economic or labor issue, such as professional qualifications, and it does not have the purpose to single out non-residents, it cannot be considered in breach of the mobility rights clause. The findings of a disparate impact caused by the provision is not enough to invalidate it.

The Court is perfectly aware that many laws on economic regulations adopted by the Provinces, pursuant the property and civil rights clause of section 92 (13) of the *Constitution Act 1867*, would be seriously questioned if a broad interpretation of section 6 of the Charter were adopted<sup>47</sup>. To assume that the mobility rights section may be breached whenever a provincial law determines the disfavoring of non-residents, although primarily aimed to regulate economic or labor issues, is something that the Supreme Court could not accept. To hold otherwise would mean challenging the very federal nature of the Canadian legal system. This implies that «the many other barriers to the mobility of goods, services, people and capital have to be addressed by other institute and legal rules»<sup>48</sup>.

---

<sup>46</sup> *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157.

<sup>47</sup> *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157. See, p. 66, «The inclusion of section 6 in the Charter reflects a human rights objective: to ensure mobility of persons, and, to that end, the pursuit of a livelihood on an equal footing with others regardless of residence. It guarantees the mobility of persons, not as a feature of the economic unity of the country, but in order to further a human rights purpose [...]. Section 6 neither categorically guarantees nor excludes the right of an individual to move goods, services or capital into a province without regulation operating to interfere with that movement. Rather, s. 6 relates to an essential attribute of personhood, and guarantees that mobility in the pursuit of a livelihood will not be prevented by means of unequal treatment based on residence by the laws in force in the jurisdiction in which that livelihood is pursued».

<sup>48</sup> Cfr. R.J. Sharpe, K.E. Swinton, K. Roach, *The Charter of Rights and Freedoms*, cit., 178.

The Court's attitude in interpreting and applying section 6 of the Charter seems to support the general view that the judiciary did not help to unify the Canadians, nor to favor the federal government<sup>49</sup>. As Peter Monahan notes, the idea of “watertight compartment”, in relation to the division of powers between federal and provincial level, - a scheme which has characterized, first, the judicial interpretation of the Judicial Comity of the Privy Council and, subsequently, to some extent at least, the Supreme Court - has proven to be ineffective in securing the needs of a modern state<sup>50</sup>.

The limited role of the judiciary in shaping Canadian federalism, in a way to favor the unitary reasons endorsed by the federal level, is not only unusual in the common dynamics of the federal legal systems<sup>51</sup> but it is even more uncommon if we consider that the framers of the *British North America Act*, as generally recognized, intended to give strong powers at a federal level. This is confirmed both by the fact that the Provinces are conferred only enumerated powers to enact laws, and that some of these powers are formulated in broader terms than the homologous provisions contained in the US Constitution<sup>52</sup>.

The failure or the non will of the judiciary to guarantee the federal government a strong legal basis to act – through, for example, a wide interpretation of the “Peace, Order and Good Government” clause or the trade and commerce clause – led to an increasing number of *de facto* sharing competences at a provincial and federal level.

Executive, cooperative, or, more recently, collaborative federalism are the names used to describe the two governmental levels, Provinces and Federation, jointly acting together to

---

<sup>49</sup> Cfr. S.I. Smithey, *The Effects of the Canadian Supreme Court's Charter Interpretation on Regional and Intergovernmental Tensions in Canada*, in *Publius: the Journal of federalism*, 1996, 2, 83 ss. See. P. Hogg, *Constitutional Law of Canada*, cit., 143, noting that «judicial interpretation accomplishes only incremental changes in the Constitution, and the changes do not necessarily reflect the needs of the day». See G. Baier, *The Law of Federalism: Judicial Review and the Division of Powers*, in F. Rocher, M. Smith (ed.s) *New Trends in Canadian Federalism*, 2003, 111 ss.

<sup>50</sup> P. J. Monahan, *Constitutional Law*, Toronto, 2006, 247 ss.

<sup>51</sup> For an overview, according to a constitutional comparative perspective, see E. Orban (ed.) *Federalisme et Cours Supremes*, Bruxelles, 1991.

<sup>52</sup> See P. Hogg, *Constitutional law of Canada*, cit., 103 ss.; P. Monahan, *Politics and the Constitution – The Charter, Federalism and the Supreme Court of Canada*, Toronto – Calgary – Vancouver, 1987, especially part 3, 141 ss.; G.P. Browne, *The Judicial Committee and the British North America Act*, Toronto, 1967; A. C. Cairns, *The Judicial Committee and its Critics*, in *C.J.P.S.*, 1971, 301 ss, G.A. Beaudoin, P. Thibault, *La Constitution du Canada: institutions, partage des pouvoirs, Charte canadienne des droits et libertés*, Montreal, 2004, c. 8; K. Swinton, *Federalism under Fire: the Role of the Supreme Court of Canada, Law and Contemporary Problems*, 1992, 137 ss.

determine the best policies and solutions, despite the absence of such a governance structure in the Constitution<sup>53</sup>.

The increase in such intergovernmental relations is also determined by institutional developments of the Canadian legal system.

When the national government in 1982 decided to “repatriate” the Canadian constitution and to adopt the Charter, despite the Quebec’s dissent, the interrelation between the federal and the provincial levels deteriorated. In the following years attempts were made to obtain the consensus of Quebec regarding the 1982 constitutional reform. To amend the Constitution, the federal government and the other Provinces agreed on two projects: the *Meech Lake Accord* in 1987 and the *Charlottetown Accord* in 1992.

Both agreements, in addition to recognizing the character of the “distinct society” of Quebec, constitutionalized the federal spending power in the welfare fields, though giving the possibility to the province of opting out. In this way, they strengthened the federal power in the field of the economic union. However, both accords failed and this led to a radicalization in the relationship between Quebec and the federal government, represented by the referendum held in 1994 on the secession of Quebec.

The failure of proceeding towards a better division of powers through a constitutional amendment, the political necessity to find a compromise with the Quebec position in order to mitigate the claim for secession, the scarce support of the Supreme Court to strengthen the federal intervention, all explain the growth of informal agreements between the federal and the provincial as the normal way of governing Canadian federalism<sup>54</sup>.

Such a development also concerned the welfare field and, within it, the practice of residency requirements. Although the BNA Act did not explicitly assign at a provincial level matters such as social assistance, education, health care, it was never questioned they fall within Province’s competence. At the same time, the federal government intervened in these areas through its federal spending power. Transfers of money were granted for the implementation of provincial

---

<sup>53</sup> See D. Cameron, R. Simeon, *Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism*, in *Publius: The Journal of Federalism*, 2002, 2, 49 ss, F. Rocher, M. Smith (ed.s), *New Trends in Canadian Federalism*, 2003, especially F. Rocher, M. Smith, *The Four Dimension of Canadian Federalism*, ch, 1, 21 ss; J. Smith, *The Constitutional Debate and Beyond*, ch. 2, 45 ss, K. Brock, *Executive Federalism. Beggar the Neighbour?*, ch. 3, 67 ss. See also, J. Poirier, *The Function of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective*, in *Public Law*, 2001, 134 ss.

<sup>54</sup> M. Croisat, *Le fédéralisme asymétrique: l’expérience canadienne*, in *Rev. fr. dr. const.*, 1999, 39 ss.

welfare systems provided that the provinces respected the conditions and the standard set at a federal level<sup>55</sup>.

The prohibition of qualifying periods of provincial residency, as a requirement for being eligible for provincial welfare benefits, has always been a condition for granting federal money transfers. The *Federal-Provincial Fiscal Arrangement Act*, which provides the legal regulation for the main shared cost programs in the welfare field<sup>56</sup>, clearly states that the law of the provinces must not require or allow a period of residency in the province or Canada as a condition of eligibility for social assistance if the province wants to be qualified for a full cash contribution<sup>57</sup>. Apparently, it could have been possible for the Province to refuse the federal grant and therefore be free to enact its own regulated welfare systems. However, such a conduct turned out to be impracticable since the amount of the federal money was of such importance not to allow the provinces to set a comparable welfare system independently. Moreover, since the opting out of the federal grant system would have resulted in no financial compensation, it was politically unsustainable to deprive the people of the provinces of the welfare services they contributed to pay for with their taxes<sup>58</sup>.

Federal spending power has constituted the main instrument in creating an almost uniform welfare system throughout Canada. In the years immediately following World War II, the weight

---

<sup>55</sup> See H. Telford, *The Federal Spending Power in Canada: Nation-Building or Nation-Destroying?*, in *Publius: The Journal of Federalism*, 2003, 23 ss.; P. Hogg, *Constitutional Law of Canada*, 147 ss

<sup>56</sup> In 1996, the *Canada Health and Social Transfer* (CHST) replaced the previous *Established Programs Financing* (which paid for health care and post-secondary education) and the *Canada Assistance Plan* (which supported social assistance). The CHST was a system of block transfer payments from the Canadian Government to Provinces to pay for health care, post secondary education and welfare. In 2004, the CHST was split into the *Canadian Health Transfer* (CHT) and the *Canada Social Transfer* (CST). For further details see the web site [www.canadiansocialresearch.net/cap.htm](http://www.canadiansocialresearch.net/cap.htm).

<sup>57</sup> See sec. 25.1 of the *Federal-Provincial Fiscal Arrangements Act*, R.S., 1985, c. F-8, 2003, c. 15, s. 8. An exception is provided by the *Canada Health Act*, sect 11 (1) a, permitting the health care insurance plan of a province to impose a minimum period of residence in the province, non exceeding three months, before residents of the province are eligible for or entitled to insured health services.

<sup>58</sup> In the 60's, Quebec, which has always questioned the legitimacy of the federal spending power in areas falling under the provincial jurisdiction, has agreed with the federal government the possibility of opting out of shared cost programs, a possibility extended then to all the other Provinces. If a Province decided not to take part in a shared federal program, the Federal government will provide either a direct cash transfer or additional tax room, provided that the Province agree to establish a similar program with comparable standards. Quebec has very often made use of this provision but it is generally observed that the opting out formula gives only an illusion of autonomy. See P. Hogg, *Constitutional Law*, cit., 123, noting «the opting out province arrangements bind the opting out province to continue established programmes without significant change, or in the case of new programmes to establish or continue comparable provincial programmes. All that opting out really involves is a transfer of administrative responsibility to the province. It does not give the province the freedom to deploy resources which would otherwise be committed to the programme into other programmes».

and the importance of federal intervention was such that the Provinces were little more than mere executors of the federal political will.

However, the rising of centrifugal forces, represented not only by Quebec's secessionist views but also by an increased regionalism in the West, led gradually to review the practice of conditional grants and to seek a broader political consensus on how to use federal spending power<sup>59</sup>.

The federal budgetary restraint in the 90's and the consequent decrease of federal money transfers allowed the provinces to accrue their bargaining power and to negotiate with the federal government on a more or less equal foot. Within this new framework of intergovernmental multilevel interrelations, the *Social Union Framework Agreement* (SUFA) was adopted in February 1999, after a negotiation conducted by the federal government and the 9 English speaking provincial governments. The SUFA aimed to impose on the federal government a fair and mutual collaboration with the provinces in relation to the exercise of federal spending power in areas covered by provincial jurisdiction. The SUFA recognized the legitimacy of such a power, specifying, however, that it cannot be exercised unilaterally. The federal government agreed that new joint programs would not be introduced or the existing ones changed without due notice and substantial provincial consent<sup>60</sup>.

The strong commitment of the federal government to ensure equal treatment to all Canadians, despite their current or previous residency, clearly emerges in the SUFA. All the signatory parties of the Agreement recognize that the freedom of movement of Canadians is an essential element of the Canadian citizenship. To this extent, they commit themselves to «eliminate, within three years any residency-based policies or practices which constrain access to post-secondary education, training, health and social services and social assistance unless they can be demonstrated to be reasonable and consistent with the principles of the SUFA»<sup>61</sup>.

If we draw conclusions from the Canadian experience, we shall note that the judiciary did not play a meaningful role in defining the issue of residency requirements. Such a behavior is consistent with the minor role the Supreme Court played in shaping the federal dynamics of Canada. But, there appears to be a sort of paradox: the Supreme Court refused to enhance the

---

<sup>59</sup> See G.W. Boychuk, *Social Assistance and Canadian Federalism*; A. Maioni, M. Smith, *Health Care and Canadian Federalism*, both in F. Rocher, M. Smith (ed.s), *New Trends in Canadian Federalism*, cit.

<sup>60</sup> D. Cameron, R. Simeon, *Intergovernmental Relations in Canada*, cit., 56-57.

<sup>61</sup> See sec. 2 of the Framework to Improve the Social Union for Canadians

centralization of powers at a federal level but at the same time it was seen by the Provinces, especially Quebec, as a centripetal force due to some high controversial decisions made<sup>62</sup>.

The ambiguous text of the Charter – leaving room to the provincial discretion in setting residency requirements within the limit of “reasonableness”–, the case law of the Supreme Court – not keen to support a wide interpretation of the mobility rights – are all factors that might have suggested the federal government to sustain the prohibition of residency requirements through negotiations rather than before the Court.

In this framework, federal spending power has played a pivotal role. By means of it, the federal level has imposed to the Provinces the prohibition to use residency requirements as a condition to get the reimbursement. It should be noted, however, that the partial retreat of the federal level in the shared cost programs has determined a more meaningful role for the Provinces which are now able to negotiate more favorable criteria and ways of exercising federal spending power. As the SUFA reveals, the prohibition of residency requirements is expressly part of the agreement, i.e. it is part of the political deal concerning the Canadian Social Union.

In other words, the use of residency requirements becomes more a question of political compromise, a fact that is reflected by the ambiguous words of the SUFA stating that the commitment of the provincial governments to eliminate residency based policies is operational «unless they can be demonstrated to be reasonable and consistent with the principles of the Social Union Framework».

Up to now, the federal government has opposed residency requirements, since they are inconsistent with the political idea of the federal government «to build a strong nation with a strong national identity based on equality of the individual»<sup>63</sup>. However, the current political and academic debate is questioning the grounding of such an approach, wondering whether the initiatives of the Federal level in the welfare field, based on the federal spending power, do not end up to favor frictions between the two orders of governments rather than to provide political

---

<sup>62</sup> The reference is here to *Qué. (A.G.) v. Can (A.G.)*, [1982] 2 S.C.R. 793, holding that no constitutional convention guarantees Quebec a veto in the amending constitution process; and *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, holding to be an implicit Constitutional right for Quebec to secede, but by negotiation, not one sided action. See H. Aronovitch, *Seceding the Canadian Way*, in *Publius: The Journal of Federalism*, 2006, 541 ss; J. Woehrling, *L'avis de la Cour Suprême du Canada sur l'éventuelle secession du Québec*, in *Rev. fr. dr. const.*, 1999, 3 ss.

<sup>63</sup> See N. Verrelli, *The Federal Spending Power*, in *Institute of Intergovernmental Relations, School of Policy Studies, Queen's University Working paper*, 10/2008, 14.

cohesion<sup>64</sup>. The attitude towards residency requirements will be dependent on how the federal spending power will be conceived, whether “a nation building” or a “national destroying” instrument<sup>65</sup>.

*5. Residence instead of nationality? European citizenship, the ECJ case law and the political discretion of the EU legislator.*

In a volume of some years ago on EC immigration law, E. Guild noted how the provisions contained in the original EC Treaty, concerning the right to free movement of workers and self employed workers within the territory of EU, determined a meaningful change in respect of the founding principles governing the immigration area. In this field, every State enjoys, as a consequence of their sovereign powers, wide decisional powers with regard to entry, residence and expulsion of individuals. However, the EU implied a lesser degree of discretion available to Member States in relation to EU migrants, at least when they were workers or self employed<sup>66</sup>.

Reserving the freedom of movement within the EU territory only to economically active EU citizens was a clear sign of the economic nature of the EC integration project. Coherently with this perspective, EC secondary legislations guaranteed social security and social assistance to EU migrants on equal terms with the nationals of the host Member States, provided they were economically active<sup>67</sup>. The rationale underpinning these legislations was consistent with a commutative notion of justice rather than a redistributive one: the entitlement to social benefits was provided for because the EU migrant by working in that Country had contributed to its economic development so being worth of a sort of social award<sup>68</sup>.

In the 1990s, Member States agreed on Directive 90/366 (subsequently replaced by Dir. 93/96), Dir. 90/365 and Dir. 90/364 (so called Residence Directives) which respectively dealt with the right of residency of students, pensioners and “other” European citizens. Although the adoption of the Residence Directives reflected the will of strengthening the political dimension of the EU, the acts still relied on an economic conception of the EU integration. In fact, the non

---

<sup>64</sup> See N. Verrelli, *The Federal Spending Power*, cit., and works cited in the bibliography.

<sup>65</sup> According to the definition provided by H. Telford, *The Federal Spending Power in Canada: Nation-Building or Nation-Destroying?*, cit., 23 ss.

<sup>66</sup> E. Guild, *Immigration Law in the European Community*, The Hague, 2001, 2 ss.

<sup>67</sup> See Regulation 1612/68 and Regulation 1408/71.

<sup>68</sup> See S. Giubboni, *Libera circolazione delle persone e solidarietà europea*, in *Lavoro e Diritto*, 4, 2006, 612 ss.

economic residence rights were made conditional upon meeting a financial means requirement and the possession of a health insurance.

Finally, in the Maastricht Treaty, Member States introduced a “citizenship of the Union” provision, giving all Union citizens the right to move and reside freely among Member States, although this freedom was explicitly subject «to the limitations and conditions laid down in the Treaty and the measures adopted to give it effect».

Many commentators criticized the new measures on the citizenship of the Union. It was generally assumed that the collection of rights envisaged by the Maastricht Treaty was by no means comparable to the list of citizenship rights, usually promoted by national constitutions. The goal of providing the nationals of Member States with a common European civic identity had not been met<sup>69</sup>.

Recent ECJ case laws seem to question, in part at least, the grounding of these criticisms and to give substance to the concept of EU citizenship. By interpreting art.18 TEC - which confers to EU citizens «the right to move and reside freely within the territory of Member States» – as a genuinely independent right, inherent to the status of the Union citizen, the ECJ suggested that the free movement and the right to reside are no more exclusively dependent on economic interests and that they are not necessarily limited to the circulation of market factors, as workers or self-employed are. Rather, it seems that the ECJ is prone to recognize that even not economically active EU migrants can exercise the right to move and to reside within the EU and therefore claim, in pursuance to art. 12 TEC, equal treatment with the nationals of the host M. State regarding welfare rights.

It was because *Martinez Sala* – a case concerning a Spaniard, resident in Germany and unemployed, to whom the German authorities had denied a child raising allowance because of the lack of a valid residency permit – that the Court of Justice, relying on art .18 TEC and on art. 12 TEC, held, for the first time, that a European citizen, having exercised the freedom of movement according to art. 18 TEC and being lawfully resident in a host European state, can rely on the principle of non discrimination on the grounds of nationality in respect of all benefits falling within the Treaty’s material scope<sup>70</sup>.

*Martinez Sala* was not an isolated judgment. It has been followed by several ECJ decisions where the non discrimination principle on the grounds of nationality has been applied even if the

---

<sup>69</sup> See D. O’Keeffe, *Union Citizenship*, in D. O’Keeffe, P. Twomey (ed.s), *Legal Issues of the Maastricht Treaty*, 1994, 94; J. Shaw, *The Many Pasts and Futures of Citizenship in the European Union*, in *E. L. Rev.*, 1998, 554 ss.; S. Fries, J. Shaw, *Citizenship of the Union: First Steps in the ECJ*, in *E. Pub. Law*, 1998, 533.

<sup>70</sup> Case C-85/96, *Martinez Sala*, [1998], in ECR I-2691

EU migrant had not exercised one of the traditional economic freedoms, such as the free movement as a worker, the right to establishment, the freedom to provide services. In order to emphasize the important change introduced by the ECJ case law, it is worth of singling out the “new” groups of people that can now claim welfare benefits provided by the national welfare systems on equal terms with the nationals of the host M. State. Such an extensive reading of the personal scope of the principle of equal treatment occurred despite previous ECJ case law and the literal reading of the terms of EC secondary law.

Jobseekers are the first group to be considered.

As is well known, the Court interpreted the notion of worker contained in art 39 TEC broadly, as to include even those seeking work. However, the Court also recognized that migrants EU jobseekers are qualified for equal treatment only with regards to access to employment but no with regard to social and tax advantages within the meaning of art. 7(2) of Regulation 1612/68<sup>71</sup>.

The recent *Collins* decision seriously questioned the previous settled case law on this issue<sup>72</sup>.

Collins was an Irish national who moved to the UK in order to find a job. He asked for a jobseekers allowance but his application was refused because he was not habitually resident in UK. The Court recognised that, according to its previous case law, Collins, as a jobseekers, could not rely on art. 7 of Regulation 1612/68 in order to be granted an allowance<sup>73</sup>. However, the Court observed that. art 7 of Reg. 1612/68 should be interpreted in the light of other provisions of Community law, in particular art 18 TEC. This leads the Court to state: «in view of the establishment of citizenship on 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 art. 48 (2) of the Treaty [...] a benefit of financial nature intended to facilitate access to employment in the labour market of a member state»<sup>74</sup>.

Although the ECJ finally found legitimate the M. State to refuse the allowance to Mr. Collins on other grounds, the decision is good law for the finding that, in view of the introduction of art

---

<sup>71</sup> Case C-316/85, *Lebon*, [1987], in ECR 2811, 26.

<sup>72</sup> Case C-138/02, *Collins*, [2004] in ECR I-2703. See O. Golyner, *Jobseekers' Rights in the European Union: Challenges of Changing the Paradigm of Social Solidarity*, in *E.L. Rev.*, 2005, 122, noting: «By excluding jobseekers from the general principle of non-discrimination for the whole duration of their stay in the host M. State in that capacity the new directive seems to drag behind the judgement in *Collins*».

<sup>73</sup> Case C-138/02, *Collins*, [2004] in ECR I-2703 p. 58

<sup>74</sup> Case C-138/02, *Collins*, [2004] in ECR I-2703 p. 63.

18 TEC in the Treaty, the scope of equal treatment principle, as set in art. 48 (2)TEC, must be extended to cover allowance jobseekers offered by the host M. State welfare system<sup>75</sup>.

A second category that benefited from the ECJ new approach are students applying for a maintenance grant to the host M. State. The leading case is *Grzelczyk*<sup>76</sup>.

Mr Grzelczyk was a French university student studying in Belgium. In the first 3 years of his studies, Mr Grzelczyk has been able to provide for himself by doing minor jobs. However, in the fourth and final year of his academic career he was no longer able to combine work and studies, and so he asked for a social assistance allowance to the Belgian authorities.

According to the Belgian law, this form of allowance was provided to Belgian citizens and, with regard to EU citizens, only if they were qualified in accordance with EC Regulation 1612/68. The Belgian authorities considered that Mr Grzelczyk was not a worker but a student, and therefore he could not rely on Regulation 1612/68. Moreover, according to the previous ECJ case law concerning rights students could claim under art. 12 of TEC, EU students had to be treated equally with national students concerning the conditions of access to education (such as fees), whereas the equal treatment duty did not cover assistance for maintenance and training, being that a matter falling under Member States jurisdiction<sup>77</sup>. This view was upheld by art 3 directive 93/96 on the right to residency for students, which stated that the directive did not establish any right to paying maintenance grants by the host state for students who benefited from the right of residency.

The Court, however, refused such reasoning and deemed that Mr. Grzelczyk had a right, under Community law, to receive social assistance even if he was not a worker. Basing its reasoning on *Martinez Sala*, the Court observes that art. 12 TEC prohibits discrimination on the grounds of nationality only within the scope of the Treaty application. The situations falling within the scope *rationae materiae* of Community law «include those involving the exercise of fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and to reside freely in another M. State, as conferred by [art 18] of the Treaty»<sup>78</sup>. The mere fact of exercising the right to move and to reside within the territory of a EU M. State is enough to invoke art 12 TEC prohibition of discrimination on grounds of nationality.

---

<sup>75</sup> Confirmed in Case C-258/04, *Ioanidis*, [2005], ECR I-8275.

<sup>76</sup> Case C-184/99, *Grzelczyk v. Centre public d'aide sociale*, [2001], ECR I-6193.

<sup>77</sup>, Case C-197/86, *Brown v. Secretary*, [1988], ECR 3205

<sup>78</sup> Case C-184/99, *Grzelczyk*, [2001], ECR I-6193, p. 33

There was an obstacle for the Court to develop thoroughly its reasoning: art. 3 directive 93/96 which excluded from the scope of the equal treatment principle the maintenance grants to students. The Court was able to conciliate the art. 3 measure with its broad interpretation of the equal treatment principle read in conjunction with art. 18 TEC. It found that the social assistance allowance required by Mr. Grzelczyk could not be classified as a “maintenance grant” for students but as a general social assistance remedy. Since no provision of the directive excludes students from the enjoyment of general social assistance provisions, the refusal of the grant was in contradiction to EC law.

In the subsequent case *Bidar*, the Court did not show any hesitations to go beyond the limitations contained in the directive 93/96<sup>79</sup>.

The case concerned Mr. Bidar, a French national who in 1998 moved to the UK to start in 2001 a University course and asked a financial assistance which was denied to him by English authorities. The Court explicitly reaffirmed its principle according to which an EU migrant, when lawfully resident in the host Member State, may rely on art. 18 to claim all benefits available in the host State on the same terms as nationals. This concerns also a maintenance grant and to this extent a provision, as that contained in directive 93/96, cannot deprive a student from enjoying the rights guaranteed by art 12 of the Treaty<sup>80</sup>.

The last category of EU migrants the Court admitted to equal principle in pursuance of art. 12 TEC regards indigents persons, although legally present in the host M. State.

Such a situation was addressed by the ECJ in the above mentioned case *Martinez Sala* and, more recently, in *Trojani*<sup>81</sup>. Trojani was a French national working at a salvation army hostel in Belgium in exchange for accommodation and some pocket money. He was refused the Belgian *minimex* benefit on the grounds that he was not Belgian and he was not qualified as a worker according to Regulation 1612/68. The first issue referred to the Court was if Mr Trojani could be considered a worker and, in case of a negative reply, whether Mr Trojani, by simply being an EU citizen, exercising his right to move as stated in art. 18 TEC, could enjoy the right of residence in the M. State.

---

<sup>79</sup> Case C-209/03, *The Queen (on the application of Dany Bidar) v. London Borough of Ealing*, [2005], ECR I-2119.

<sup>80</sup> Case C-209/03, *Bidar*, [2005], ECR I-2119, p. 46, «However, article 3 of Directive 93/96 does not preclude a national of a member State who, by virtue of art. 18 EC and Directive 90/364, is lawfully resident in the territory of another M. State where he intends to start to pursue higher education from relying during that residence on the fundamental principle of equal treatment enshrined in the first paragraph of art. 12 EC».

<sup>81</sup> Case C-456/02, *Trojani*, [2004], ECR I-7573.

The Court accepted the view that Mr Trojani was not a worker under Regulation 1612/68. It also found that Mr Trojani could not derive a right of residence from article 18 (1) TEC in conjunction with directive 90/364 due to his lack of resources. However, it resulted that Mr. Trojani was lawfully resident in Belgium, according to the Belgian national law. As such, Mr Trojani was entitled to benefit from the fundamental principle of equal treatment as laid down in art 12 TEC and thus to be beneficiary of the *minimex*, on equal terms with Belgian nationals.

If we consider these judgements jointly, it is clear that, due to the measures taken with the regard to EU citizenship, especially art. 18 TEC, the EU migrant, legally resident<sup>82</sup> in the host Member State, can claim equal treatment with the nationals of the host M. State, as far as welfare matters are concerned, irrespective of his status of a non economic active person. Since the principle of equal treatment is enshrined in the EC Treaty, thus enjoying the rank of primary EC law, it prevails on limiting provision contained in secondary EC legislation as the case of art. 3 directive 93/96.

However generous this case law might be, one cannot but note that the ECJ has never recognised an unconditional right of moving and residency for EU needy migrants citizens. The Court has always noted that art. 18 TEC confers to every EU citizens a right to move and to reside freely in the EU but that this right is subject to the conditions and limitations laid down in the secondary EC legislation. The latter – now contained in directive 38/2004, the EC legislation that replaced various previous directives (included the three Residence Directives) on the exercise of freedom of movement of EU citizens – is still based on the fact that the EU migrant should have sufficient resources and a medical insurance.

Nonetheless, the ECJ tends to give a more integrationist reading of these measures, assuming that they have to be interpreted and applied by M. States in the light of the general principles of EC law, especially the principle of proportionality<sup>83</sup>. The result is that the Court is sensibly limiting the capacity of M. States of deterring needy EU migrants, although maintaining the

---

<sup>82</sup> It is not clear what “lawful residence” exactly means. *Trojani* and *Martinez Sala* suggest that the lawfully condition must not necessarily be derived by Community law, on the grounds of the “economic test” set by secondary European law. It can be based on national or international provision or, even, from the very fact that the national authorities in the host Member State had non requested to leave. The fact that the ECJ does not consider the legal residence of the EU migrant as necessarily based on the respect of the conditions set in EC secondary law supports the view that these conditions affect only the exercise of the rights to move and to reside, not their existence which stems directly from art. 18 TEC. For the consequences of this approach see further in the text and footnote 90.

<sup>83</sup> See M. Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, in *E.L. Rev.*, 2006, 613 ss.

legitimacy of the economic and health insurance requirements, now contained in directive 38/2004.

In *Baumbast*, the ECJ held that denying residency permit on the ground that the sickness insurance did not cover the emergency treatment given in the host M. State would amount to a disproportionate interference with the exercise of the right of residence<sup>84</sup>.

In *Grzelczyk* the Court deliberated that a Member State may evaluate that a student who applied for social assistance may no longer have the right to reside, according to directive 93/96, and thus allowing the consequent measures of withdrawing the residency permit or not renewing it<sup>85</sup>. However, the Court further held that such measures «may not become the automatic consequence of a student having recourse to social assistance»<sup>86</sup>. To that extent the Court recalled the sixth recital of directive 93/96 stating that beneficiaries must not become an unreasonable burden on the public finance of the host state and it concluded that dir. 93/96, like directive 90/364 and 90/365, «accept a certain degree of solidarity between nationals of the host M. States and nationals of other M. States, particularly if the difficulties with a beneficiary of the right of residence encounters are temporary»<sup>87</sup>.

Finally, in the case 408/03 *Commission, v. Belgium*, the Court held that Belgium had not kept its obligations under EC law by allowing the right of residency to EU citizens who had sufficient *personal* resources, since such a restriction concerning the origin of financial resources is not required by the directive<sup>88</sup>. In the same case, the ECJ held that Belgian authorities contravened EC law by sanctioning EU citizens, who were not able to produce within a prescribed period of time the documents required, with an automatic order to leave Belgium, deeming it a too disproportionate measure<sup>89</sup>.

These increasing limitations on the power of Member States to expel EU migrants, provided they do not respect the conditions laid in the secondary EC legislation, have to be put in relation with an other important issue: whether the above mentioned conditions and limitations (essentially economic resources and sick insurance) concern the very existence of the right to reside or rather they impinge only on its exercise. The adoption of the second approach

---

<sup>84</sup> Case C-413/99, *Baumbast*, [2002], ECR I-7091, p. 93.

<sup>85</sup> Case C-184/99, *Grzelczyk*, [2001], ECR I-6193, p. 42

<sup>86</sup> Case C-184/99, *Grzelczyk*, [2001], ECR I-6193, p. 43

<sup>87</sup> Case C-184/99, *Grzelczyk*, [2001], ECR I-6193, p. 44.

<sup>88</sup> See also C-200/02, *Zhu-Chen*, [2004], I-09925.

<sup>89</sup> Case C-408/03, *Commission v. Belgium*, [2006], ECR I-02647. More recently, Case C-398/06, *Commission v. Netherlands*, Judgement April 10<sup>th</sup> 2008.

determines profound consequences since it would mean that an EU citizen, residing in a host member State, should be considered a lawful resident and therefore entitled to equal treatment according to art. 12 TEC as long as the host State does not refuse residency or ends lawful residence status because of his lacking economic resources<sup>90</sup>.

Such a view has been first expressed by Advocate General La Pergola in the *Martinez Sala* case<sup>91</sup>. Subsequently the ECJ in the *Baumbast* case shared the same reasoning. Contrary to the observations presented by the Commission, underlining that the right to move and reside established by art. 18 TEC is conditioned by the pre-existing rules, both primary and secondary, which define the categories of person eligible for it, the Court recognized that «Union citizenship has been introduced into the EC treaty and art.18(1) has conferred a right, for every citizens, to move and reside freely within the territory of the Member States»<sup>92</sup>. The Court further observed that the right to reside within the territory of the Member States under art.18 TEC is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member States and consequently as a citizen of the Union, Mr Baumbast, therefore, had the right to rely on art. 18. Although the latter is subject to the limitations and conditions laid down by the EC Treaty and by the measures adopted to give it effect, «the

---

<sup>90</sup> See A.P. van der Mei, *Freedom of Movement for Indigents*, cit., 847-848, «The “conditions and limitations” mentioned in art. 18(1) EC relate to the exercise rather than the existence of the right to reside. Consequently, M. States which do not use their power to take measures ending the lawful residence status of economically inactive nationals of the other M. States must award these Union citizens social assistance benefits under the same conditions as their own nationals. In other words, European Union citizens who are actually residing in the territory of another Member State are entitled to be treated equally regarding social assistance benefits until the host state executes measures to end their lawful residence status». See S. O’Leary, *Putting Flesh on the Bones of European Union Citizenship*, in *E.L. Rev.*, 1999, note 43, where the Author reports a case decided by the *English Court of Appeal* in *R. v. Westminster City Council, ex parte Castelli and Tristán Garcia*, February 27, 1996. *The Court of Appeal* observed: «a European national who had, or might have, ceased to be a qualified person in fact, but who had not been given and overstayed a limited leave to remain and had not been informed that the secretary of state had decided that he should be removed, did not belong to a category of persons “not lawfully here” who were not to be regarded as “persons” for the purposes of sections 62 and 63 (temporary or permanent provision of Housing)». See J.D. Mather, *The Court of Justice and the Union Citizen*, in *E.L. Jour.*, 2005, 742, «The exercise of this freedom, as opposed supposedly to its existence, is therefore still ever subordinate to the economic imperatives laid down elsewhere in the Treaty (and even extraneous extra-Community provisions). [...] In effect, therefore, although the Union citizen cannot rely on that status to exercise the fundamental right to reside in another Member State, he or she may perversely rely on it to claim equality of treatment within».

<sup>91</sup> AG La Pergola in Case C-85/96 *Martinez Sala* [1998], ECR I-2691, p. 18, «The right of residence can no longer be considered to have been created by the directive. [...] The right to move and reside freely throughout the whole of the Union is enshrined in an act of Primary law and does not exist or cease to exist depending on whether or not it has been made subject to limitations under other provisions of Common law, including secondary legislation. The limitation in art. (18) itself concern the actual exercise but not the existence of the right».

<sup>92</sup> Case C- 413/99, *Baumbast*, [2002], ECR I-7091, p. 81. The Court observed that this Treaty Amendment determined the overruling of its previous case law according to which the right to reside was subject to the condition that the person concerned was carrying on an economic activity within the meaning of art. 39, 43 e 44 TEC

application of these limitations and conditions [...] in respect of the *exercise* of that right of residence is subject to judicial review [...]»<sup>93</sup>.

Thus, it seems that the source of the right to move and to reside is to be grounded directly on art 18 TEC. The conditions laid down in the secondary legislation do not concern the existence of the right to reside but they regard only its exercise. Paradoxically as it might be, this view brings the EU migrant to face the following dilemma: he can claim on equal foot with nationals social benefits but this request might enable M. State to consider him no longer lawfully resident according to EC law<sup>94</sup>.

As a response to this judicial evolution, the EC legislator passed directive 2004/38, which, as already said, replaced various directives on workers, self-employed, and service providers and the three residence directive concerning the free movement of not economically active EU citizens. The directive aimed to remedy the piecemeal approach that characterized the EC legislation on the freedom of movement, at the same time codifying the more recent ECJ case law<sup>95</sup>.

The directive reflects only in part the change of perspective brought by the ECJ case law and it essentially rests on the idea that the EU citizen right to move and to reside within the territory of a M. State is, in case of non economically active persons, on condition he possesses sufficient economic resources and health insurance. The rationale that underpins the directive is that the scope of the equal treatment principle, as well as the conditions and limitations upon which the right to reside in a host EU M. State can be exercised, are both dependent on the status of EU citizen – in terms of being economically active or not– and on the length of residence in the host M. State.

To this extent, the directive singles out three different categories of EU migrants.

---

<sup>93</sup> Case, C- 413/99, *Baumbast*, [2002], ECR I-7091, p. 86 (italics added).

<sup>94</sup> See C. Barnard, *The Substantive Law of The EU – The Four Freedoms*, Oxford, 2005, 413; M. Dougan, E. Spaventa, *Educating Rudy and the (Non-) English Patient: A Double Bill on Residency Rights under Article 18 EC*, in *E.L. Rev.*, 2003, 697. See Case 456/02, *Trojani*, [2004], ECR I-7573, p. 45, «It should be added that it remains open to the host M. State to take the view that a national of another M. State who has recourse to social assistance no longer fulfils the conditions of his right of residence. In such a case the host Member State may, within the limits imposed by Community law, take a measure to remove him. However, recourse to the social assistance system by a citizen of the Union may not automatically entail such a measure».

<sup>95</sup> On 2004/38 directive see Alexovičová, *The Rights of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States*, in *Migration, Integration and Citizenship: A Challenge for Europe's Future – Vol. I, Maastricht*, 2005. S. Giubboni, G. Orlandini, *La libera circolazione dei lavoratori nell'unione Europea*, Bologna, 2007, 57.

The first group is made of those wishing to enter the host State for up to three months. This right is not linked to the possession of economic resources or medical insurance, but only to the holding of a valid identity card or passport<sup>96</sup>. The members of this group enjoy the right to equal treatment with the nationals of the host M. State within the scope of the Treaty but they are not entitled to social assistance during the first three months. The exclusion applies even to jobseekers staying in the host EU M. State for longer than three months<sup>97</sup>.

The second group concerns those EU migrants wishing to reside in the host M. State for more than three months. In this category, we have both economically active EU migrants – workers, self employed workers or members of their families – and non economically active EU migrants. The latter enjoy the right of residence provided they have sufficient resources for themselves and their families to not become a burden on the social assistance systems and they have to have a comprehensive sickness insurance<sup>98</sup>. Both groups are entitled, according to art. 24 of dir. 2004/38, to equal treatment with the nationals of the host member State but M. States are not obliged prior to the acquisition of the right of permanent residence to grant maintenance aid for studies, including vocational training, consisting in students grants or students loans to person other than worker, self employed persons, persons who retain such status and members of their families. The right to equal treatment includes also access to welfare benefits. This applies even to non-economically active EU migrant. Moreover, according to art. 14(3) an expulsion measure may not be the automatic consequence of a Union citizen's recourse to social assistance system of the host M. State, unless he becomes an unreasonable burden on the social assistance system of the host M. State (art. 14.1).

---

<sup>96</sup> See art. 6 dir. 2004/38.

<sup>97</sup> Dir. 2004/38, Art. 24, par. 1, «Subject to such specific provisions as are expressly provided for in the treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that M. State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a M. State and who have the right of residence or permanent residence». Art 24, 2 p., «By way of derogation from paragraph 1, the host M. State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in art. 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or students loans to person other than workers, self-employed persons, persons who retain such status and members of their families».

<sup>98</sup> Art. 14 dir. 2004/38.

The third group considered by the directive is made up of those residing legally in the host Member State for a continuous period of more than five years<sup>99</sup>. They enjoy a right to permanent residence and to equal treatment without the limitations of the other two categories.

The directive reproduced in many cases the results of more recent case-laws of the ECJ in the area of freedom of movement. However, there are also situations where legal regulations appear inconsistent with some decisions of ECJ, thus reflecting a potential clash between the political compromise reached by EU M. States with the adoption of dir. 2004/38 and the will of the ECJ.

It is worth to consider some of them.

Firstly, according to art. 24 dir. 2004/38, EU citizens legally residing in the host Member State enjoy equal treatment with the nationals of that M. State «within the scope of the Treaty». The phrasing might suggest that the equal treatment provision must be applied only to matters falling under the EU jurisdiction. Such a view was opposed by a recent judgement of the ECJ according to which since the right to move and to reside within the EU territory is a European fundamental right, it applies also to matters with respect to which the Treaty grants the Community no powers<sup>100</sup>.

Secondly, in *Bidar*, a case mentioned earlier, the ECJ made it clear that to exclude from the scope of the principle of equal treatment the maintenance grants for students – a limitation to equal treatment originally set in art. 3 dir. 93/96 and now equally reproduced in art 24 (2) dir. 2004/38 – is no longer admissible according to EC law.

Thirdly, in *Collins* the Court recognized that the equal treatment principle, set in art. 39 (2) TEC, should be interpreted in the light of art 18 TEC as to encompass even jobseekers allowances. Again, such broad interpretation of art. 39 TEC, which has overruled previous case law of the ECJ, has not been reflected by the directive, whose art. 24 (2) explicitly excludes social assistance to jobseekers from the scope of application of equal treatment principle.

Finally, art. 24 dir. 2004/38 excludes from the enjoyment of social assistance those EU migrants residing in the host EU M. State for less than three months. According to *Trojani*, such an exclusion is not admissible, though the recourse to social assistance may lead the M. State to end the permanence of the EU migrant.

---

<sup>99</sup> Art 16, dir. 2004/38.

<sup>100</sup> Case C-192/05, *Tas Hagen*, [2206], ECR I-10451.

What emerges then is a puzzled picture where the ECJ has interpreted restrictively, in the light of the proportionality principle, the conditions and limitations with regard to the EU citizens right to move and to reside freely within the EU territory<sup>101</sup> and it has not refrained from extending the scope of the equal treatment principle beyond what EC legislation – that is the political compromise reached by M. States – had set up<sup>102</sup>.

In the light of this new scenario concerning the EU freedom of movement, someone has suggested that the ECJ adopted a “perfect assimilation” approach where the treatment of community migrants, legally resident, is on equal footing with that of nationals of the host M. State<sup>103</sup>.

Alternatively, other scholars have pointed out that the ECJ case law seems to suggest «an incremental approach to residence and equality – the longer migrants reside in the Member State, the greater the number of benefits they receive on equal terms with nationals and this is justified in the name of integration and solidarity»<sup>104</sup>.

This view finds support in some ECJ decisions where the Court validates residency requirements as a condition to be eligible for social benefits, although recognizing, in line with the well-settled case law, that a condition based on residency must be strictly scrutinised since it is likely to have a discriminatory effect on those exercising the freedom of movement.

In the area of allowances for young people in transition from education to employment, the Court recognised that it is legitimate for a State to grant the allowance on showing that there exists a real link between the applicant and the geographic market concerned. To this extent a durational residence requirement may be a suitable tool to pursue such a legitimate aim<sup>105</sup>.

The issue of the legitimacy of residence requirement in the area of welfare was further explored by the ECJ in the already mentioned *Bidar* case. The Court found in breach of EC law a UK measure which granted students the right to assistance, covering their maintenance costs, provided they were settled in UK, but precluding at the same time a student of another EU M.

---

<sup>101</sup> See the above mentioned cases: *Baumbast*, *Grzelczyk*, *Zhu-Chen*, *Commission v. Belgium*.

<sup>102</sup> See the above mentioned cases: *Tas Hagen*, *Bidar*, *Grzelczyk*, *Collins*, *Trojani*.

<sup>103</sup> A. Iliopoulou, H. Toner, (note on *Grzelczyk* case) *C.M.L.Rev.*, 2002, 616.

<sup>104</sup> See C. Barnard, *EU Citizenship and the Principle of Solidarity*, in M. Dougan, E. Spaventa (ed.s) *Social Welfare and EU Law*, Oxford, 2004, 166.

<sup>105</sup> See Case C-224/98, *D’Hoop*, in [2002], ECR I-6191, p. 38, Case C-138/02, *Collins*, [2004] in ECR I-2703, p. 69 e 70, «It may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that state. The existence of such a link may be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the M. State in question».

State to be qualified as a settled person in UK. However, the Court showed itself sympathetic with the argumentations of the UK government concerning the economic sustainability of a too-far reaching integrationist approach. It recognizes that «it is permissible for a M. State to ensure that the grant of assistance to cover the maintenance costs of students from other M. States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by the State»<sup>106</sup>.

Such a legitimate interest should be nonetheless conjugated with the duty of a certain degree of financial solidarity to be expressed toward the nationals of another M. State in the organisation and application of the national social assistance, according to the principle expressed in *Grzelczyk*. The compromise between the two conflicting interests is set by the Court itself, by imposing a duty to M. States to grant assistance «only to students who have demonstrated a certain degree of integration into the society of that state»<sup>107</sup>. To pursue the aim of guaranteeing such an integration, it is legitimate for a State to require a previous durational residence in the territory of the State for three years.

The examination of the above mentioned ECJ case law might cast some light on the understanding of the core meaning of the EU citizenship concept or, at least, on what the Court wants to promote with such a concept. The Court seems to consider the legal residence in the host Member State as the main criteria for defining the rights stemming from the EU citizenship. As it has been noted, this challenges directly the idea of citizenship as a permanent bond between the migrant and his country - a notion that reminds that of nationality - and it moves towards the idea of an inclusionary concept of citizenship, one based on residency and on the idea of a community whose members choose to be part of<sup>108</sup>. Consistent with this perspective is the fact that the EU migrant will not enjoy welfare rights of a host M. States simply because he is an EU citizen but rather because, by residing in the host M. State for a period, he will show the (true) intention to become a member of that community. In this context, durational residency

---

<sup>106</sup> Case C-209/03, *Bidar*, [2005], ECR I-2119, p. 56.

<sup>107</sup> See Case C-209/03, *Bidar*, [2005], ECR I-2119, p. 57.

<sup>108</sup> See. D. Kostakopoulou, *European Union Citizenship: Writing the Future*, in *E.L.J.*, 2007, 643, «Although nationality has been taken to be a proxy for political community, the free movement provisions of the treaty, coupled with the grant of local electoral rights to Community nationals in the state of their residence, have severed the link between nationality and the enjoyment of equality of treatment and rights. [...] Such developments have made domicile a more suitable criterion for membership in the European demos, than possession, or acquisition, of M. State nationality». See, of the same author, *Ideas, Norms and European Citizenship: Explaining institutional Change*, in *Mod. L. Rev.*, 2005, 233 ss.; G. Davies, 'Any Place I Hang My Hat?' or: *Residence is the New Nationality*, in *E.L.J.*, 2005, 43 ss; N. Reich, *Union Citizenship – Metaphor or Source of Rights*, in *E.L.J.*, 2001, 4.

requirements, as a condition for being eligible to welfare benefits, is accepted by the ECJ as long as they are used fairly as an instrument for establishing a genuine link with the community itself and to deter those who are likely to abuse of it.

The “genuine link” argument allows the Court to reply to the doubts raised with regards to the “moral”<sup>109</sup> grounding of a full assimilationist model in a context, such as the European one, lacking a strong collective identity. By making the entitlement to welfare rights conditional to a nexus with the given territory, the Court substantially accepts the view that welfare rights are based on solidarity and membership in a given community. Moreover, the “genuine link” argument permits M. States to safeguard the financial sustainability of their national welfare systems against the possible coming of social tourists attracted by the higher level of welfare state<sup>110</sup>.

In this sense, durational residency requirements look like the squaring of the circle: they permit the integration of EU immigrants, by providing them equal treatment with the nationals of the host M. State. At the same time, the integration process is a gradual one: the equal treatment is proportionate to the length of the stay, thus avoiding M. States to become welfare magnets.

Nonetheless, the rationale durational residence requirement presupposes is not plainly consistent with directive 2004/38/CE. The latter adopts a category-based approach to the equal treatment, limiting the range of the available benefits according to the economic status of the EU immigrant, whereas *Baumbast*, *Grzelczyk*, *Collins* suggest that the ECJ attitude is more flexible, requiring an assessment of the personal conditions of the individual according to the proportionality test. A category based approach seems to be excluded.

It is unlikely that the new provisions of the directive will push the ECJ to review its recent case law<sup>111</sup>. Thus, a possible clash between the will of the European legislator and the ECJ idea of EU political integration is likely to emerge.

---

<sup>109</sup> M. Dougan, E. Spaventa, *Wish You Weren't Here ... New Models of Social Solidarity in the European Union*, in M. Dougan, E. Spaventa (ed.s), *Social Welfare and EU Law*, Oxford, 2004, 202.

<sup>110</sup> M. Dougan, E. Spaventa, *Wish You Weren't Here ... New Models of Social Solidarity in the European Union*, in M. Dougan, E. Spaventa (ed.s), *Social Welfare and EU Law*, cit., 202-203.

<sup>111</sup> See M. Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, cit. , 631, «Yet if consistency and common sense prevail, so that the *Baumbast* rule is accepted by the Court to apply across the full palette of the provisions of Directive 2004/38 directed against economically inactive Union citizens, then it would be possible to envisage situations wherein – notwithstanding the clear and express rules laid down by the Community legislature – Member States would be obliged to offer migrant Union citizens equal treatment as regards maintenance assistance with their educational studies before having acquired the right to permanent residency, and as regards social assistance during their search for employment on the host labour market».

*6. Concluding remarks. Toward a new functionalist reading of the European freedom of movement.*

Our research has focused on whether a constitutional comparative approach supports the overall idea that it is typical of the federal legal systems to require subnational units to guarantee the free movement of persons within the Union, even if indigent, and grant them equal treatment. The analysis, conducted in relation to the Canadian and American experiences, reveals that this finding is only partially true and that it might take on different aspects, due to the unlike historical, social, cultural factors that characterize the experiences taken into consideration. The subject has been addressed to by considering a specific issue related to the topic, namely the legitimacy of durational residency requirements as a mean of selecting the beneficiaries of social services.

To this extent, the Canadian experience, as far as residency requirements are concerned, reflects the dynamics which characterize the Canadian federalism: namely, a scarce support, at least if compared to the usual patterns found in federal legal systems, of the Canadian Supreme Court toward the strengthening of the national level powers and the development of intergovernmental relations as the usual ways of governing the exercise of the powers. Even the constitutionalization of a “mobility section” in the 1982 Charter of Rights did not guarantee a strong protection of the freedom of movement and equal treatment; in fact, the prohibition of indirect discrimination is not covered by the mobility section, and residency requirements, as a condition of being eligible for social services, are deemed legitimate provided they are reasonable. The consequence is that the Federal level has primarily used its federal spending power to promote the prohibition of residency requirements, by making it one of the conditions to get federal grant in the welfare field. However, this meant to shift the issue toward a framework highly characterized by political compromises between the national and the provincial level whose importance has increased in the last years. That means also it can not be excluded a different balance of the values at stake, especially if the Provinces will be able to renegotiate the way the federal spending power is enforced.

The US experience seems to be, at least considering the US Supreme Court case law, quite clear in finding the residency requirements illegitimate: the right to interstate travel and the right of a newcomer to be treated on equal terms with the “old” residents are considered as fundamental rights, stemming directly from the federal structure of the US.

However, if we look more thoroughly at the historic experience of the US, it emerges that quite a long time had elapsed before such findings were settled. It is mainly because of the Great Depression in 1939 and the increased federal interventions in the welfare field that the perception towards needy people changed and doubts on the legitimacy of residency requirements, as a means for the local communities to ban indigents, were cast<sup>112</sup>.

In 1968 the Supreme Court held the unconstitutionality of residency requirements in the *Shapiro* decision. However the scholars have prevalingly interpreted this case as an attempt of the Supreme Court to indirectly protect the social entitlements of the citizens rather than as an effort to acknowledge an unconditional right to interstate mobility and to equal treatment. A similar affirmation was held only in the *Saenz* case in 1999.

Considering the above presented elements, it seems to me that the attitude towards durational residency requirements may vary according to the value we give to the free movement and to the equal treatment principles in a territorial pluralistic legal order.

To this regard, I have suggested that these principles may be evaluated according to an individual right perspective, as if they were either a progeny of the fundamental right to personal liberty or as rights conferred to the individual as a member of a federal union. As such, any derogation to them, if admissible, must be narrow construed. In this framework, residency requirements are seen as a threat since they can be a furtive tool by which the states become what an American scholar has called “affective communities”<sup>113</sup>.

Alternatively, the right to interstate travel and to equal treatment may be considered more as functional interests in order to promote an economic and political union. We may add that a functional reading of the freedom of movement tends to apply when the polity of reference presents a low degree of political cohesiveness and regional forms of ethnos develop. In this

---

<sup>112</sup> See A.P. van der Mei, *Freedom of Movement for Indigents*, cit., 813, «The right to travel may have always been inherent in the nature of the Union, but the right was only granted to indigents after the establishment of the “Welfare Union”».

<sup>113</sup> See, R.M. Hills Jr, *Poverty, Residency and Federalism: States’ Duty of Impartiality Toward Newcomers*, cit., 280. According to the Author, the risk for the states to result in “affective communities” may be referred even to the US States, in consideration of the historical institutional behavior they have shown with regards to the treatment of indigent people exercising the right to interstate travelling.

case, a wider approach to the freedom of movement and equal treatment, especially if supported by the federal judiciary, risks to have disrupting effects. The main consequence of this idea is depriving the judiciary (or at least the narrowing down) of the primary task of striking the balance between the cohesiveness reasons and the autonomy principle mainly because of the inherent political nature of the values at stake. The balancing task is attributed to both the legislative and to the intergovernmental relations, considered as the best suited mechanisms to determine what is best for the national interest.

Such a perspective, which currently characterizes the Canadian experience, has also emerged in the American context. It has been recently argued that the role of the American Congress in shaping the intergovernmental relations between States and national level should be strengthened. To this extent, it has been suggested that: «Congress should be able to authorize interstate discrimination when it plausibly concludes that such discrimination serves the national interest, and its enactments in this regard should not be subject to greater scrutiny than the lenient rationality review that ordinarily applies to Congress commerce power legislation»<sup>114</sup>.

This also emerged in the *Saenz* case, where the Federal government asked the US Supreme Court to apply a rationale scrutiny test with respect to the Californian residency requirement provisions, on the grounds that they were consistent with the conditions set by the Federal government to grant reimbursements to the States in the welfare field. The federal government argued that these challenged measures were structured to enhance federal interests. By providing the newcomers the same amount of benefits they would have enjoyed in the State of origin, California avoided the risk to become a welfare magnet and therefore forced to reshape its redistributive policies. However, the Supreme Court refused such an approach and it held that the Congress may not allow States to breach the XIV Amendment.

We must now consider whether the theoretical framework drawn from our constitutional comparative analysis is applicable to the EU.

---

<sup>114</sup> See G.E. Metzger, *Congress, Article IV, and Intestate Relations*, in *Harv. L. Rev.*, 2007, 1475. In the past, this issue has been addressed to by W. Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, in *Stan. L. Rev.*, 1983, 387 ss. In more general terms see also J.H. Choper, *Judicial Review and the National Political Process – A Functional Reconsideration of the Role of the Supreme Court*, Chicago, 1980, 175, claiming: «The federal judiciary should not decide constitutional questions respecting the ultimate power of the national government *vis-à-vis* the states; rather, the constitutional issue of whether federal action is beyond the authority of the central government and thus violates “states’ rights” should be treated as nonjusticiable, final resolution being relegated to the political branches – i.e., Congress and the President».

The case law shows that the ECJ seems willing to consider the freedom of movement and residency within the EU territory as rights inherent to the European citizen as such and no longer limited to the status of European worker. To this extent, it may be noted that in several cases the ECJ has explicitly referred to the freedom of movement as a fundamental freedom<sup>115</sup>, somehow reechoing the US Supreme Court case law. Nonetheless, the EU Court has repeatedly stated that such rights are still restricted to the meeting of the conditions and limitations set in the secondary EC law (i.e. the possession of adequate economic resources, as far as non economic migrants are concerned). This is certainly one of the major limits in order to equate the EC experience to that of the above mentioned federal legal orders, at least with reference to the freedom of movement<sup>116</sup>.

A purely “fundamental right approach” regarding the issue should lead the Court to overcome, by means of interpretation, the economic resource test. To do so, the Court might rely on the Charter of Fundamental Rights of the European Union to which the new Lisbon Treaty, once into force, will recognize a legal binding nature<sup>117</sup>.

Apparently, the Charter provisions do not determine substantial changes. Art. 45<sup>118</sup> must be read in conjunction with art. 52, p. 2 according to which «rights recognized by this Charter which are based on the Communities Treaties or the Treaty on EU shall be exercised under the conditions and within the limits defined by those Treaties». Consequently, the economic resource test set in the secondary EC legislation and to which, although indirectly, art. 18 TEC refers, cannot be challenged in accordance with the new Charter provisions.

However, a different conclusion may be reached if we take into account art. 52, p. 1, establishing that «any limitation on the exercise of the rights and freedoms recognized by this Charter must [...] respect the essence of those rights and freedoms». The same provision further

---

<sup>115</sup> Union citizens’ right to free movement is expressly referred to as a fundamental freedom in *D’Hoop*, Case C-224/98 in [2002] ECR I-6191, p. 29; *Garcia Avello*, Case C-148/02, [2003] in ECR I-11613, p. 26.

<sup>116</sup> An additional, meaningful difference is represented by the express derogation, set in the EC Treaty, allowing Member States to derogate from the principle of free movement on the grounds of public policy, public security, public health (see art 39 (3), 46 and 55 TCE)., According to the ECJ case law, these derogations are interpreted restrictively and in accordance with the proportionality principle. These findings are now set in art 27 of dir. 2004/38, according to which «Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned». For a recent application of this provision by the ECJ see Case C-33/07, *Jipa*, Judgment of 10th July 2008.

<sup>117</sup> See art. 6.1 Treaty on European Union of Lisbon Treaty, «The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the EU of 7 December 2000, as adapted at a Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties»

<sup>118</sup> Art. 45: «Every citizen of the Union has the right to move and reside freely within the territory of the Member States».

states that limitations are subject to the proportionality principle and can be made «only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedom of others». Given its general scope, the above mentioned clause applies even to the limitations to the EU citizens' freedom of movement and residency set in secondary EC law.

By considering the new approach emerging in the ECJ case law, it may be argued that limiting the right of a European citizen to move and to reside upon the possession of economic resources denies the essence of the rights themselves<sup>119</sup>. In fact this limitation indirectly deprived indigent people from enjoying at all the fundamental freedom of free movement and residency within the EU<sup>120</sup>. In this sense such a restriction turns out to be a negation rather than a limitation of the right itself, at least for indigents.

It can also be suggested that the possession of economic resources is actually beyond what is necessary to meet the general interest of the EU. In fact, even assuming that the financial sustainability of the national welfare systems is a general interest for the EU, it is questionable whether the economic resource test is the only available means to pursue the aim. It may be argued that durational residency requirements may serve the same intent of safeguarding the national budgets, without recurring to a clear-cut rule, as does the economic resources test, thus depriving indigent and economically inactive people from establishing residency in other M. States.

However, such a move seems unlikely, at least at the moment. The matter has to be assessed not only in legal terms but also in political ones. To recognize the right to move and to reside to the European citizen as such, going beyond the current limitation of the possession of sufficient economic resources, would undoubtedly have some practical consequences but its relevance should be assessed more in symbolic terms: it would be seen as a meaningful step toward the political dimension of the EU. However, signs of a strong political union are not exactly what M.

---

<sup>119</sup> A.G. Geelhoed, in his Opinion in the Bidar case, p. 32, refers to the German constitutional notion of 'Kernbereich', whose meaning is equivalent to the essence or the substantive core of a fundamental right, to the extent of requiring M. States, when applying measures as residency requirements, as a tool to select beneficiaries for social assistance, to take into account the particular individual circumstances of applicants where refusal of such assistance is likely to affect the essence of the right contained in section 18 TCE.

<sup>120</sup> See S. Carrera, *What Does Free Movement mean in Theory and Practice in an Enlarged EU?*, in *E.L.J.*, 2005, 699, observing that indigents are indirectly excluded of the free movement provided by the Union citizenship.

States are willing to accept at the moment. The removal of any reference to the idea of a political union is one of the most evident features of the new Lisbon Treaty<sup>121</sup>.

Moreover, the endorsement of a “full fundamental right based” approach is also made unlikely by some structural features of the current EU integration process related to the matter.

As mentioned in the first part of this paper, welfare rights are based on the premise of solidarity: the more cohesive the ties in a given polity are, the stronger this solidarity gets. In this framework, we noticed that the intervention at the federal level in the welfare field provides, to a certain extent at least, the glue to support the idea of a solidaristic community<sup>122</sup>. On the contrary, if we look at the European scenario, we do not find «any comparable sense of collective identity [...] strong enough to provide popular support for the construction of a genuine European welfare system»<sup>123</sup> and consequently (or because of?) no redistributive functions, needed to develop such a supranational welfare system, are conferred to the Union. Although one may consider the structural funds as a partial attempt to develop a redistributive framework within the EU, they are usually considered as an instrument to re-balance the economic regional or national disparities rather than a mean to redistribute resources amongst individuals<sup>124</sup>.

Welfare rights are still provided by M. States; it is up to them to ensure a fair balance between, on the one hand, the budget concerns and, on the other, the reasons of equality and solidarity<sup>125</sup>. To this regard, it has been said that M. States are subject to a form of “vicarious responsibility”, since they must provide, through their own domestic budgets, the EU citizens, whether or not economically active, with welfare rights on an equal basis with their nationals<sup>126</sup>. Therefore, it is mainly because of the lack of a general welfare European system and the absence of redistributive functions at the European level that the ECJ can not, at least both for

---

<sup>121</sup> The Lisbon Treaty does not contain any reference to the symbols of the Union, nor a primacy clause, as it was formulated in the Treaty establishing a Constitution for Europe, respectively at art. I-8 and art. I. 6.

<sup>122</sup> B.G. Garth, *Migrant Workers and Rights of Mobility in the European Community and the United States: A Study of Law, Community, and Citizenship in the Welfare State*, quoted by S. Giubboni, *Libera circolazione delle persone e solidarietà europea*, in *Law. e Dir.*, 2006, 628.

<sup>123</sup> M. Dougan, E. Spaventa, *Wish You Weren't Here ... New Models of Social Solidarity in the European Union*, in M. Dougan, E. Spaventa (ed.s) *Social Welfare and EU Law*, cit., 187-188.

<sup>124</sup> See C. Buzzacchi, *Dalla coesione all'eguaglianza sostanziale. Il percorso comunitario*, Milano, 2005, 37 ss.

<sup>125</sup> See A. D'Aloia, *Diritti sociali e politiche di uguaglianza nel «processo» costituzionale europeo*, in M. Scudiero (cur), *Il diritto costituzionale comune europeo*, 2002, 841; S. Giubboni, G. Orlandini, *La libera circolazione dei lavoratori nell'UE*, 2007, 197 ss.

<sup>126</sup> M. Dougan, E. Spaventa, *Wish You Weren't Here ... New Models of Social Solidarity in the European Union*, in M. Dougan, E. Spaventa (ed.s) *Social Welfare and EU Law*, cit., 189.

convenience and for political reasons, adopt a strictly fundamental right approach to the freedom of movement.

As the above mentioned case law reveals, the ECJ has assumed a pragmatic view, thus seeking a compromise between the adoption of a wide interpretation of the freedom of movement and the financial sustainability of M. States. The result is what it has been defined as “incremental approach”<sup>127</sup> of the EU citizenship: M. States are called to provide a certain degree of solidarity to the needy EU immigrants provided that the latter show a genuine link with the hosting community. Residency requirements are seen as a legitimate tool to pursue this aim if they are requested fairly and not to cover up conditions based on nationality.

Such an approach seems more consistent with the idea that the freedom of movement is not a value to be protected *per se*, as it is the case of fundamental rights, but to the extent it helps to promote a stronger political cohesion. Therefore, the ECJ has not set aside a functional reading of the freedom of movement but rather it has changed the usual frame of reference: no longer a freedom instrumental to the market integration but rather to the construction of a supranational polity.

It may be therefore argued that while in the US the freedom of movement and the equal treatment are seen as a corollary of the political union, assuming the existence of a strong collective identity, in the EU context, on the contrary, the freedom of movement and the equal treatment are seen as instruments permitting to build a political union. The debate on the EU citizenship has, then, a “generative” dimension, as noted by N. Walker, one that reflects the evolving nature of the EU polity and of its constituent parts<sup>128</sup>.

In this sense, both Canada and the Eu consider the freedom of movement and the equal treatment according to a functional perspective, unlike the US where a fundamental right based approach applies. The pattern is however slightly different: if in Canada the purpose is *maintaining* the political union notwithstanding the resurgence of strong local collective identities, in Europe the goal is to *generate* an European civic bond.

Despite the fact that it is not clear whether the ECJ evaluates the EU citizenship according to a “proto-federal” conception of the EU rather than as a *sui generis* one<sup>129</sup>, since the Court has

---

<sup>127</sup> See C. Barnard, *Eu Citizenship and the Principle of Solidarity*, cit., 166.

<sup>128</sup> See N. Walker, *Denizenship and the Deterritorialization in the EU*, in EUI Working Paper, 2008/8, 9.

<sup>129</sup> For a review of the main positions on the subject, see S. Besson, A. Utzinger, *Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora’s Box*, in *E.L.J.*, 2007, 573 ss.

abandoned considering the European citizenship as functional to the promotion of the internal market in favor of a more non-economic integrationist view, it has started to carry out a quasi-political function. This has meant for the Court to review not only national regulatory measures but also secondary EC provisions whenever they fell short of the degree of political cohesiveness the ECJ wanted to promote<sup>130</sup>.

To this regard, although directive 2004/38 reproduces in many instances the new integrationist approach of ECJ, this is not the case of art. 24 that provides a clear-cut rule for excluding equal treatment for certain categories considered to be more likely “social tourists”. This concerns, for examples, grants for students and social assistance during the first three months’ residence of inactive Union citizens. However, in accordance with the ECJ case law it seems that «neither the community legislature nor the M. States enjoy the competence to dictate any category of Union citizen should be definitively excluded from enjoying equal treatment as regards any benefits falling within the material scope of the treaty»<sup>131</sup>.

Rather, what the Court seems to suggest is a case-by-case approach, according to which the exclusion from the equal treatment is to be reviewed in compliance with the proportionality principle. More in general terms, the proportionality principle is used by the Court for the purpose of limiting the capacity of national public authorities to enforce the general rules set in directive 2004/38 concerning the EU citizens movement<sup>132</sup>.

A case by case approach to the issue risks, however, to blur the legal boundaries within which M States operate: both the proportionality test and the “genuine link” concepts present a subjective character that will end up to favour different case law applications<sup>133</sup>.

---

<sup>130</sup> See K. Hailbronner, *Union Citizenship and Access to Social Benefits*, in *C.M.L.Rev.*, 2005, 1245, «the most worrying feature of the Court’s recent jurisprudence on Union citizenship [...] (is) the tendency to interpret Community law against its wording and purpose. [...] Union citizenship and the principle of proportionality are used to rewrite the rules laid down in secondary community law».

<sup>131</sup> M. Dougan, E. Spaventa, *Wish You Weren’t Here ... New Models of Social Solidarity in the European Union*, in M. Dougan, E. Spaventa (ed.s), *Social Welfare and EU Law*, cit., 214-215.

<sup>132</sup> See the cases *Baumbast*, *Grzelczyk*, *Zhu-Chen*, referred to in section 5. On this point, see especially M. Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, cit., 626, observing that the new balance of interests in relation to art. 18 TEC «is to be achieved not directly by striking down the three Residency Directives as invalid, but indirectly by the technique of the “cleavage”, that is, through the executive responsibilities of the Member States when implementing secondary legislation.[...] The level of judicial scrutiny now demanded by the principle of proportionality [...] could not [...] be undertaken against the abstract provisions of the Residency Directives themselves. It can most conveniently be conducted when the national authorities come to apply those abstract provisions to individual disputes and an allegedly disproportionate restriction emerges».

<sup>133</sup> See M. Dougan, E. Spaventa, *Wish You Weren’t Here ... New Models of Social Solidarity in the European Union*, in M. Dougan, E. Spaventa (ed.s), *Social Welfare and EU Law*, cit., 204, observing: «Both these problems are made worse by the risk of inconsistency in the uniform application of Community law by the national courts.

Nonetheless, the ECJ keeps on claiming a prominent role, even if this means to replace the political compromises reached by the European legislator<sup>134</sup>.

This is not entirely surprising since the role of the ECJ cannot be assessed in terms of neutral arbiter but rather as that of a political promoter<sup>135</sup>. However, the fact this judicial activism regards provisions contained in EC secondary law or national measures taken to enforce the latter is quite uncommon and raises questions namely regarding the reasons why the proportionality test proposed by the Court should be preferred to the clear cut rules provided by the directive.

It has been suggested that a justification for such a conduct could be found in the new “constitutional” character of art. 18 TEC<sup>136</sup>. Since the Court was determined to consider art. 18 TEC as a cornerstone of the Community legal order, «the path then lay open for the Court to decide that art. 18 EC contains an individual right of sufficient potency as to swing the balance back in favour of greater scrutiny over the will of the Community legislature, within the context of the proportionality assessment, even despite the powerful considerations of public interest which normally act as a constraint upon the judicial function»<sup>137</sup>.

However, if art. 18 TEC must be read as it had a constitutional character, one may expect the consequences to be more far reaching than those mentioned above: i.e. the widening of the scope of the equal treatment provision of directive 2004/38 and the reviewing, according to the proportionality principle, of the national enforcing measures concerning permanence and expulsion of EU citizens. Although we do not deny the practical relevance of these Court findings, they fall short of a true constitutional understanding of art. 18 TEC.

We wonder whether the alleged constitutional character of art. 18 TEC and the underlying idea of developing a stronger European civic bond can not be more coherently pursued by a more

---

Given the difficulties involved in assessing the proportionality of residency requirements as regards welfare benefits, the end result reached by domestic judges is very likely to vary – especially across different Member States – according to the manner in which the welfare system is organised, and the way in which social provision itself is culturally perceived».

<sup>134</sup> See M. Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, cit., 640, « Contrary to what one might assume, the real losers of the recent citizenship case law are not really the M. States. [...] The real loser is rather the Community legislature itself: the political institutions have witnessed an appreciable decrease in their effective regulatory competence, to the extent that legislative choices are now being subject (albeit indirectly) to a level of judicial review based upon the principle of proportionality which does not usually apply to those activities».

<sup>135</sup> See R. Dehousse, *The European Court of Justice: the Politics of Judicial Integration*, London, 1998.

<sup>136</sup> See M. Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, cit., 625.

<sup>137</sup> See M. Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, cit., 625.

fundamental rights approach to the freedom of movement. This would involve the elimination of the economic resources test and the admissibility of derogations to the equal treatment principle, as residency requirements are, only in limited cases.

To this extent, even the M. State financial sustainability argument, usually advanced to oppose such evolution, may be reevaluated. Taking into account the usually referred small percentage of EU citizens effectively exercising the freedom of movement within Europe<sup>138</sup>, it is questionable that extending the freedom of movement and residency to non economically active EU citizens would effectively undermine the national budget of a EU M. State. Whenever empirical evidence supports such a finding, a durational residency requirement could be applied<sup>139</sup>.

Thus, if the Court is willing to confer to the freedom of movement and residency a true constitutional dimension, it should also be ready to extend it to everyone and to admit derogations only in very specific situations. Such evolution is unlikely but it would have the advantage of being clear, evocative of an emerging European demos, and above all it would force the Court to be fully conscious of the political consequences of its decisions.

Otherwise, it would be important to wonder why the task of balancing the “generative” dimension of the EU citizenship with the political and economical discretion of M. States regarding welfare policies has to be performed by the ECJ rather than by the European legislature and intergovernmental relations, which are the best suited mechanisms, as the Canadian case reveals, to reach such a political compromise.

After a sly ECJ, which indirectly promotes a wide reading of the freedom of movement, thus avoiding a too deliberate challenge to the political discretion of M. States, wouldn't a braver ECJ be more necessary?

---

<sup>138</sup> C. Barnard, *The Substantive Law of the EU*, Oxford, N.Y., 2004, 400, quoting data excerpted by Eurostat, Labour Force Survey, 2000, refers that only 2.75 million EU people have exercised the freedom of movement in other M. State as economically active citizens (less than 2% of those employed as workers in the EU as a whole).

<sup>139</sup> A situation as such is probably the case of students grants provided to EU migrant students in those Countries which are net recipients of students. See for interesting data about the political debate in UK concerning the issue, C. Barbard, *EU Citizenship and the Principle of Solidarity*, in M. Dougan, E. Spaventa (ed.s) *Social Welfare and EU Law*, Oxford, 2004, 166.