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The 'principled' nature of Union citizenship revised: 'functional' and 'constitutive' general principles in the definition of Union citizens' right to social equality

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Abstract

The material limits of Union citizens' right to social equality have become increasingly contingent on proportionality analysis. In the case law of the Court of Justice of the EU, this has been illustrated by the use of the concepts of a 'real link' and a 'certain degree of integration' in defining when economically inactive migrant Union citizens are sufficiently integrated into the society of the host Member State in order to gain equal access to non-contributory social benefits. My question in this paper is whether the general principle of proportionality alone is enough to define the limits of Union citizens' right to social equality. I will discuss this question by distinguishing between (1) functional and (2) constitutive general principles of Union law. I will argue that the principle of proportionality *stricto sensu*, i.e. balancing, is in itself an 'Empty Idea' and that guidance for the interpretation of the Union citizens' right to non-discrimination on grounds of nationality must be sought from the constitutive principles of Union law, such as the principle of equality and fundamental rights. Finally, this paper makes a suggestion for a normative hierarchy of general principles of Union law by examining the aims of integration in the light of the recent constitutional changes of Union law, such as the incorporation of the EU Charter of Fundamental Rights into primary law.

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1 Introduction

This paper examines the changing role of general principles in defining Union citizens' right to social equality. In the light of the case law of the Court of Justice of the EU, this paper first shows how the principle of proportionality has become the most fundamental norm in defining who is protected against nationality discrimination under EU law in the context of non-contributory social welfare. It will then argue that proportionality becomes an 'Empty Idea'[1] when the judicial review enters into the realm of full balancing. The view endorsed in this paper is that the constitutionalization of Union citizenship calls for a more developed normative hierarchy of general principles of Union law to strike the balance between the right of Union citizens to social equality and the right of the Member States to welfare sovereignty. Finally, this paper suggests that one way to revise the 'principled'[2] nature of Union citizenship is to distinguish between 'functional' and 'constitutive' general principles of Union law.

The aim of this study is to critically examine and systematize the role of general principles of Union law in the access of economically inactive migrant Union citizens (i.e. non-workers) to non-contributory social-welfare benefits in their host Member State. The unconditional access

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1 See below at 11.

2 See for instance X. Groussot who speaks of the 'principled' nature of Union citizenship in X. Groussot: '"Principled Citizenship" and the Process of European Constitutionalization – From a Pie in the Sky to a Sky with Diamonds', in U. Bernitz – J. Nergelius – C. Gardner (eds.): *General Principles of EC Law in a Process of Development*, Kluwer Law International (2008), at 315.

to social benefits ('full assimilation'[3]) is not what is promoted in this paper. Still, the alternative idea of equal treatment based on sufficient integration is subject to varying interpretations of the criteria under which a 'real link' is established between an economically inactive migrant Union citizen and his/her host Member State. It is therefore important to have a closer look at the role of general principles in defining when a migrant Union citizen is considered to be legally resident or otherwise sufficiently integrated into society in the host Member State in order to qualify for non-contributory social benefits.

2 Proportionality as the "basic norm" for social equality between Union citizens

This section examines the increasing role of proportionality analysis in defining the material limits of Union citizens' right to social equality under Article 18 of the Treaty on the Functioning of the European Union (TFEU). In the well-known *Baumbast* case, the Court declared that the limitations and conditions on Union citizens' right to move and reside under Article 21 TFEU (ex 18 EC) must be applied in accordance with the general principles of EU law and 'in particular the principle of proportionality'.[4] This study endorses the view that the Court's statement of 'general principles' has in practice been applied in a narrow way, focusing on the principle of proportionality at the expense of other general principles of EU law, such as the principle of equality and fundamental rights. First, however, it is important to clarify what it means in practice that Union citizens' right to equal treatment has become increasingly

3 See e.g. C. Barnard: 'EU Citizenship and the Principle of Solidarity', in E. Spaventa – M. Dougan (eds.): *Social Welfare and EU* Law, Hart (2005), at 166 about the difference between assimilationist and incremental approaches to social solidarity between the Member States.

4 C-413/99 Baumbast and R v Secretary of State for the Home Department [2002] ECR I-7091, paras 90 – 91. The *Baumbast* case introduced proportionality as a primary test for the interpretation of limitations and conditions on the right to reside under Article 18 EC (now 21 TFEU) in the light of Directive 90/364. The Court has not abandoned the proportionality assessment after the entry-into-force of the current Citizenship Directive 2004/38/EC.

case-specific and 'ad hoc'[5]-based.

Not all differential treatment constitutes prohibited or unlawful discrimination. Drawing the line between 'legitimate differential treatment' and 'unlawful discrimination' lies, therefore, at the heart of discrimination law analysis. The situation is complicated further by the fact that treatment that fulfils the criteria of *prima facie* unlawful discrimination can be objectively justified under certain circumstances. In its simplest and most common form, the test for prohibited discrimination consists of the following three steps: (1) comparability of situations, (2) difference in treatment and (3) no objective justification.[6]

In the context of nationality discrimination, the comparability analysis focuses on similar or different treatment in relation to the host Member State's own nationals. The underlying question is who should be treated equally with the host Member State's own nationals. Traditionally, the protection against nationality discrimination has been contingent on economic activity. The concept of Union citizenship as 'the fundamental status of all Member State nationals' has added a new strand into the definition of comparability between private individuals within the European Union. In the light of the case law, it seems clear that Union citizens are now regarded to be comparable irrespective of their economic status and that it is only the objective justification test which can justify their unequal treatment in certain cases.[7]

5 See more about the term 'ad hoc' proportionality e.g. in E. Spaventa: 'Seeing the wood despite the trees? On the scope of Union Citizenship and its constitutional effects', (2008) *CMLRev* 45, 13 – 45, at 13 and 24.

6 See e.g. J. Usher: *General Principles of EC Law*, Longman (1998) as discussed in G. Barrett: 'The Concept of Equality in European Community Law', in C. Costello – E. Barry (eds.): *Diversity In Equality: The New Equality Directives*, Irish Centre for European Law (2003), at 114 – 118.

7 In a series of cases beginning from the famous *Grzelczyk* judgment, the Court has underlined the importance of the Union citizenship as 'the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'. C-184/99 Rudy Grzelczyk v Centre public d'aide d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193, para 31 and

In the early *Sotgiu* case, the Court confirmed that prohibited nationality discrimination covers both 'overt' and 'covert' forms of discrimination. After that, the Court nevertheless stated that the prohibited forms of discrimination would not cover cases 'which took account of objective differences'.[8] More recently, the objective justification test has gained particular importance when the prohibition of nationality discrimination has been applied together with Union citizens' right to free movement and residence. In practice, the use of proportionality analysis as part of the objective justification test sets down the limits of substantive equality between Union citizens in those cases in which the prohibition of nationality discrimination under Article 18 TFEU is applied in relation to the right to free movement and residence under Article 21 TFEU and Directive 2004/38/EC. The criteria such as a 'real link' and 'genuine connection' and 'certain degree of integration' define who is *de facto* entitled to social equality under European Union law.

Economically inactive individuals did not have a right to free-movement and residence until the adoption of the three Residence Directives in 1990 and even these directives made their right dependent on the possession of sickness insurance and sufficient financial resources.[9] The general right of Union citizens to move and reside was included in Article 18 of the EC Treaty (now Article 21 TFEU) when the concept of Union citizenship was created by the Maastricht Treaty in 1992. However, this right exists only 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. The Court's jurisprudence on Union citizenship has expanded both the personal and material scope

8 152/73 Giovanni Maria Sotgiu v Deutsche Bundespost [1974] ECR 153, paras 11 – 12.

9 Directive 90/364 on the right of residence [1990] OJ 180/26: Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activities [1990] OJ L18028 and Directive 90/366 on the right of residence of students [1990] OJ L180/30, readopted as Directive 93/96 [1993] OJ L317/54. These three directives were repealed by Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L229/35.

of application of the Treaty articles in the context of free-movement, residence and non-discrimination.[10] Most disputes concerning social benefits will now come within the jurisdictional scope of Union law both *ratione personae* and *ratione materiae* but 'what is not as certain though is when Union citizens will actually get the benefit applied for, ie equal treatment with nationals'.[11]

Union citizens' right to equal treatment is now re-defined in Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. It is important to distinguish between (1) migrant Union citizens who fall outside the right to equal treatment under Article 24(2) of the Directive because they are unemployed work-seekers, students applying for maintenance aid or their residence in the host Member State does not exceed three months and (2) migrant Union citizens who have the right to equal treatment under Article 24(1) of the Directive but whose right is subject to different limitations and conditions. Article 7 of Directive 2004/38/EC states that Union citizens have the right to reside in the area of of other Member States for more than three months, providing (1) that they are workers or self-employed persons or (2) that they and their family members have 'sufficient resources not to become a burden on the social assistance system of the host Member State' and have 'comprehensive sickness insurance cover'. The Court has been explicit in stating that the termination of residence must not become an automatic consequence of recourse to the social assistance system of host Member State but that it must always be considered whether the Union citizen would become an unreasonable burden on the welfare system of the host Member State. Secondly, the Court

10 See e.g. S. O'Leary: 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship', (2008) *YEL* 27, 167 – 193, at 178.

11 M. Elsmore – P. Starup: 'Union Citizenship – Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy', (2007) *YEL* 26, 57 – 113, at 105.

has stated that it is legitimate for the host Member State to require a 'real link' or a 'certain degree of integration' between the applicant of benefits and their own society when deciding whether or not an economically inactive migrant Union citizen would become an unreasonable burden.

The Court has made it clear that the requirement of equal treatment applies automatically if and when a Union citizen is legally residing in the area of another Member State.[12] Their right to equal treatment is not absolute, however. First, the limitations on the right to residence impose limitations on the right to equal treatment as the exercise of the latter is dependent on the existence of the former. In the light of the case law, it seems that a Union citizen cannot be regarded as an unreasonable burden once he or she is sufficiently integrated into the society of the host Member State. Reversely, this means that it is legitimate for the Member States to require a 'real link' or a 'certain degree of integration' when assessing whether the claim for social welfare benefits by an economically inactive migrant Union citizen would lead to an 'unreasonable burden' and, thus, to the termination of residence. Secondly, indirect discrimination on the grounds of nationality can be regarded as objectively justified. According to the Court, objectively justified differential treatment must be based on 'objective considerations independent of the nationality of the persons concerned' and 'proportionate to the legitimate aim'.[13] This means that the requirement of integration can also be used to objectively justify differential treatment between Union citizens. The Court has recognized the legitimate wish of the Member States to ensure the existence a real link as an objective justification for differential treatment. In other words, the equality of Union citizens to benefit from the rights under Article 18 TFEU is conditioned both on legal residence and on a certain

12 See e.g. C-85/96 Maria Martínez Sala v Freistaat Bayern [1998] ECR I-2691, paras 61 – 62.
13 C-224/98 Marie-Nathalie D'Hoop v Office national d'emploi [2002] ECR I-6191, para 36 and C-224/02 Heikki Antero Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö [2004] ECR I-5763, para 20.

degree of integration.[14]

According to the Court, the decision to withdraw a residence permit or not to renew it cannot become 'the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system'.[15] The openness of the Court's statement has left the door open for proportionality analysis in the interpretation of the right to reside *and* in the interpretation of the material limits of the right to be treated equally once legally residing in the host Member State. In the *Collins* case, the Court stated that the legitimate wish of a 'genuine link' between the applicant and the geographic employment market can be based on a 'residence requirement' and that the conditionality of a jobseeker's allowance on residence did not violate the right to equal treatment 'in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions'.[16] In the *Trojani* case, the Court nevertheless confirmed the distinction between Articles 12 and 18 EC (now 18 and 21 TFEU) by stating that the permissibility of the requirement of sufficient resources 'does not mean that such a person cannot, during his lawful residence in the host Member State, benefit from the fundamental principle of equal treatment as laid down in Article 12 EC'.[17] In the *Bidar* case, the Court outlined that 'objective considerations independent of nationality' can be derived from the finding that the applicant 'has resided in the host Member State for a certain length of time'.[18]

14 Groussot, supra n 2, at 328.
15 C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193, para 42 – 43.
16 C-138/02 Brian Francis Collins v Secretary of State for Work and Pensions [2004] ECR I-2703, paras 67, 72 and 73.
17 C-456/02 Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS) [2004] ECR I-7573, para 40.
18 C-209/03 The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills [2005] ECR I-2119, para 59.

The introduction of the real link test by the Court of Justice has shifted the analysis towards the host Member State's ability to present objective justifications for discriminatory restrictions on access to public benefits.[19] In practice, this means that proportionality as one of the general principles of Union law is applied to balance the interests of the host Member State with the Union citizen's right to equal treatment. The nature of general principles of Union law is nevertheless controversial. This has led many authors to debate whether the interpretation and application of concrete provisions of secondary legislation, such as the restrictions on equal treatment in Directive 2004/38/EC, should fall within the scope of the Treaty and, thus, within the more abstract general principles of Union law. It has been argued that the Baumbast-type proportionality analysis might easily result in the rights of Union citizens which go beyond what the Union legislature has intended to grant in Directive 2004/38/EC.[20] On the other hand, it has also been argued that the notion of general principles will carry over 'an abstract concept of law which cannot always be derived from the written rules laid down by the Member States or institutions and is superior to those rules, and which may ultimately be regarded as an emanation of the notion of natural law'.[21] If this is true, the general principles of Union law could only be limited by the objectives of the EU Treaties and they must be applied in all those cases that come within the material scope of these treaties.[22] Article 3(1) of the Treaty on European Union declares that one of the Union's aims is to promote its values which, according to Article 2 of the same Treaty, include human dignity, equality and respect for human rights. Moreover, Article 3 TEU does not only mention the establishment of an internal market but is also outlines that the Union shall 'combat social exclusion and discrimination, and shall promote social justice and protection'.

19 M. Dougan: 'The constitutional dimension to the case law on Union citizenship', (2006) *ELRev* 31(5), 613 – 641, at 631.
20 Ibid, at 614 – 615.
21 A. G. Toth: 'Human Rights as General Principles of Law, in the Past and in the Future', in U. Bernitz – J. Nergelius (eds.): *General Principles of European Community Law*, Kluwer Law International (2000), at 78.
22 Ibid, at 78.

In the light of what was said above about the general principles of Union law, it seems clear that the limitations and conditions on Union citizens' right to social equality are not absolute but they must be applied in a manner which does not conflict with the aims of integration. In the words of M. Dougan, secondary legislation does not any longer offer definite conditions for Union citizens' rights to residence and equality but merely a 'framework' within which the lawfulness and proportionality of different conditions and limitations can be assessed 'having regard to their degree of integration into the host society'.[23] It is therefore important to examine further what is the *substance* of proportionality as a general principle of Union law in the definition and interpretation of the material limits of social equality between Union citizens and whether other general principles of Union law, such as equality and fundamental rights, should be given greater emphasis.

3 Proportionality: a tool or an end?

It was outlined above in Section 2 how the application of proportionality analysis plays an important role in defining when differential treatment between migrant Union citizens and the nationals of the host Member State is justifiable in those cases which fall into the jurisdictional scope of EU law. This development can also be referred to as the constitutionalization of EU anti-discrimination law because the interpretation of equality between Union citizens has become increasingly dependent on general principles of Union law. It is therefore important to ask whether the relatively open and elusive definition of the substance of proportionality is in compliance with the strong and almost teleological role given to proportionality as one of the fundamental general principles of Union law.

23 Dougan, supra n 19, at 621.

Peter Westen describes equality as an 'Empty Idea' in his well-know critique of egalitarian views of justice.[24] His argument is that any idea of prescriptive equality needs to rely on other non-egalitarian conceptions of justice.[25] In this section, my question is whether the "prescriptive" role of proportionality analysis in EU law similarly calls for more substance and whether a more developed hierarchy between the different types of general principles of Union law could offer this substance for the judicial review of the material limits of Article 18 TFEU. It has been argued that the principle of proportionality 'constitutes a crucial element of providing (social) justice' in citizenship cases.[26] In this section, I want to address the question of under what conditions this statement of proportionality is a true proposition of Union citizenship.

The 'intellectual roots' of the proportionality principle can be derived both from the aim of 'redistributive justice' and from the idea of the 'liberal state'.[27] What is common for both approaches is that proportionality is usually described as a primarily 'protective' principle in relation to individual rights and freedoms.[28] Some authors approach proportionality as an independent fundamental right, whereas others argue that it is only a procedural principle derived from the rule of law.[29] Accordingly, one of the most important developments of proportionality analysis in EU law is its increasing use with reference to fundamental rights.[30]

24 P. Westen: 'The Empty Idea of Equality', (1982) *HarvLRev* 95(3), 537 – 596.
25 Ibid
26 Groussot, supra n 2, at 342.
27 J. Schwarze: *European Administrative Law*, Sweet&Maxwell (1992), at 678.
28 Ibid, at 679. See also J. Rivers: 'Proportionality and discretion in international and European law', in Tsagourias, Nicholas (ed.): *Transnational Constitutionalism: International and European Models*, Cambridge University Press (2007), at 110.
29 See e.g. N. Emiliou: *The Principle of Proportionality in European Law: a Comparative* Study, Kluwer Law International (1996), at 136.
30 S. Peers: 'Taking Rights Away? Limitations and Derogations' in S. Peers – A. Wards (eds.): *The European Union Charter of Fundamental Rights*. (Hart, 2004), at 142 – 143 and J. Morijn: 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution', (2006) *European Law Journal* 12(1), 15 – 40, at 37.

For instance in the *Schmidberger* case, the Court referred to the concepts of 'public interest', 'social purpose' and 'the very substance of the rights' when assessing whether a restriction of the free-movement of goods was 'justified'.[31] Nonetheless, a common fear is that the Court of Justice might apply the objective justification test too broadly in the context of fundamental and human rights.[32]

In the Union legal system, the principle of proportionality is most often defined by referring to the German concept of proportionality as a three-fold test: the measure must be (1) 'appropriate for attaining the objective', (2) 'necessary, in the sense that no other measure is available' and (3) 'must not be disproportionate to its aim'.[33] The difference between these 'levels' of proportionality review has been explained by stating that under the first two levels the limitation of rights is required to be 'as small as possible', whereas the third level, i.e. the balancing test, asks whether the limitation 'adequately compensates for the loss to rights'.[34] The exercise of full balancing. i.e. proportionality *stricto sensu*, is something relatively new for the Court of Justice who has traditionally limited its review to the less intense 'manifestly inappropriate test' when the rights of private individuals have been balanced against the Union or Member State interests.[35] But the use of proportionality as part of the objective justification test in discrimination analysis would be difficult without recourse to a more comprehensive exercise of balancing. This step towards the full balancing analysis has quite naturally increased the Court's reliance on the general principles of Union law, such as proportionality,

31 C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich [2003] ECR I-5659, paras 64, 77 and 80.

32 Peers, supra n 30, at 142 – 143 and Morijn, supra n 30, at 37.

33 Schwarze, supra n 27, at 678. See also e.g. F. G. Jacobs: 'Recent Developments in the Principle of Proportionality in European Community Law' in E. Ellis (ed.): *The Principle of Proportionality in the Laws of* Europe, Hart (1999).

34 J. Rivers: 'Proportionality and Variable Intensity of Review', (2006) *Cambridge Law Journal* 65(1), 174 – 207,at 201.

35 T. Tridimas: 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny', in E. Ellis (ed.): *The Principle of Proportionality in the Laws of* Europe, Hart Publishing (1999), at 66.

but whether this means that EU anti-discrimination law is genuinely constitutionalized depends on how seriously the more substantive dimension of general principles is taken into account in the interpretation of Article 18 TFEU.

The need for balancing is usually derived from the abstract and flexible nature of constitutional norms.[36] Robert Alexy's well-known definition of constitutional principles as 'optimization requirements' shows how the argument in favour of balancing is derived from the more general goal of rationality.[37] It is common to argue that the mere rationality-irrationality analysis does not form a sufficient justification *for* anti-discrimination law.[38] At the same time, however, 'rationality', 'arbitrariness' and 'reasonableness' have been accepted as valid criteria for objective justifications *within* anti-discrimination law. In this section, my argument is that the principle of proportionality becomes an 'Empty Idea' when the Court steps into the realm of proportionality *stricto sensu*, i.e. balancing. The normative hierarchy of EU constitutional principles needs to be examined in order to guide the exercise of balancing and to clarify the relationship between 'proportionality' and 'equality'.

According to S. Fredman, what is progressive in the concept of proportionality is the fact that it is not limited to the traditional concept of comparator.[39] Fredman nevertheless points out that this does not automatically lead to substantive equality, for '[p]roportionality, in prescribing a notion of equality as rationality, is itself a sophisticated form of consistency, namely that difference should be treated according to its degree of difference'.[40] For instance

36 See e.g. M. Novak: 'Three Models of Balancing (in Constitutional Review)', (2010) *Ratio Juris* 23(1), 101 – 112, at 101.
37 R. Alexy: 'Constitutional Rights, Balancing and Rationality', (2003) *Ratio Juris* 16(2), 131 – 140, at 136.
38 See e.g. O. Doyle: 'Direct Discrimination, Indirect Discrimination and Autonomy', (2007) *OJLS* 27(3), 537 – 553, at 543 – 544 and D. Hellman: *When Is Discrimination Wrong?* Harvard UP (2008), at 20.
39 S. Fredman: *Discrimination Law*, OUP (2002), at 118.
40 Loc. cit.

B. Çali has underlined that her criticism of 'weights, scales and proportions' is not derived from the irrationality of balancing but rather from its failure to 'adequately capture the agent-relative (subjective) aspects of human rights claims'.[41] Similarly, according to S. Leader, the proportionality principle remains meaningless unless the 'supervision of the objectives' under the 'strong' version of proportionality is adopted in addition to the 'weak' proportionality analysis of the mere 'means chosen to pursue those objectives'.[42]

It has been debated whether there are such absolute rights and interests which exclude the whole application of objective justification test and proportionality analysis or whether 'the only duty to which they [rights] give rise is a procedural obligation to justify their breach in a particular form'.[43] The advocates of balancing, such as Robert Alexy, claim that there is 'no morality without balancing' in their reply those (e.g. Ronald Dworkin) who have criticized the dangers of subordinating the well-being of individuals to the 'demands of society at large'.[44] It seems to me that the logical conclusion of this debate is that, equally, there is *no balancing without morality*. In other words, more substantive constitutional principles are needed to guide the Court of Justice once it has stepped into the field of proportionality stricto sensu in the interpretation of Union citizens' right to social equality under Articles 18 and 21 TFEU.

41 B. Çali: 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions', (2007) *Human Rights Quarterly* 29, 251 – 270, at 263.

42 S. Leader: 'Proportionality and the Justification of Discrimination' in J. Dine – B. Watt (eds.): *Discrimination Law: Concepts, Limitations and Justifications*, Longman (1996). , at 115.

43 A. McHarg: 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', (1999) *MLR* 62(5), 671 – 696, at 680.

44 R. Alexy: *A Theory of Constitutional Rights*, OUP (2002), at 193 – 196 and 363 and R. Dworkin: *Taking Rights Seriously*, Duckworth (1977), at 197 – 198.

4 Normative hierarchy of general principles: is there any in EU law?

4.1 The relationship between proportionality and equality

It was showed in the previous section that the exercise of balancing forms a necessary part of proportionality analysis in the context of the objective justification test and that the general principles of Union law are therefore needed to strike the balance between Union citizens' right to equality and the rights of the Member States to treat non-nationals differentially in relation to their own nationals. In this section, I will argue that a more developed understanding of the normative hierarchy between different general principles of Union law is needed to give substance for the proportionate and disproportionate limitations on Union citizens' right to social equality and non-discrimination.

The question of the relationship between the non-discrimination principle and proportionality is not new in the Union context. It was raised in the aftermath of the so-called 'Skimmed-milk powder cases' in the 1970s when prohibited discrimination was assimilated with disproportionality.[45] Prohibited discrimination is often defined to be 'essentially tantamount to arbitrary distinction'.[46] It has nevertheless been questioned whether this means that the objective justification test should or could be assimilated with the general principle of proportionality in Union law. The counter-argument is that the test of discrimination ought to be more about the effect on relationships between persons and undertakings than about the relationship between the impact on the 'material sphere of the affected persons' and the 'aim underlying the measure'.[47] In practice, this means that both the 'specific criteria of non-

45 See e.g. 114/76 Bela-Mühle Josef Bergmann KG v Grows-Farm GmbH & CO. KG. [1977] ECR 1211, para 7.

46 M. Herdegen: 'The Relation between the Principles of Equality and Proportionality' (1985) *CMLRev* Vol. 22, 683 – 696, at 685.

47 Ibid, at 685.

discrimination' and the 'general criteria of proportionality' would lose their specific character if entangled with each other.[48]

How, then, could this difference between 'equality' and 'proportionality' be transformed into the context of general principles and does it have any relevance for the constitutionalization of Union citizenship? In this section, my argument is that these questions can best be explored by distinguishing between 'functional' and 'constitutive' general principles of Union law. This argument is based on the claim that general principles of law have a dual role in both maintaining and enabling the Union legal system. The *functional* general principles provide instruments to secure that the objectives of integration are maintained. The *constitutive* general principles, for their part, are in essence about the objectives of integration and they lay down the normative standards which the functional principles aim to maintain. In other words, they constitute the objectives of the Union legal system by their very existence and can therefore provide substance for the application of functional general principles. This is not to say that the functional principles could not have a substantive dimension of their own but their substantive dimension must always be justified by relying on the constitutive principles.

4.2 Functional general principles: proportionality

The material limits of Union citizens' right to social equality were examined above in the light of the case law of the Court of Justice of the EU. My argument was that the use of proportionality analysis as part of the objective justification test under Article 18 TFEU has created a hierarchy within which proportionality is placed on the top of the pyramid, whereas other general principles have gained less attention in the judicial review of Union citizens right to equality and non-discrimination. The Court has opened the door for a more

48 N. Emiliou: *The Principle of Proportionality in European Law: a Comparative* Study, Kluwer Law International (1996), at 155.

constitutive use of proportionality analysis by expressly underlining the status of proportionality among other general principles of Community law, such as fundamental and human rights.[49] It is, therefore, important to ask how the strong and almost teleological role given to proportionality as a major tool for the interpretation of Article 18 TFEU fits in with the functional nature of proportionality analysis. The core of the problem is captured for instance by A. McHarg who argues that 'a human rights court needs to be able to point to a firmer theoretical foundation for its claim to legitimacy than simply the reasonableness of individual decisions'.[50] Accordingly, it is important to have a closer look at those constitutive principles of EU law that could potentially offer a firmer substantive foundation for proportionality analysis.

4.3 Constitutive general principles: equality

This section examines the question of whether equality could play a more explicit role in the process of extracting justificatory criteria for the material limits of Union citizens' right to non-discrimination on the grounds of nationality under Article 18 TFEU. It has been pointed out that the proportionality analysis cannot be used to 'establish' rights that are 'not yet existent'.[51] This statement captures the functional nature of the principle of proportionality. Therefore, only constitutive general principles can shed light into the reasons why the Treaty articles are sometimes interpreted in the way which seems to create previously non-existent rights for economically inactive Union citizen. The key to understand this normative "leap" is that, unlike functional general principles, the constitutive general principles can only be limited by the objectives of integration. In other words, the limits of constitutive general principles must be reviewed against the aims of the EU Treaties, rather than against the technical competence clauses for which they *ipso jure* offer normative justification.

49 C-413/99 Baumbast and R v Secretary of State for the Home Department [2002] ECR I-7091, para 91.
50 McHarg, supra n 43, at 696.
51 K. Hailbronner: 'Union Citizenship and access to social benefits', (2005) *CMLRev* 42, 1245 – 1267, at 1254.

By referring to the idea of a 'general framework for combating discrimination', the Court has already refused to interpret the principle of equal treatment 'strictly' when it has defined the scope of the Equality Directives in cases such as *Mangold* (age discrimination) and *Coleman* (disability discrimination).[52] In the *Mangold* case, the Court referred to the purpose of Article 1 of Directive 2000/78 as creating 'a general framework for combating discrimination on any of the grounds referred to in that article'.[53] Despite the broad discretion given to the Member States in the field of social and employment policy, the Court has stated that 'the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued'.[54]

It is important consider whether the same logic of argument could also apply to discrimination on the grounds of nationality or whether it is meant to be strictly limited to those grounds of discrimination that are included in Article 19 TFEU. It seems reasonable to assume that the logic of general principles of Union law is something which goes beyond the specific Treaty articles to explain and underpin the whole Treaty system. Against this background, it seems justified to assume that the Court could apply the same logic to its proportionality analysis in the context of Article 18 TFEU and in the context of Article 19 TFEU. In any case, the Court itself has already relied on a cross-pollination between nationality discrimination and age discrimination when defining the jurisdictional scope of Union law in these fields.[55]

It has been argued that the general principles of Union law must take precedence over

52 C-144/04 Werner Mangold v Rüdiger Helm [2005] ECR I-9981, paras 56 and 59 and C-303/06 S. Coleman v Attridge Law and Steve Law [2008] ECR I-5603, para 38.
53 Ibid, para 56 and 59.
54 Ibid, para 65.
55 C-274/06 Birgitte Bartsch v Bosch und Siemens Hausgeräte (BSH) Alterfürsorge GmbH [2008] ECR I-7245, paras 22 – 23.

secondary legislation if the right to free movement and residence under Article 21 TFEU is regarded as one of the EU fundamental rights.[56] It is important to consider whether this primacy solely concerns proportionality analysis, or whether equality as one of the general principles of Union law could also have a constitutive impact on the interpretation of secondary legislation. In other words, could a similar fundamental status be attached to the right to non-discrimination and equality under Article 18 TFEU as has been attached to the right to free-movement and residence under Article 21 TFEU? This quest for the constitutive nature of social equality relates to the question of what the 'principled' nature of Union citizenship means at the current state of integration and how it can be revised in the light of the current constitutional changes of Union law, such as the primary law status of the EU Charter of Fundamental Rights.

5 The 'principled' nature of Union citizenship: in search of substance

What applies to citizenship in a national state does not automatically apply to a 'derived'[57] citizenship in a supranational polity. At the same time, the very use of the ideologically-loaded concept of citizenship, instead of other forms of social and democratic membership, seems to verify that at least some elements of equality between citizens were aimed to be transformed into the context of Union law. Thus, the limited material scope of Union citizenship, including the unequal treatment of economically inactive Union citizens, cannot be taken for granted but more attention must be paid to its justification in a *principled* and transparent way. Different normative models of European citizenship include at least the following: (1) market citizenship, (2) republican citizenship, (3) cosmopolitan citizenship, (4)

56 Groussot, supra n 2, at 334.
57 C. Closa: 'Citizenship of the Union and Nationality of the Member States', (1995) *CMLRev* 32, 487 – 518, at 510.

social citizenship and (5) deliberative political citizenship.[58] But to the extent that the whole idea of supranational citizenship is still an artefact rather than a flourishing social institution, it is possible to argue that the scope of Union citizenship does not yet have an independent existence but that it is contingent on the way in which general principles are constituted in supranational law.

What, then, is the role of general principles in defining the substance of Union citizenship? It has been argued that the Baumbast-type application of proportionality 'was certainly facilitated by EU citizenship, but it was not necessarily dependent on it' and that 'the lens of fundamental rights has had decisive effect outwith citizenship also'.[59] On the other hand, the goal of the EU principle of equality has been articulated to be the situation in which 'no discrimination between Union citizens arises as a result of the process of European integration'.[60] Accordingly, the jurisprudence on Union citizenship is said to be 'marked by the pervasiveness of the general principles of Community law'.[61] In practice, this means that Union citizenship advances the constitutionalization of EU law in so far as citizenship provisions are given the status of fundamental rights.[62] The constitutional approach to Union citizenship must nevertheless address the question of to what extent, if any, the creation of Union citizenship was meant to expand the material scope of judicial review exercised by the Court of Justice.[63]

58 See e.g. U. Liebert: 'The European Citizenship Paradox: Renegotiating Equality and Diversity in the New Europe', in B. Siim – J. Squires (eds.): *Contesting Citizenship*, Routledge (2008).
59 N. Nic Shuibhne: 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?', in Barnard, Catherine – Odudu, Okeoghene (eds.): *The Outer Limits of European Union Law*, Hart (2009), at 169 and 176 – 177.
60 A. Tryfonidou: 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe', (2008) *Legal Issues of Economic Integration* 35(1), 43 – 67, at 63 and E. Spaventa: 'From *Gebhard* to *Carpenter*: towards a (non-)economic European Constitution', (2004) *CMLRev* 41, at 770 – 771.
61 Groussot, supra n 2, at 315.
62 Ibid, at 316.
63 Dougan, supra n 19, at 622.

In the case of migrant workers, the question of a genuine or effective link relates to the personal scope of application of the Treaty, i.e. whether or not the applicant is regarded as a 'worker', whereas in the case of economically inactive migrant Union citizens, it appears at a later stage of analysis enabling the host Member State to justify (indirect) discrimination and restrictions on the access to social benefits.[64] It has been argued that while the establishment of the personal scope of application of the Treaty should be considered 'in principle' and depend on 'legality' only, the substantive scope of Treaty provisions 'in a particular situation' can legitimately be interpreted by means of proportionality principle.[65] It has also been pointed out that the requirement of a link or integration is not independent or self-sufficient but that the Court has 'subjected the "habitual residence" requirement to a conventional discrimination analysis'.[66] In reality, however, this submission is often circular because the 'conventional discrimination analysis' has become so close to the mere application of proportionality analysis. As argued above, the concern about the increasing use of proportionality analysis at the expense of other general principles of Union law, such as equality and fundamental rights, must be addressed first.

My argument is that Union citizenship as the fundamental status of all Member State nationals has not just underlined the importance of the right to free movement under Article 21 TFEU but, more fundamentally, has crystallized equality as one of the objectives of Union citizenship. It is therefore important to pay more attention to the dual nature of equality and non-discrimination both as a fundamental right and as a general principle of Union law. The Court has traditionally claimed that it has competence to examine the compatibility of

64 O'Leary, supra n 10, at 184.
65 A. Epiney: 'The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship', (2007) *ELJ* 13(5), 611 – 622, at 613 – 614 and 619 – 620.
66 Ibid, at 174.

national rules with fundamental rights as general principles of Union law in all those cases in which national rules fall into the material scope of Union law.[67] If this is still the case, irrespective of the wording of Article 51(1) of the EU Charter of Fundamental Rights which states that the Charter applies to the Member States 'only when they are implementing Union law', it seems possible to argue that Union citizens' fundamental rights should play a more explicit role in the interpretation of the material limits of Article 18 TFEU. This argument is particularly relevant if the principle of non-discrimination on the grounds of nationality can be seen as transforming towards a personal fundamental right.

In the well-known *Konstantinidis* case, Advocate General Jacobs included in his opinion an attempt to extend the jurisdiction of the Court and the scope of Community law by establishing a connection between European citizenship and the fundamental rights. According to him, an economically active migrant Union citizen should have been able to invoke the status of 'civis europeus sum' in order to oppose any violation of his/her fundamental rights.[68] The Court did not share this view in *Konstantinidis* but its more recent case-law has given a considerable emphasise on the 'genuine enjoyment' of rights of Union citizens. For instance, in the recent *Ruiz Zambrano* case, the Court interpreted the scope of application of the Treaties by using the 'genuine enjoyment of substance of rights of Union citizens' as the standard of its analysis.[69] This seemingly rather vague idea of 'substance of rights' was taken further by AG Sharpston who suggested in her opinion that the availability of EU fundamental rights protection should be made dependent on 'the existence and scope of

67 60 and 61/84 Cinéthèque SA and others v Fédération nationale des cinémas français [1985] ECR 2605, paras 25 – 26; 12/86 Meryem Demirel v Stadt Schwäbisch Gmünd [1978] ECR 3719, para 28 and C-260/89 Ellinki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas [1991] ECR I-2925, paras 42 – 43.

68 Opinion of AG Jacobs in C-168/91 Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt [1993] ECR I-1191, para 46.

69 C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM), para 42.

a material EU competence' irrespective of whether those competences have been exercised or not.[70] According to AG Sharpston, only such a definition of EU fundamental rights would cohere with 'the 'full implications of citizenship of the Union' in the long run.[71]

The EU Charter of Fundamental Rights forms now part of primary law and its Article 21(2) reiterates the wording of Article 18 TFEU by stating that '[w]ithin the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited'. This double-confirmation can be understood as a special emphasise on the nature of the prohibition of nationality discrimination as a fundamental right. Otherwise, why would it be necessary to repeat the exact wording of Article 18 TFEU in the Charter? The interesting question is, then, whether the status of a fundamental right has an impact on the legitimate limitations and conditions on the prohibition of nationality discrimination. If fundamental rights can play an explicit role in the interpretation of Article 18 TFEU, it means that the material limitations and conditions on Union citizens' right to social equality must be examined as restrictions on their *fundamental right* to equal treatment and not just as restrictions on their *fundamental freedom* to move and reside.

6 Conclusions

It has been argued that the Court has already taken the law 'about as far as it can go' in the light of Directive 2004/38/EC and that the legislative 'enhancement of Union citizens non-economic status does not loom large on the political horizon'.[72] This, however, should not be

70 Opinion of AG Sharpston, 30 September 2010, in C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM), paras 163 and 165.
71 Ibid, para 170.
72 Elsmore – Starup, supra n 11, at 108.

seen as an obstacle to the further systematization of and debate on the role of general principles in defining Union citizens' right to equal treatment in the field of social welfare. A more explicit secondary legislation covering Union citizens' access to non-contributory minimum benefits, even if strongly recommendable[73], would still be subject to judicial interpretation just as any piece of secondary legislation. My analysis of the role of general principles should therefore be seen as complementary rather than competing to the powers of the Union legislature in this field. Moreover, by distinguishing between functional and constitutive general principles, this paper pointed out that, as an expression of the aims of integration, the constitutive general principles are equally relevant for the work of Union legislature and not just for the work of Union judiciary.

In this paper, I examined the role of general principles of Union law in defining the material limits of economically inactive Union citizens' right to social equality under Article 18 TFEU. First, this paper showed how proportionality as one of the general principle of Union law has become the major tool in defining who is protected against nationality discrimination under EU law. This development was then examined against the constitutionalization of Union law and, more particularly, against the changing role of general principles in defining social equality between Union citizens. It was argued that a more developed normative hierarchy between 'constitutive' and 'functional' general principles could provide guidance for the substance of proportionate and disproportionate differential treatment when the Court moves into the field of balancing and weighting. It was concluded that the judicial review of the material limits of Article 18 TFEU cannot be limited to the mere proportionality (functional) but that other general principles of Union law, such as equality (constitutive), must be used in

73 See e.g. H. Verschueren: 'European (Internal) Migration Law as an Instrument for Defining the Boundaries of Nationality Solidarity Systems', (2007) *European Journal of Migration Law* 9, 307 – 346, at 343 – 344.

search of substance for the social rights of Union citizens.