

# UNION CITIZENSHIP AND FREE MOVEMENT: WHO IS WHO?

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The motivation for this paper is to consider the status of both Union citizens and workers in the 21<sup>st</sup> century, especially in the light of the old and new secondary EU legislation on the rights of Member State nationals moving to another Member State. There will continue to be two groups of migrant Union citizens: those with an independent status and rights and those who derive their status and rights from another person. The situation is further complicated if we study those Union citizens whose family members are not Union citizens, and/or whose relationship is not based on marriage between a man and a woman.

In the 1960s, Member State nationals became part of the European workforce, which was to be mobilised by giving the right to free movement to gainfully employed workers. This was essentially done through Regulation 1612/68. From 1993 onwards, the citizens of Member States have held a special status as Union citizens.<sup>1</sup> Although views are not unanimous on the importance of this status, there is a consensus on what forms the core of Union citizenship: the right to free movement, i.e., Art. 18 EC. This Article has recently, in 2002, been confirmed by the Court of Justice of the European Communities (ECJ) as being directly effective; however, it is subject to the limitations and conditions referred to in it.<sup>2</sup> Still, according to the ECJ: 'Union citizenship is destined to be the fundamental status of nationals of the Member States.'<sup>3</sup>

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<sup>1</sup> The term Union citizen is chosen here instead of e.g. European citizen, because it better corresponds with Article 17 EC and with the wording of the proposed Treaty establishing a Constitution for Europe.

<sup>2</sup> On direct effect, see C-413/99, *Baumbast and R*, ECR [2002] I-7091, on limitations and conditions see C-456/02, *Michel Trojani*, nyr, paras 30–39. Very generally, the conditions are that in order to employ this right one must either be a worker or have sufficient means to support oneself and valid health insurance. Limiting free movement with *ordre public* type exceptions is also possible when properly justified and proportional.

<sup>3</sup> C-184/99, *Grzelczyk*, ECR [2001] I-6193, para 31, see also C-224/98, *Marie-Nathalie D'Hoop*, ECR [2002] I-6191, para 28.

This development, together with the complexity of the several Directives and Regulations originating from the 1960s onwards, has led to a reform of the secondary legislation concerning the Union citizens' right to free movement. For the new Directive (2004/38), the Commission had four main goals: simplification, a common EU law concept of family/spouse that is broader than a heterosexual marriage, the right of Union citizens to reside in a receiving Member State for six months with just a valid passport or identity card, and a permanent residence permit after three years of legal stay. Only the first of these goals was met successfully. After the lengthy process of drafting the Directive, one can say that – basically – the groups of people who have a right to reside in another Member State and the statuses that engender this right remain unaltered. However, a change relating to the spousal situation occurred elsewhere. During the Directive drafting process, in spring 2004, the Staff Regulations of the Community institutions were amended so that '[f]or the purposes of these Staff Regulations, non-marital partnerships shall be treated as marriage.'<sup>4</sup>

### **1. Ms Union Citizen and Mr Worker?**

The fundamental status of Member State nationals, i.e., Union citizenship, is written into the founding Treaty as a personal status of all Member State nationals (Art. 17 EC). The right to free movement (Art. 18(1) EC) reads like a subjective right afforded to all Union citizens. However, this right is in fact—and by the second sentence of the Article—limited to those citizens that are economically active or have a certain level of affluence. Such Union citizens have the right to free movement with their spouse or family, and not providing for their family to move along with them would be a restriction of this right.<sup>5</sup>

Let us define the EU law term 'worker' somewhat more clearly. A worker is a Member State national, who works part or full time in genuine and effective activity

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<sup>4</sup> Council Regulation No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, Point 3 of the amending Regulation, Article 1d of the consolidated Staff Regulations. OJ L 124, 27/04/2004, p. 1–118. The amendment was made after a meticulous analysis on how expensive it would be.

<sup>5</sup> The right to bring a common law spouse to a receiving Member State that recognises such relationships has been considered to be a social advantage, see Case 59/85, *Ann Florence Reed*, ECR [1986] 1283.

and receives remuneration.<sup>6</sup> Activity is work when ‘for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.’<sup>7</sup> The ECJ has interpreted the concept of remuneration broadly, and has also accepted that remuneration can be in forms other than money.<sup>8</sup> According to the ECJ, the amount of remuneration received does not need to be adequate for subsistence.<sup>9</sup> The only minimum requirement is that the activity is not so insignificant that it can be considered marginal or ancillary.<sup>10</sup> For instance, giving twelve music lessons per week has not been considered marginal.<sup>11</sup> The worker always remains free to make the choice between a part time or full time job – even if this means receiving subsistence subsidy from public funds when necessary.

There are no requirements an employer must fulfil; it can be a private or public association, a profit-making or nonprofit enterprise,<sup>12</sup> or the employer may be a private person. For instance, a spouse can work for the other spouse. A managing director who is the sole shareholder of a company cannot fulfil the conditions of being a worker because of the missing subordinate relationship.<sup>13</sup> Nevertheless, the spouse of such a director can qualify as a worker employed by the latter if the general requirements are fulfilled.<sup>14</sup>

The worker’s motivation for working has been termed irrelevant by the ECJ. One can work in order to gain a higher standard of living, to receive income lower than the subsistence income, or just to receive certain rights that are related to the status of a worker, such as the right to reside in the receiving Member State.<sup>15</sup> However, work that solely means rehabilitating or reintegrating the worker cannot be considered genuine and effective work.<sup>16</sup> When national courts interpret EU law and examine

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<sup>6</sup> Friedl Weiss and Frank Wooldridge, *Free Movement of Persons within the European Community*, (The Hague: Kluwer Law International, 2002), 46.

<sup>7</sup> Case 66/85, *Lawrie-Blum*, ECR [1986] 2121, para 17.

<sup>8</sup> The ‘Bhagwan Community’ decision, 196/87, *Steymann*, ECR [1988] 6159.

<sup>9</sup> Case 139/85, *Kempf*, ECR [1986] 1741.

<sup>10</sup> 53/81, *D. M. Levin*, ECR [1982] 1035, para 17. For the concept of work in Regulation 1408/71, see C-2/89, *Kits van Heijningen*, ECR [1990] 1755.

<sup>11</sup> *Asia* 139/85, *Kempf*, ECR [1986] 1741.

<sup>12</sup> Nationality discrimination in the public sector is principally prohibited, therefore such jobs that are not justifiably reserved for nationals are open to all Union citizens. See also Paul Craig and Gráinne de Búrca, *EU Law Text, Cases, and Materials*, 3<sup>rd</sup> ed. (Oxford: Oxford University Press, 2003), 722–728.

<sup>13</sup> C-107/94, *Asscher*, ECR [1996] I-3089, para 26.

<sup>14</sup> C-337/97, *C.P.M. Meeusen*, ECR [1999] I-3289.

<sup>15</sup> See 53/81, *D. M. Levin*, ECR [1982] 1035, para 17.

<sup>16</sup> Case 344/87, *Bettray*, ECR [1989] 1621, para 17: ‘However, work under the Social Employment Law cannot be regarded as an effective and genuine economic activity if it

whether the work in question is genuine and effective economic activity, they should especially consider if such activity is 'capable of being regarded as forming part of the normal labour market.'<sup>17</sup> At the end of the day, one must realise that a Union citizen can fulfil the status of a worker with very little effort, such as a few hours of work per week. This status enables legal residence in the receiving Member State.

Thus far it has been established that the motive for working is irrelevant. Moreover, it is a fact that normal household work could be offered on the regular labour market. Now the following question can be posed: what differentiates working for a religious Bhagwan community, in household maintenance, in return for housing, food and pocket money from the domestic work a spouse staying at home performs? Why is the first work performed by a worker in the sense of EU law and the second not? In light of the facts of 196/87, *Steymann*, obtaining the status of a worker cannot require e.g. a contract of employment or taxable income. The general formal requirements created by the ECJ for the status of a worker are that the person is obliged to work for another, receives remuneration, and works under the direction and control of another. This leaves us to compare the Bhagwan community member and a 'house-spouse' in terms of 'working for another' and 'working under the direction and control of another.' What seems to make the difference is that the marriage is considered to be the basis of the work, the motive for performing it love, and the children (or the sick or elderly) cared for are possibly the other or both parents' biological or adoptive relatives.<sup>18</sup> As stated earlier on, the motive for working was determined irrelevant by the ECJ in qualifying as a worker. One can argue that for the one the workplace is the 'market,' for the other it is the home ('third sector'). Nevertheless, as also C-60/00, *Carpenter*, suggests, these domains cannot be quite coherently separated from each

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constitutes merely a means of rehabilitation or reintegration for the persons concerned and the purpose of the paid employment, which is adapted to the physical and mental possibilities of each person, is to enable those persons sooner or later to recover their capacity to take up ordinary employment or to lead as normal as possible a life.'

<sup>17</sup> See C-456/02, *Trojani*, nyr, para 24.

<sup>18</sup> In for instance C-60/00, *Carpenter*, ECR [2002] I-6279, the deportation of the spouse caring for the children of Mr Carpenter, the male breadwinner of the family, who was a service provider, would have meant that his fundamental 'freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse.' Mrs Carpenter was enabling her husband's use of his fundamental freedom 'by looking after her husband's children from a previous marriage' (paras 39 and 44).

other. The family, like the religious community, can be seen as an economic unit, the members of which are working for the economic benefit of the unit.<sup>19</sup>

For decades, EU law has encountered critique on discrimination against women in relation to rules on workers. Presumably, similar tendencies in national societies predate this development. The critique has been brought forward both before Union citizenship existed and afterwards.<sup>20</sup> However, in the context of Union citizenship this critique has received new impetus. The reason for this is the fact that Union citizens who 'work' have an independent right to free movement and those who do not<sup>21</sup> are disappointed in not having a subjective right to employ what is nominally every Union citizen's fundamental freedom, but in fact only a right derived (i.e., not self-reliant) from the worker family member to this end.

The critique is still as valid as before, since the newly reformed secondary rules on migrant Union citizens do not really deal with this question.<sup>22</sup> The situation remains discriminative since although care work is not the prerogative of women only, they still statistically more often work 'outside the labour market,' i.e. in domestic or care work at home. It is debatable whether this distinction of work performed outside and inside the labour market is truly a normative question or simply a social fact beyond the reach of the system of law. In 1998, *Moebius* and *Szysczak* argued that the 'definition of economic activity as remunerated activity is based on a false dichotomy between the market and the family.' They supported this argument by referring to several things. First, sociological and economic analyses have revealed that household work is productive. Secondly, they refer to what they call an inherent unjustifiable paradox of devaluing informal care work, which is that on the labour market love for your work does not exclude remuneration, but 'outside' it, remuneration is excluded because the

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<sup>19</sup> Isabella Moebius and Erika Szysczak: Of Raising Pigs and Children, *Yearbook of European Law*, 1998, 125–136, 141.

<sup>20</sup> See for a summary of these critical assessments and ECJ case law for instance Isabella Moebius and Erika Szysczak: Of Raising Pigs and Children, *Yearbook of European Law*, 1998, 125–136. The Article starts with a quote from Friedrich List's *Das nationale System der Politischen Ökonomie* (4<sup>th</sup> ed., Jena, 1922): 'Those who raise pigs are productive, while those who raise children are unproductive, members of society [...].'

<sup>21</sup> Those who do not study, receive pension or have enough capital, but follow the worker abroad to do care work.

<sup>22</sup> The right to a permanent residence permit is given to Union citizens and third country family members alike, after five years of uninterrupted legal residence in the receiving Member State, Dir. 2004/38, Art. 16.

work is also done for love. Thirdly, they point to national legislation and ECJ case law that has not consistently held care work as not being real work.<sup>23</sup>

Whatever the reason, this means that migrant Union citizens who are homemakers and thus cannot have the status of a worker in a receiving Member State, must therefore, now and in the future, have a position from which they can derive the right to reside in the receiving Member State. Their right to reside is therefore not independent – not a right engendered by the fundamental status of Union citizenship, even after the new Directive EC/2004/38 – but derivative in nature, after the stay has lasted over three months. Workers have rights that continue after their employment has been terminated. Children have the right to continue receiving their education in the receiving Member State, and this right of the child extends as a derivative right to the primary caretaker of the child (whatever the caretaker's status is) as a right to reside in that receiving Member State.<sup>24</sup> The new Directive enables an ex-spouse of a worker to remain in the receiving Member State under certain conditions. However, a current Union citizen spouse of the Union citizen worker who is staying home has not had and will not have an independent status, only derivative rights. Perhaps things will never change?

## **2. Who can be the migrant Union citizen's spouse or family member?**

A vast amount of scholarly work on the varying attitudes of Member States in legal recognition of common law marriages and registered partnerships already exists. The differences are naturally reflected in varying national conceptions of family.<sup>25</sup> The secondary rules of EU law on workers' rights and their families' status currently in force originate from the 1950s and 1960s. At the moment, these old rules are to be replaced in part by a new Directive, and in part will remain altogether or substantively unaltered. The old legislation and the current social reality are in conflict. The old rules are a product of an era that perhaps saw the peak of mass production and stable employment. Additionally, it was a time when women stayed home, at least after having

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<sup>23</sup> Isabella Moebius and Erika Szyszczak: Of Raising Pigs and Children, *Yearbook of European Law*, 1998, 125–136, 153–155.

<sup>24</sup> See C-413/99, *Baumbast and R*, ECR [2002] I-7091.

<sup>25</sup> For example, see Robert Wintemute and Mads Andenaes, *The Legal Recognition of Same-sex Partnerships: A Study of National, European and International law*, (Oxford: Hart, 2001), and Katharina Boele-Woelki (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, (Antwerpen: Intersentia, 2003).

children, divorce was uncommon, and ‘unconventional’ family relationships unthinkable. It was not uncommon that families consisted of three generations and the overwhelming effects of globalisation were not yet felt.

Several things have obviously changed – although the new Directive poorly reflects these changes.<sup>26</sup> In addition to the things listed above, EU law has also changed. More specifically, Union citizenship has become a Treaty Article (17 EC) and the ECJ has clarified, developed, and created law relating to both workers’ and Union citizens’ status and rights.

The renewed rules on free movement of Union citizens do not resolve the differences of opinion between Member States on the concept of family. At the moment, there is no reason to expect any progress in this area, as the Council’s ‘Hague Programme’ states that judicial cooperation in civil matters shall not lead to ‘harmonised concepts of “family” and “marriage”.’<sup>27</sup> There are those who see this as positive, because it allows willing Member States to proceed in making all partnerships equal.<sup>28</sup>

But there are also other matters that may contest the restrictive approach to the terms. The Union has devoted much energy to promoting the fact that it promotes basic and human rights. When asked what these rights are and where they can be found, the EU points to the common constitutional traditions of the Member States and to international conventions, most often to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In particular, this convention includes the right of ‘men and women’ to marry,<sup>29</sup> and ‘everyone’ to enjoy respect for family life.<sup>30</sup> It furthermore prohibits discrimination ‘on any ground such as sex, race,

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<sup>26</sup> It regulates situations in which a divorce takes place, but it does not give migrant Union citizen homemakers an independent status, considers only a matrimonial spouse as a spouse, and seems to build on the idea that families consist of three generations.

<sup>27</sup> The Hague Programme; strengthening freedom, security and justice in the European Union, 13993/04 JAI 408, 27.11.2004, p. 31.

<sup>28</sup> Gerhard Wagner: The Virtues of Diversity in European Private Law, in: *The Need for a European Contract Law; Empirical and Legal Perspectives*, Jan Smits (ed) (Groningen: Europa Law Publishing, 2005), 1-24, 11. In recent years, several Member States have passed legislation making same-sex partnerships equal or at least almost equal with conventional marriage. The author suggests that this could not have happened if such rules were uniform across Europe.

<sup>29</sup> Article 12 ECHR.

<sup>30</sup> ECHR as amended by Protocol No. 11, Article 8: Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right

colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’<sup>31</sup>

In several preliminary rulings, the ECJ has referred to Article 8 ECHR. The references have typically taken place when the dispute at hand has concerned deporting a third country national spouse of a Union citizen. The ECJ has in fact asked the national court to pay due attention to the ECHR in deciding the case.<sup>32</sup> The interpretation of the European Court of Human Rights on Article 8 is that ‘the Court recalls that the notion of ‘family life’ in Article 8 (Art. 8) is not confined solely to families based on marriage and may encompass other *de facto* relationships [...]. When deciding whether a relationship can be said to amount to ‘family life,’ a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.’<sup>33</sup> This has not led the ECJ to pursue an activist role on these issues, quite the contrary – it has expressly termed these questions as moral, belonging to the national legislator’s competence.<sup>34</sup>

Comparing this interpretation of the ECHR with the EU law position on the concept of family makes the latter seem particularly peculiar. The term spouse, for instance, refers only to the parties of a married opposite-sex couple. It does not include common law marriages between partners of the same or opposite sex, or even married or registered parties of a same-sex couple.<sup>35</sup> Extending the EU law status of family

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except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>31</sup> Article 14 ECHR.

<sup>32</sup> For instance, in C-60/00, *Mary Carpenter*, ECR [2002] I-6279, para 41.

<sup>33</sup> X, Y and Z v. United Kingdom, judgment of 22 April 1997, para 36.

<sup>34</sup> See joined cases C-122/99 and C-125/99, *D and the Kingdom of Sweden*, ECR [2001] I-4319. Critical scholars have argued that Article 10(2) of Regulation 1612/68 could have been interpreted so that the position of common law spouses and same-sex partners could have been actively improved much earlier by classifying them as persons to whom paragraph 2 applies: ‘Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.’ See e.g. Elspeth Guild: Free Movement and Same-Sex Relationships, in Robert Wintemute and Mads Andenaes (eds): *The Legal Recognition of Same-sex Partnerships: A Study of National, European and International law*, Oxford, 2001, 680.

<sup>35</sup> The ECJ has wavered minutely in C-65/98, *Safet Eyüp*, ECR [2000] I-4747, where it decided that under particular circumstances a common law marriage could be considered a marriage. In the light of Article 8 ECHR, Advocate General La Pergola considered in the opinion on *Eyüp* that the term spouse would – more generally than in only this case – also

members to include persons other than families based on marriage between partners of the opposite sex is wholly dependent upon the applicable national legislation of a Member State and the principle of non-discrimination, even after the new Directive has entered into force. This means that the system that should promote free movement, and in the area of justice and home affairs should be based on mutual recognition, does not facilitate the mandatory recognition of a family status entered into legally in another Member State.

Perhaps a practical illustration is called for at this point. Consider a couple, the parties of which are nationals of Sweden and are of opposite sexes and who have a stable relationship, i.e., a common law marriage. If one spouse receives a job offer from Italy, can the other spouse follow her? The answer would be that if they get married (which they in fact can do), if the other spouse becomes or continues to be economically active in Italy, becomes a student in Italy, or has sufficient resources and health insurance, then they can move together. If none of the above is true, the employed spouse must, in principle, remain alone in Italy after three months.

As a further illustration, one could imagine the following situation. An Italian same-sex couple moves to live in the Netherlands (as Union citizens, both with an independent status allowing them to take up residence in a receiving Member State) and gets married there.<sup>36</sup> After some time, they wish to return to Italy. At this point, a question arises: how will their family status be treated in Italy? The national legislation does not provide the possibility for same-sex couples to legally register their relationship, and certainly not to get married. However, the Italian private international law rules only state that a marriage is legally valid when it is valid according to the laws of the country where it was concluded.<sup>37</sup> Therefore, the marriage would seem to be valid in Italy. However, Article 16 of the same Italian law states that a foreign law must not be applied if it is against public policy (*ordre public*). Furthermore, in real life situations corresponding with this example, Italian officials have refused to recognise such marriages, because they are against the foundations of the Italian system of law, and therefore against public policy. As to my knowledge, there is no case law on this yet.<sup>38</sup> This illustrates how family status and the rights it constitutes, do not always

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cover a spouse in a common law marriage.

<sup>36</sup>The Netherlands' national legislation allows same-sex marriages. To be able to get married in the Netherlands, the couple must live there and they must be legally competent.

<sup>37</sup>Legge 218/1995, Riforma del sistema italiano di diritto internazionale privato, GU 3-6-1995 - Suppl. Ordinario n. 68.

<sup>38</sup>According to Italian case law, the requirement to register a marriage concluded abroad is only a formality that does not affect the validity of the marriage (Cass. civ., sez. I, 13/04/2001). Furthermore, Islamic marriages must be recognised although they do not fulfil

survive the migration of Union citizens, premised on the fundamental freedom guaranteed by EU law.

The two situations can be complicated almost endlessly by adding a child or children (adopted, biological, or social) to the equation, changing the nationalities of the migrating Union citizens, or imagining that one of the spouses is a third country national, instead of a Union citizen.<sup>39</sup> Additionally, one must remember that the recognition of marriage and the status of family members are relevant in many fields of everyday life, such as social security, divorce, the law on succession etc.

Differences in rules on relationships, the reluctance of mutual recognition together with the willingness to resort to the private international law principle of protecting the *ordre public* in fact make it impossible for certain groups of people to use their 'fundamental right' of free movement. If these issues do not make it impossible, they certainly cause legal uncertainty.

The problems that couples of the same sex encounter in exercising their right to free movement can be expected to rise. One of the reasons is that three Member States (Netherlands, Belgium, and Spain) already provide same-sex couples the possibility of getting married instead of only registering their partnership or concluding a contract. As the relationship is called a marriage, just like with couples of opposite sexes, the only reason for treating these persons differently in situations of moving from one Member State to another is their sexual orientation.

### **3. Closing comments**

The point of this paper has not been to challenge the current national or EU legal orders from either a feminist studies or a gender equality point of view. Simply, the point was to make plain the fact that from the perspective of free movement, regardless of recent developments, the 'fundamental status of Member State nationals,' i.e., Union citizenship, does not produce the subjective right of free movement for all citizens, but only to certain groups of Member State nationals. The concept of a worker remains at the heart of the right to free movement. The demands to revise what is determined to be work may be justified. However, more justified yet appears to be a critical perspective

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the requirement of loyalty that the Italian system presumes a marriage should be based on (1739/1999, Cass. civ., sez. I, 2/03/1999).

<sup>39</sup> Consider what would happen if an Italian woman had married a Cuban woman in the Netherlands and would have later wanted to move to Italy with her family.

on Union citizenship. The issues illustrated in this paper show both how arbitrary the drawing of lines is in legal thinking and how difficult it is to give concrete meaning to Union citizenship as the fundamental status of Member State nationals. On the basis of the examples above, it is relatively easy to see how enjoying the freedom to move is easier for some groups than for others (i.e., unconventional families). Nevertheless, no solutions have been found to combat this discrimination.

This leaves us with the question, why? Why is EU law relating to free movement constructed as it is? Why is it impossible for Member States to mutually recognise family statuses that are legally valid in another Member State?

The first question relates quite obviously to the Union citizen's contribution to the society that the Union citizen lives in. A positive contribution may not always be necessary; however, the possibility of burdening the economy of the receiving Member State remains. Accusations of social welfare shopping are never far away in this discussion. However, at the moment an estimated 2% of the population of Member State nationals belong to the group of privileged and able Union citizens who do reside in a receiving Member State. Is there really a threat of unemployed, unhealthy, or politically unwanted Union citizens mass-migrating? Certainly there is no evidence of this. Perhaps there exists such a threat, but most likely it does not pose a risk to national budgets. Apparently the highly sought-after European solidarity has not reached the level where Union citizenship can be properly realised.

The second question relates, in addition to Union citizenship, again to social security and to rules of private international law and human rights. Legislation that directly acts as an obstacle of free movement – be it private international law or something else – as do rules on legally valid family relationships should be revised so that the family status migrates with the family. It is also questionable whether Member States should be allowed to resort to *ordre public* exceptions via private international law, which are a product of the 19<sup>th</sup> century and created to safeguard the sovereign power of the nation-state, in relation to other Member States' legal orders. A human rights perspective on these matters reveals the limited effect that such rights as the right to marry and the right to respect for family life still have in Europe. Gender-based discrimination is expressly forbidden in many work-related situations, but apparently the realm of family life escapes all restrictions.

To conclude, let us summarise the argument concerning work: the reason for the reluctance of extending the EU law term work/worker to include household work performed at home is not actually related to gender. Rather, it is related to economy. However, what follows is quite possibly indirect discrimination. This is a conclusion that heavily depends on the legal definition of what constitutes work in the market, and

a conclusion that is difficult to solve through legislation. Arguably the real problem of opening up the work/worker category of EU law to informal care work is actually not that one would gain an independent right to reside in the receiving Member State. The problem is the vast amount of national social advantages available to people with the status of a worker, together with the frivolous fears associated with images of a mass migration of Union citizens and the rights which would be extended to third country citizens who are family members of a Union citizen. In the Treaty establishing the Constitution for Europe, the Union aims to strive for solidarity throughout the world and promote it among Member States.<sup>40</sup> In the meanwhile, solidarity amongst Union citizens concerning social advantages is poorly developed. The question remains: are these separate problems?

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<sup>40</sup> See, e.g., the preamble and Article I-3 of the Constitutional Treaty.