The Right to Family Reunification in the Spanish Law System

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I. INTRODUCTION

Economic immigration is a phenomenon that has diverse effects on the individual immigrants themselves as well as on their respective countries of origin and host nations. The two principle effects experienced in the host country are of an economic and social nature. From among the economic effects in the host country the most immediate is probably the availability of labour to cover those sectors where there is a shortage of national workers. The social effects arise when the immigrant population comes from a different cultural community and on occasion these can give rise to tensions. Furthermore, the host state does not entirely benefit from the economic productivity if the immigrant leaves his family behind in the country of origin because in that case he is faced with the obligation of sending them money to guarantee their subsistence. The fact of the matter is, the aim of the immigrant's unaccompanied arrival to the host country is that of finding employment with a view to sending money to his family, possibly putting away some savings and subsequently returning to his country of origin. In many cases, however, the situation is not as bright as expected and saving becomes very difficult leading to a feeling of solitude, uprooting from the family setting and difficulty in returning as soon as first thought leading many immigrants to bring their families to the host country as well. It is also quite possible that the immigrant never had the intention of returning in the first place. Family reunification means savings both for the immigrant (having his family with him means that he is no longer deprived of part of his salary and could even mean that another family member may also find work) as well as the host state given that the salary received by the immigrant is spent entirely in that country.

Moreover, it can be assumed that the phenomenon of "family immigration" will double the flow of immigration (if each brings his respective spouse) or increase it by three or four if they also bring one, two or more

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children.[1] Family reunification is and has been for some time now one of the channels through which immigration is taking place in Europe both in terms of aliens married to nationals of Member States as well as resident immigrants.[2] In light of the increase in the volume of the population through family reunification, forecasts of foreign labour needs could be surpassed if the reunified family members are fit to work.

Today, family reunification as an immigrant's "right" is the result of international commitments that are regularly entered into by democratic states such as Spain. From the perspective of the Spanish legal system, the rights protected by the Spanish Constitution such as the right "to personal and family privacy" (Art. 18.1), or Art. 32.1 that recognises the "right to contract matrimony" and the obligation on the part of the public authorities, in accordance with Art. 39.1 of assuring the "social, economic and legal protection of the family", do not imply the acceptance of nor do they assume family reunification as a constitutionally recognised fundamental right.[3] However, the LOExIS does not limit itself to the constitutional reference of the "right to

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[1] Forecasts indicate that family reunification in the case of the documented foreign nationals that are already living in Spain will increase the proportion of foreigners to 4% of the Spanish population accounting for 600,000 additional immigrants: the newspaper *El Mundo*, Tuesday 30 January 2001. J.Y. Carlier points to family reunification as one of the four characteristics of contemporary migrations in Europe: "De Schengen à Dublin en passant par Maastricht: Nouveaux itinéraires dans la circulation des personnes, leur incidence sur le droit international privé de la famille", in *Nouveau itinéraire en droit. Hommage à François Rigaux*, Brussels 1993, 131–151, p. 135. For information on family reunification in France and Germany see the doctoral thesis of F. Jault-Seseke, *Le reagroupement familial*, Paris 1996.

[2] In this sense see the case *Mouvement ASBL v. Belgium*, C-459, the conclusions of the Advocate General Ms. Christine Stix-Hackl, 13 September 2001, paragraph 27, in *http://www.europa.eu.int*.

[3] *Cfr.*, against, M. Moya Escudero, "Derecho a la reagrupación familiar", in M. Moya Escudero (coord.), *Comentario sistemático a la Ley de Extranjería*, Granada 2001, 673–707, p. 673. We are therefore in disagreement with M. Moya Escudero regarding his criticism of Art. 16.1 of the Organic Law on Aliens and Social Integration, 4/2000, of 11 January (*BOE* [Official State Journal] 12 and 24–01–00), partially amended by Organic Law 8/2000, of 22 December (*BOE* 23–12–00 and 23–2–01), [henceforth referred to as LOExIS] because he indicates that "alien residents have a right to family life and family privacy" in accordance with the said law and international agreements and treaties and goes on to state that this right is conditioned by legal residency status in Spanish territory by virtue of which the legislator "subordinates" a *constitutionally recognised right* (Spanish Constitution Art. 18) to compulsory legal residence in Spanish territory which is an administrative requirement and not a material one. It should be pointed out to Moya Escudero that the right to personal and family "privacy" stipulated in Spanish Constitution Art. 18 does not imply the right to "family life" because if that were the case it would not have been necessary to make explicit mention of both aspects in LOExIS Art. 16.

personal and family privacy",[4] but goes further still in Art. 16 both in its reference to family life (section 1) and the right to "reunite the family members specified in Art. 17" (paragraph 2) with them. This right to "reunify" is endorsed by the LOExIS pertaining to alien residents in Spanish territory. Regarding its application, the Law and its Implementing Regulation approved by Royal Decree 864/2001 of 20 July (henceforth referred to as the LOExIS Regulation), are responsible for indicating which families are eligible for reunification and the conditions and procedures to be followed in the said regrouping.[5] In this case we find evidence of the *vis expansiva* of this fundamental right that is capable of converting, due to the strength of its very regulatory nature, part of the content or elements that may be included (but that are not necessarily included) and comprise the exercise of the right to personal and family privacy into *a new right*,[6] although not necessarily a fundamental one. From this perspective the issue must be addressed whether *family reunification* is a fundamental right in and of itself or whether, on the other hand, it is a necessary extension in order to fully achieve "the right to family life." This is the aim of section II of this work, i.e. the identification of those international texts protecting Human Rights that could lead to this material duplication, this *vis expansiva* of the right to personal and family privacy.

From the perspective of the individuals affected, it should be considered that family reunification does not apply solely to aliens legally residing in Spain but also to Spaniards residing in Spain who have non-Spanish family members. Now, while the family members of the former group are subject to the LOExIS and its Regulation, the family members of the latter group are affected by Royal Decree 766/1992, of 26 June on the entry and stay in Spain of nationals from European Union Member States and other States party to the Agreement on the European Economic Area.[7] A distinction will therefore be drawn in section III of this work with respect to the active subject of family reunification between Spaniards and European Union citizens on the one hand and foreign nationals from third countries legally residing in Spain on the other. In the case of the former, citizenship as a complement to nationality creates a peculiar "personal statute" that in turn gives rise to a series of rights and duties characteristic of the European Union context that are exercised and protected in the intra-

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[4] It could also be considered that family "privacy" can be affected even if the family members reside in different countries and therefore its inclusion in Art. 6 of the LOExIS (2000) is not superfluous.

[5] We therefore cannot accept the opinion of M. Moya in loc. cit p. 764 that the LOExIS (2000) fails to recognise the "right" to reunite.

[6] In this sense it should be pointed out that paragraph (9) of the Council's amended Proposal regarding the right to family reunification – henceforth referred to as Directive proposal – (Brussels 10–10–2000, doc. COM (2000) 624 final, 1999/0258 CNS, Bull. 10-2000/1.4.2), indicates that, "To ensure protection of the family and the preservation or formation of family life, a right to family reunification *should be established* and recognised by the Member States." (The emphasis is ours.).

[7] *BOE*, 30–6–92 and 18–11–92.

IPTF	International Police Task Force for Bosnia-Herzegovina
IRPF	Personal Income Tax
ISM	Instituto Social de la Marina
ITU	International Telecommunication Union
IU	Izquierda Unida
IVAC	Instituto Vasco de Administración Publica
KLA	Kosovo Liberation Army
LECiv.	Ley de Enjuiciamiento Civil (Civil Procedure Law)
LECrim.	Ley de Enjuiciamiento Criminal (Criminal Procedure Law)
LGSS	General Social Security Law
LH	Ley Hipotecaria (Mortgage Law)
LJCA	Law on Contentious-Administrative Jurisdiction
LO	Ley Orgánica (Organic Law)
LOCE	Ley Orgánica del Consejo de Estado (Organic Law of the Council of State)
LODE	Ley Orgánica de Educación (Organic Law on Education)
LOPJ	Ley Orgánica del Poder Judicial (Organic Law on Judicial Power)
LOTC	Ley Orgánica del Tribunal Constitucional (Organic Law of the Constitutional Court)
LPL	Ley de Procedimiento Laboral (Labour Procedure Law)
LRC	Ley de Registro Civil (Register Office Law)
LSA	Ley de Sociedades (Company Law)
LTTM	Ley de Tribunales Tutelares de Menores (Juvenile Court Law)
MAE	Ministerio de Asuntos Exteriores
MARPOL	International Convention for the Prevention of Pollution from Ships
MEDWETCOM	Mediterranean Wetlands Committee
MINUGUA	UN Human Rights Verification Mission in Guatemala
MINURSO	UN Mission for the Referendum in Western Sahara
MINUSAL	UN Observation Mission in El Salvador
MO	Ministerial Ordre
MTAS	Ministerio de Trabajo y Asuntos Sociales (Ministry of Labour and Social Affairs)
NAFO	Northwestern Atlantic Fisheries Organisation
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organisation
NEAFC	Northeast Atlantic Fisheries Organisation
NGG	Nuclear Supplies Group
OAMI	Oficina de Armonización del Mercado Interior (Office for Harmonization in the Internal Market)
OAU	Organisation of African Unity

community territory by both the national law of the Member States as well as by Community law. The nationals of third countries, however, are not in this same situation although they may have similar or comparable rights in the event that a special relationship exists between the European Union and the State of his or her nationality as is the case with the Association Agreements and the Euro-Mediterranean Agreements.[8] This is to say that even in the case of nationals from third countries, a distinction should be made according to the special relationship that these countries may have with the European Community or with some Member State. With respect to the different classes of aliens, Jean-Yves Carlier believes that the European management of the migratory phenomenon has not only led to a wider gap between the Community citizens' statute and that of third country nationals but also among the latter themselves – drawing a distinction between those that have been residing on a regular basis for a certain period of time (five or ten years) and the rest.[9] In addition to these there are also intermediate categories of "privileged aliens" that range from students to those filing for asylum status and/or as refugees. These differences give rise to different protection mechanisms that lead us away from adherence to the principle of equality among foreign nationals proclaimed by the Council of Europe.[10] And finally, in section IV an analysis will be done of which family

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[8] In the Agreements between the European Community and the Eastern European and Maghreb countries there are clauses concerning equal treatment between nationals from the different States excluding all of those whose situation is not legal or normalised. In a general sense, one of a number of pertinent works is D. Duyssen's, "Migrant Workers from Third Countries in the European Community" in *CMLR* (1997), 501 *et seq.*, and regarding the differences between European Union citizens and nationals of third countries see A. Borrás Rodríguez, "Los ciudadanos no europeos en la Unión Europea" in *Sistema* (1993) issues 114–115, pp. 223–234, among others.

[9] The importance of this distinction that could give rise to new discrimination among aliens (third-country nationals) depending upon the duration of time they have resided in Community territory is evident in the Proposal for the Council Directive on the status of third-country nationals who are long-term residents (Doc. 510PC0127) that, with minor adjustments, received the assent of the Economic and Social Committee on 17 October 2001 (*OJ* C-36, of 8–2–02, 59–62,) and in which the recommendation is made to the governments of "United Kingdom, Ireland and Denmark" to take the decision to apply the Directive with a view to "making the right to free movement granted to long-term residents more of a reality." The purpose of this Directive is to give the nationals of third countries that are long-term residents the same rights as Community residents including the right to be accompanied by family members on their journeys. Now, given that the Proposal for the Directive does not envision the granting of long-term resident status to family members, the Social and Economic Committee has recommended a modification of the Directive in this sense (sections 3.4.1 and 3.4.2). In the 4 March 1996 Council Resolution on the status of third-country nationals who are long-term residents in the territory of the Member States (*OJ C*-80, 18–3–96, 2–4), the maximum term of legal and ongoing residence recommended to consider a person a "long-term resident" should be ten years.

[10] "De Schengen à Dublin ... " loc. cit., p. 144.

members are eligible for reunification and under what circumstances while section V will provide a brief reference to the procedure and requirements necessary to achieve this reunification focusing always on the Spanish legal system and common practice as a point of reference.

II. FAMILY REUNIFICATION AND HUMAN RIGHTS

An analysis of Human Rights texts such as the 1948 United Nations Convention, its covenants, even the Convention on the Protection of the rights of all immigrant workers and their families[11] or the European Convention on Human Rights shows that there is no explicit recognition of "family reunification" as a human or fundamental right. These texts indicate that the family is a natural and fundamental element of society that has the right to be protected by that society and by its public authorities. The right to marry and have a private and family life and children's right to have a relationship with both parents is also proclaimed. It is true that indirectly all of these rights could lead one to the conclusion that family reunification is a right.[12]

Neither does the Charter of the Fundamental Rights of the European Union, despite the attention it gives to the problems and rights of immigrants, focus on family reunification as a fundamental right to be protected.[13] Art. 7 of the Charter recognises that "everyone" has the right to respect for his or her "private and family life" and Art. 9 guarantees the right to marry and the right to found a family "in accordance with the national laws governing the exercise of these rights." Protection of family and professional life should focus on three essential aspects: legal, economic and social in order to guarantee conciliation

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[11] With regard to this Convention that has not yet entered into force, see, A. Álvarez Rodríguez, "Contenido jurídico de la Convención Internacional sobre la protección de los derechos de todos los trabajadores migrantes y de sus familias" adopted by the United Nations General Assembly by virtue of Resolution 45/158 of 18 December 1990" in *Migraciones* (1999-5), 121–160. Also see our work "Inmigración y Derechos Humanos" in *Social Mes a Mes*, no. 61, March 2001, 36–44, Ediciones Francis Lefebvre.

[12] Art. 16.3 of the Universal Declaration of Human Rights of 1948; Art. 23.2 of the International Covenant on Civil and Political Rights of 1966; Art. 17 of the International Covenant on Social, Economic and Cultural Rights of 1966; Art. 8 of the European Convention on Human Rights of 1950; Arts. 9 and 10 of the Convention on the Rights of the Child of 1989. With regard to respect for private and family life described in Art. 8 of the European Convention see F. Rigaux, "La liberté de la vie privée" in *Revue internationale de droit comparé* (1991) no. 3, 540–563.

[13] *OJ* 200/C, 364/01, of 8 February 2000. An analysis of the content, background, drafting and context of the Charter is found in M. Pi Llorens, *La Carta de los Derechos Fundamentales de la Unión Europea*, Serv.Pub.Univ.Barcelona, Barcelona 2001, especially pp. 47–75; and A. Salinas de Frías, *La protección de los derechos fundamentales en la Unión Europea*, Granada 2000.

between family and professional life when children's needs must be met and to favour social, legal and economic integration.

Although the texts cited do not recognise family reunification as an independent right, this is not the case with Art. 19 of the second part of the European Social Charter on "The rights of migrant workers and their families to protection and assistance", by virtue of which the signing Parties commit:

> "6. To facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;"

Spain has not formulated any reservation regarding this Article of the European Social Charter[14] thus making the text binding for our country. The issue, therefore, is whether this Article of the European Social Charter, despite the limitations concerning the personal scope of application of the Social Charter itself (included in its Appendix), is or could be applied *directly* by the Spanish authorities.[15] In section 1 of the Appendix to the Social Charter it is made clear that those protected by Arts. 1 to 17 "include foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned." However, the personal scope may be enlarged to include the nationals of States that are not party to the said Social Charter.[16] Now, even though Art. 19 is beyond the scope of that explanation, nothing stands in the way of considering that it refers to the rights of migrant workers and their families to "protection and assistance," regardless of whether they are nationals or not of a Contracting State to the European Social Charter. We therefore find ourselves faced with broad and poorly defined terms that need to be specified in each case by judicial means.

What is most paradoxical about the European Social Charter is that in its Appendix, in clarifying the concepts used it indicates that for the purpose of Art. 19.6 "the term 'family of a foreign worker' is understood to mean at least his wife and dependent children under the age of 21 years". This is to say family is

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[14] In the Declaration contained in the instrument of ratification, deposited on 6 May 1980, Spain declares that it will interpret and apply article 5 and 6 of the European Social Charter, read jointly with article 31 and the Appendix to the Charter, in such a way that their provisions will be compatible with articles 28, 37, 103.3 and 127 of the Spanish Constitution. It goes on to state that the Declaration contained in a letter from the Permanent Representative dated 4 December 1990, registered at the Secretary General on 4 December 1999 formalises the failure to accept Article 8(4) (b) as of 3 June 1991 with reference to Article 37.

[15] This direct application has taken place in France according to G. y A. Lyon-Caen in the book *Droit social international et européen*, 8éme ed. Paris 1993, p. 138.

[16] With respect to foreign nationals, the European Social Charter guarantees the same rights as to nationals if they are nationals of states which have ratified the Charter and who reside lawfully in another country Party to the charter. In practice however, many states apply most of their rights to all foreign nationals lawfully residing within their territory regardless of their nationality.

defined as the wife **(esposa)** of the worker and his dependent children under the age of 21. The international legislator therefore was of the opinion that either only men have the right to reunite with their spouses or that migrant women do not exist. The former hypothesis did not seem to make sense and we therefore accepted the historic fact that during the 60's the majority of the migrant population was male.

It is true, however, that the commitment that the Contracting States have with Art. 19.6 is not absolute because it textually states "as far as possible" which permits setting certain discretionary limits to the ordre public. The conclusion that can be taken from this text is that the Contracting States recognise the fact that migrant workers have a need to live with their families in the place where they work and are permitted to adopt measures protecting their socio-economic principles. This is to say that the immigration policy adopted by the State cannot ignore the phenomenon of "family immigration" that, over the long term, will benefit or facilitate the integration of the aliens in the host state because the children will attend school and because the family as a unit is more likely to engage in social activities than one individual member. This is over and above the psychological and economic well-being that family life contributes to the immigrant worker.

On the other hand, in the European Convention on the Legal Status of Migrant Workers done in Strasbourg on 24 November 1977[17] pertaining to "migrant workers," subjects of Council of Europe Member States, Art. 12 states as follows:

"1. The spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the receiving State, who are dependent on the migrant worker, are authorised on conditions analogous to those which this Convention applies to the admission of migrant workers and according to the admission procedure prescribed by such law or by international agreements to join the migrant worker in the territory of a Contracting Party, provided that the latter has available for the family housing considered as normal for national workers in the region where the migrant worker is employed. Each Contracting Party may make the giving of authorisation conditional upon a waiting period which shall not exceed twelve months.
2. Any State may, at any time, by declaration addressed to the Secretary General of the Council of Europe ..., make the family reunion referred to in paragraph 1 above further conditional upon the migrant worker having steady resources sufficient to meet the needs of his family.
3. Any State may, at any time, by declaration addressed to ..., derogate

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[17] *BOE* 18–6–83. Ratified and in force in France, Italy, the Netherlands, Norway, Portugal, Spain, Sweden and Turkey.

> temporarily from the obligation to give the authorisation provided for in paragraph 1 above, for one or more parts of its territory which it shall designate in its declaration, on the condition that these measures do not conflict with obligations under other international instruments. The declaration shall state the special reasons justifying the derogation with regard to receiving capacity.
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> ...
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> The derogation shall not, as a general rule, affect requests for family reunion submitted to the competent authorities, before the declaration is addressed to the Secretary General, by migrant workers already established in the part of the territory concerned."

In this international text the use of the term "spouse" does not refer exclusively to the wife. In the Explanatory Report on the European Convention on the Legal Status of Migrant Workers, the comment made with reference to Art. 12, paragraph 1 clarifies that "It was specified that the term 'spouse' is intended to apply to both sexes".

Summarising the above it can be said that:

1. The right to private and family life is recognised in international texts in a very broad sense.
2. The right to a "family life" means the possibility or the right of migrant workers to reunite with their families as long as both the former as well as the latter meet certain requisites the aim of which is to assure the economic and social stability of the reunited family and which are set out in each country's legal system.
3. The States should foster family reunification although they may equally defend the preservation of socio-economic balance within their country. In order to achieve this the different interest at stake will have to be weighed.
4. Within the European Union, the proposal for a Directive on family reunification is considering the appropriateness of "establishing" the right to family reunification.

Having studied the Human Rights texts, we must now turn our attention to how this translates into practice. In this respect it can be said that the decisions taken by the European Commission of Human Rights (until its extinction) and the judgements delivered by the European Court of Human Rights (henceforth referred to as the ECHR) are not very clear. This is true to such a degree that the Commission on Human Rights has stated that nothing holds foreign nationals back from returning to their countries of origin to rejoin their families and they therefore may not invoke Art. 8 of the Convention to obtain a residence or temporary permit.[18] The ECHR failed to overturn this decision affirming in the

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[18] Decision of the Commission taken on 6 July 1981 in the Y. *v.* Sweden case, 9105/80 and, more recently, in the ECHR sentence in the Gül *v.* Switzerland case, of 19

Abdulaziz, *Cabales* and *Balkandali* cases[19] that it is a firmly established principal of Public International Law that states possess the sovereignty to determine the conditions to be met in order to gain access to their territories and to establish their own immigration policy that cannot be called into question by the ECHR. The argument behind these decisions is as follows. Although Art. 8 of the European Convention obliges the Contracting Parties to respect family life and to adopt necessary protective measures, it does not impose any obligation to respect the decision taken by the married couple regarding their common place of residence nor does it accept the establishment of the non-national spouse in its territory[20] and the Commission considered it legitimate that the States adopt measures not to admit family members when nothing is keeping the family from living as a unit in the country of origin. Moreover, the need to maintain the economic and social order of the host state is added to the above. The European Convention also represents a guarantee for foreign nationals insofar as making an interpretation of the on-site interests by weighing the circumstances and applying the principle of proportionality. From this perspective it is our view that in the 21 December 2001 ECHR judgement[21] this weighing of the circumstances focuses on those that surround the case and deals with elements that appear separately in earlier cases and therefore serves us well as a summary and compendium:

1. Children born within the marriage union are automatically an integral part of family life because from the very moment of their birth a relationship is established between the child and its parents that constitutes family life[22] and this cannot be subsequently foregone except in the case of exceptional circumstances.[23]
2. Family relations are ever-changing and therefore do not have an absolute character and can vary in accordance with social and economic circumstances.[24]
3. The birth of one or more children in the host State does not pose an obstacle to returning the parents to the State of origin.[25]
4. The Government's obligation to admit into its territory the immigrant's

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cont.

February 1996, *Rec.* 1996-I, pp. 173–174 and the Ahmut *v.* the Netherlands case of 28 November 1996, *Rec.* 1996-VI, pp. 2030 ss.

[19] ECHR sentence of 28 May 1985 in *Rec.* ECHR Series A, Vol. 94, p. 34 paragraph 68.

[20] The Cruz Varas case, ECHR decision of 20 March 1991, Series A, no. 201.

[21] Sen *v.* the Netherlands case 31465/96 in *http://www.echr.coe.int.*

[22] Gül *v.* Switzerland case, 19 December 1996, *Rec.*, 1996-I, pp. 173–174, paragraph 32 and Boughanemi *v.* France, 24 April of 1996, *Rec.* 1996-I, p. 608, paragraph 35.

[23] Berrehab *v.* the Netherlands, 21 June 1988, Series A no. 138, p.14, paragraph 21 and Ahmut *v.* the Netherlands of 28 November 1996 in *Rec.* 1996-VI, p. 2030, paragraph 60.

[24] See Sen *v.* the Netherlands, *cit.* in note 21, paragraph 33.

[25] See Gül *v.* Switzerland, paragraph 38.

family members depends on the general interests of the State that has the jurisdiction to control the entry of foreign nationals into its territory. Moreover, in accordance with Art. 8 of the European Convention, the decision that a couple takes with regard to their place of residence cannot be interpreted as a general obligation of the State binding and obligating it to family reunification in its territory.[26]

5. Notwithstanding the above, the best interests of the minor must be taken into account mindful of age and the situation prevailing in the State of origin as well as parental dependence that, in the *Sen* case, was interpreted as greater integration in the State of origin where the child lived with his mother until the age of three at which time he was left in Turkey living with an aunt until the age of nine when his parents requested reunification.[27]
6. There are exceptional socio-economic circumstances that could hinder the return of immigrants to the State of origin in light of difficulties in procuring employment and a decent standard of living. This is to say that family stability in the host country could make family reunification recommendable.[28] For that reason the States should take a balanced stock of immigrants' interests on the one hand and their own interest in controlling immigration on the other.

III. ACTIVE SUBJECTS OF FAMILY REUNIFICATION

1. Rennification with a Spanish national and/or European Union citizen

A. Application of Community law

In this section the active subject of family reunification is a citizen of a European Union Member State that could be Spanish or from another State. In neither of these cases may national regulations be studied in isolation because simultaneous consideration must be given to Community law that cannot be contravened by the former. It should be pointed out that Community law in force does not contain any regulation concerning family reunification except in the case of nationals of third states that share some sort of kinship with nationals of Member States that exercise their right to free movement or to provide services.

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[26] Gül cited above, paragraph 38 and Ahmut *cit.* p. 67.

[27] Sen case, citation from paragraph 40.

[28] With regard to this issue, in the Sen case it was considered that Mr. Sen had an establishment permit, his wife a residence permit and their two children born in the Netherlands were integrated and attended school in the Netherlands. Abandonment of this situation of economic and family stability or having to renounce the reunification of their child who is living in Turkey is a very difficult decision for a family of immigrants: see paragraph 41 of the judgement.

There is, however, a 1993 Council Resolution on the harmonisation of national policies as regards family reunification[29] (that lacks binding legal authority due to the technique employed) and the amended proposal of the Commission Directive on family reunification[30] that includes in its scope of application foreign family members of European Union citizens that do not exercise their right to free movement. This means that under Community law currently in force there are differences between third-country nationals whose spouses (Community citizens) exercise their rights derived from Community legal order and third-country nationals whose spouses have never exercised these rights.[31] And, if it is considered that the Resolutions are not legally binding and the fact that the Directive has yet to be approved, the most significant regulation that could be directly applied and that would take precedence over national law is Art. 10 of Council Regulation 1612/68 of 15 October 1968,[32] that states:

"1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

a) His/her spouse and their descendants who are under the age of 21 years or are dependants;

b) Dependent relatives in the ascending line of the worker and spouse.

2. 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.

3. For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; this provision, however must not give rise to discrimination between national workers and workers from the other Member States."

This means that the legal status of foreigners who are third-country nationals and who are part of the family of a Member State national resident in that same Member State, is determined by the autonomous law of the Member State in

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[29] Council Document SN 2828/1/3 WGI 1497 REV 1.

[30] See note 6 of this work.

[31] For more on this topic see the K. Poirrez case, C-206/91, 16–12–1992, *Rec.* (1991-I), pp. 6685 and subsequent.

[32] *OJ* L 257, 19–10–68. Of the many texts on this Regulation see D. Martin, *La libre circulation des personnes dans l'Union Européenne*, Brussels 1994; M. I. Lirola Delgado, *Libre circulación de personas en la Unión Europea*, Madrid 1994 and P. Jiménez de Parga Maseda, *El derecho a la libre circulación de las personas físicas en la Europa Comunitaria*, Madrid 1994. Communications of the Commission to the Council and to the European Parliament on a common immigration policy of 15 November 2001: COM/2001/0672.final may also serve as interpretive elements.

question,[33] without prejudice to the fact that Community law recognises their right to reunify in light of the special link that they have with the European Community forming part of the family of a European Union citizen.[34] We should therefore begin with the premise that, regardless of whether the third-country nationals are family members of a Spanish national or of a national from another Member State, their regulation should conform to the legal indications of the principles of Community law in force but with the application of the legal system operating in the Member State in which reunification is envisioned. This is to say that secondary legislation should be interpreted in light of the original law and that Member States' autonomous law is subordinate to the former two. It is in this context, therefore, that the application of the right to family reunification to the family members of Member State nationals who do not exercise any of the Community freedoms is deemed impossible; to state it in another way, Community law does not apply to those situations considered merely internal of a Member State.[35] If the necessary Community element does not concur (if a European Union citizen fails to exercise his/her rights under the Community legal system), that person and his spouse or family member who is a third-state national will be subject exclusively to national law both with regard to free movement as well as the right to residency status.

From this perspective, when the application of Community law prevails the Member States shall be under obligation to permit the entry into their respective territories, upon "presentation of a valid passport or identification card[36]", of family members of EU citizens that are nationals of third countries, even though it is added that Member States *may* require a visa in which case they must grant a broad range of facilities for its procurement. This requirement is not overridden by the list of third countries whose citizens must have a visa to enter into Community territory affecting all nationals of these countries,[37] regardless of their family ties to a European Union citizen. There is, therefore, no *obligation* on the part of the Member State to grant a visa but rather to facilitate the

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[33] For more information on this issue see the K. Poirrez case cited in note 31.

[34] See Art. 1 of Council Directive 68/360 of 15–10–68 on abolition of restrictions on movement and residence within the Community for workers of Member States and their families: *OJ* L-257, p. 13; and Art. 1 of Council Directive 73/148 of 21–5–73 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services: *OJ* L-172, p. 14.

[35] In this sense refer to judgments delivered by the ECCJ on 21 October 1999, Jägerskïold, C-97/98, *Rec.* (1999-I), p. 7319 and on 16 January 1997, USSL n. 47 di Bielle, C-134/95, *Rec.* (1995-I), p. 95.

[36] Art. 3.1 Directives 68/360 and 73/148.

[37] The list of these countries is found in Council Regulation (EC) 574/1999 of 12 March 1999 (*OJ* L-072, 18–3–99, pp. 2–5, amended by (EC) Regulation 539/2001 of 15 March 2001 (*OJ* L-081, 21–03–01). It should not be forgotten that these regulations are not applicable in the United Kingdom or Ireland.

process whether this be by simplifying the procedure or the material requirements. In short, Member States *may require a visa* of family members of European Union citizens that are third-country nationals and in fact *should require* it when the nationality of the said nationals is that of a country included on the list. In both cases however, the lack of an identification document (passport, identification card) and/or a visa, gives the Member States the right to refuse entry into their territory of the foreign family members of a European Union citizen. However, despite the lists of States whose nationals must procure a visa, in special cases the Member States may exempt certain categories of persons from the visa requirement or, on the other hand, require it.[38] No special mention is made, however, of family ties as a circumstance to be considered in exempting one from the visa requirement.

Despite what has been said so far, here we are dealing with "privileged aliens" and this means that any measure that restricts the right to respect for family life should be in consonance with the principle of proportionality both because it is a fundamental and protected right,[39] as well as because respect for family life presupposes a positive consequence and a negative obligation placed on Member States. The positive consequence takes the form of the Member States' duty to permit entry into their territory of certain family members of Member State nationals and the negative obligation implies that the Member States may not interfere with the right of spouses to live together.[40] With the sole purpose of protecting national security, public health and public order (crime prevention and protection of morals and rights and freedoms) the Member States may take action that interferes with the right to respect for family life. Therefore, before any measure is taken, public and private interests should be weighed before limiting the right to respect for family life.[41] It can thus be observed that in Europe the same criteria that were mentioned above when analysing ECHR case law are being followed.

Community law regulation is found in a series of Directives that have moulded the legal and regulatory framework developed by the Member States. It

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[38] Art. 4 of the mentioned Regulation provides for a list of categories of people that includes the crews of ships, aircraft, etc.

[39] See Art. 6.2 of the TEU and the interpretation offered by the ECCJ in the Connolly case, C-274, judgement of 6–3–01, paragraphs 37–38.

[40] For more information on these aspects see judgements in Commission *v.* Germany of 18–5–89, C-249/86 in *Rec.*, p. 1263 and Johnston of 15–5–86, C-224/84 in *Rec.*, p.1651. Also see the ECHR judgement of 13–6–79 in the Marckx *v.* Belgium case in Series A, no. 31, paragraph 31.

[41] Art. 8 of the Directive proposal foresees the possibility for Member States to deny the entry and residence of family members for reasons of "public policy, domestic security and public health," the former two only with respect to the personal conduct of the individuals and with the clarification, relative to the third cause for denial, that in the event of the appearance of illness or disability subsequent to reunification, neither the extension of the permit nor the expulsion of the alien is justifiable.

would therefore be helpful to gain an understanding of this legal background with a view to assessing the degree to which State laws conform to the above-mentioned Directives. Extrapolating from Council Directives 64/221/EEC of 25 February 1964 and 68/360/EEC of 15 October 1968, the following conclusions can be made:

a) The Member States will admit into their territory family members of a European Union citizen who has exercised one of the Community freedoms by means of the "simple presentation of an identification card or a valid passport" (Art. 3 Directive 68/360 and Art. 3 Directive 73/148).
b) The Member States may require a visa or similar credential of third-country nationals[42] who are family members of a European Union citizen. However, a commitment is made to facilitate this process but this is not to say that an alien who does not have the documents or visa required by the Member States cannot be refused entry (Art. 3.2 Directive 68/361).
c) The Member States shall recognise the right of alien family members of Community citizens to remain in their territory provided they present the following documents: document used to gain entry into Community territory, document issued by the competent authority of the state of origin or the state from which they came verifying kinship or proving – depending upon the case – that they are dependent upon the Community citizen or that they reside with the latter in that country (Art. 4 Directive 68/360 and 4.3 Directive 73/148).
d) The Member States shall issue a residency document with the same validity as the one issued to a Member State citizen working and residing in another Member State. Furthermore, family housing should be of normal standards in accordance with the labour category and the place of residence (Art. 10 R. 1612/68).
e) Expiration of the identification document permitting entry or by virtue of which the residency permit was issued (Art. 3.3 Directive 64/221) or expiration of the visa by the time application for family reunification is filed shall not be considered valid motives for the expulsion from the territory of Member States of reunified aliens.[43]

Expulsion from the territory of a state is a public order measure and therefore can only be based on the personal behaviour of the individual (Art. 3.1 Directive 64/221) and the mere existence of a criminal conviction does not, in and of itself, constitute a motive for expulsion.

Member States may only refuse entry to family members when this refusal is

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[42] We refer here to the third states that are not included in the visa Regulation cited in note 37.

[43] Among others see the Mouvement contre le racisme, l'antisémitisme et la xénophobie case, ASBL *v.* Belgium C-459/99, concluding statement made by the Advocate General Ms. C. Stix-Hackl of 13–9–01.

in compliance with the right to respect for family life and is in keeping with the principle of proportionality that applies to the said measure.[44]

Member States may only refuse a residency permit to alien family members of a European Union citizen that entered the country illegally and may only adopt expulsion measures if these are compatible with the right to respect for family life and the principle of proportionality.[45]

Here we are dealing with a right that is derived from another right; i.e. that is based on a right held by a European Union citizen, and it is therefore not an independent or autonomous right but rather is linked to a primary right of a Member State citizen without whom the derived right would not exist.[46] The right to family life is bestowed on Member State citizens and the latter's family members are therefore the indirect beneficiaries of the said right. Community law can only be applied, however, if one of the Community freedoms is exercised. The debates waged in the ECCJ regarding discrimination among alien family members of Community citizens that exercise their right to free movement and those that do not exercise the said right have led to the setting of the objective of reunification not only of family members of third-country nationals legally residing in Community territory but also of European citizens that do not exercise their right to free movement (Art. 1) in the amended proposal of the Directive on family reunification.

But far from establishing a regulation *ex novo*, Art. 4 of the Directive proposal provides for the application of Arts. 10, 11 and 12 of Council Regulation (EEC) 1612/68 to this group of people. Alien family members of Member State citizens, regardless of whether they exercise their right to free movement, thus comprise a group of "privileged" aliens as long as they maintain a situation of family and/or economic dependence on the European citizen. As is affirmed in paragraph (12) of the Directive proposal:

> "To avoid discriminating between citizens of the Union who exercise their right to free movement and those who do not, provision should be made for the family reunification of citizens of the Union residing in countries of which they are nationals to be governed by the rules of community law relating to free movement."

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[44] Refer again to the case: Mouvement contre . . . .

[45] Among other cases see: Royer, C-48/75, 8–4–76 (*Rec.*, p. 497, paragraphs 33 and 42); Watson and Belman, 118/75, 7–7–76 (*Rec.*, p. 1185, paragraph 21); Sagulo, 8/77, 14–7–77, (*Rec.*, p. 1495, paragraph 6); Adoui and Cornuaille, accumulated 115 and 116/81, of 18–5–82 (*Rec.*, paragraph 15); Santillo, 22–5–89, 131/79 (*Rec.*, p. 1585); Pieck C-157/79, 3–7–80 (*Rec.*, p. 2171, paragraph 20); Coote , 22–9–98, C-185/97 (*Rec.*, p. I-5199, paragraphs 20 subsequent) Shingara and Radiom, accumulated C-65/95 and C-111/95 (*Rec.*, p. I-3343) and Metallgesellschft Ltd. and others, accumulated C-397/98 and C-410/98, paragraph 85.

[46] Diatta case, 13–2–1985, 267/1983, in *Rec.* 1985, pp. 567 and subsequent; also the Lebon case, 316/85, in *Rec.* 1985, pp. 2838 and subsequent.

B. Application of Spanish law

From the Spanish perspective, Royal Decree 766/1992 of 26 June[47] on entry and permanence in Spain by nationals of Member States of the European Communities as well as its amendment by Royal Decree 737/1995 of 5 May[48] and Royal Decree 1710/1997 of 14 November,[49] the right to enter Spanish territory, regardless of nationality, of family members of Spaniards and other Member State nationals that, in the case of spouses, should not be separated by the law, can be deduced.[50] We say *can be deduced* because the norm cited regulates the freedom of movement of persons and the said norm cannot be exercised unless entry and/or residency permit was previously obtained. References to Community law should be interpreted, as far as Spanish nationals and their alien family members desirous of reunification are concerned, in the sense of guiding regulations leading to the objectives, principles and values set out by the European Union. Mention should be made here, as Álvarez Rodríguez points out, that the ECCJ has declared that Community regulations concerning the free movement of persons may not be invoked by a Member State national against that Member State of which he/she is a citizen "because the legal relationship that a Member State has with its citizens is beyond the scope of Community law".[51] We do not share the opinion of this author, however, that Royal Decree 766/1992 has incurred in "a lack of precision" when it defines the personal scope of application. It makes it sufficiently clear that the family members of Spaniards listed and that are third-country nationals find themselves in a "privileged" situation in that they are subject to the same laws as the rest of

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[47] This Royal Decree incorporates Directive 90/364 into the Spanish legal system: *BOE* 30–6–92. With regard to Royal Decree 1099/86 of 26 May on entry, permanence and working in Spain of the citizens of the European Communities Member States repealed by the Royal Decree cited above, see the work by J.L. Iglesias Buhigues "Entrada, permanencia y trabajo en España de los nacionales de los Estados miembros de la Comunidad Europea" in *La Ley. Com. Eur.* (1986-2), pp. 25 and subsequent; and with regard to Royal Decree 766/1992 of 26 June, see A. Álvarez Rodríguez, "La ley española de extranjería: problemas que plantea en materia de discriminación por razón de nacionalidad" in *Cursos de Derechos Humanos de Donostia-San Sebastián,* vol. I, Bilbao 1999, 247–303, especially pp. 250–251 and bibliography cited therein.

[48] *BOE* 5–6–95. This Royal Decree and the Regulation of the LOEx (1985) were developed by Ministerial Order of 11 April 1996 on visa exemptions.

[49] *BOE* 15–11–97.

[50] Álvarez Rodríguez, A., "Régimen de extranjería comunitaria en el ordenamiento jurídico español (Analysis of Royal Decree 766/92 on the entry and permanence in Spain of European Community Member State nationals)", in *La Ley. Com. Eur.* (1993) no. 80, 1–9; Aprell Lasagabaster, A., *Régimen administrativo de los extranjeros en España. Ciudadanos comunitarios y nacionales de terceros Estados*, Madrid, 1994, especially pp. 126–127 and 160–163.

[51] "La ley española ... " in *Cursos de Vitoria* (1999), p. 262, note 40.

the European Union citizens (nationals of other Member States).[52] All the rest of the aliens are subject to the Spanish Alien Law; i.e. the LOExIS and its Regulation.

The specific rights attributable to the family members of Spanish nationals are free entry, exit, movement and permanence in Spanish territory provided that the requirements set out in Royal Decree 766/1992 of 28 June have been met.[53] In order to exercise these rights, application should be filed for a residency card and the following requirements should be met:

a) Passport or identification card should be presented and should indicate nationality and contain the corresponding visa (visa issued free of charge) (Art. 5 Royal Decree 766/1992).
b) A five-year residency permit will be issued (Art. 6.5 Royal Decree 766/1992) and no prior period of permanency in Spanish territory shall be required.[54]
c) In order to be issued a residency permit documents accrediting kinship, that the alien depends economically on the sponsoring Spanish citizen and a residency visa stamped in the passport must be presented although a waiver may be granted from this last requirement (Art 10.3 of Royal Decree 766/1992).[55] In the 21 January 1996 judgement on the reunification of a third-state national married to an Italian citizen that was working and residing in Spain, the Supreme Court expressed the view that although the alien was in Spanish territory, he should not be made to leave the country with the sole objective of requesting a waiver of the residency visa, especially considering

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[52] These family members referred to in Art. 2 of Royal Decree 766/1992 of 26 June are: "a) ... spouse providing that he/she is not legally separated. b) ... descendants and the spouse's descendants, providing that he/she is not legally separated, under the age of 21 or over that age if they are economically dependent. c) ... ascendants and those of the spouse providing that he/she is not legally separated and that they are economically dependent and their respective spouses, that would not otherwise have the right to residency."

[53] Among others see STSJ (Basque Country), 17–6–99, in *RJCA* 1999/2741. In this judgement the right to visa exemption for residency permit "for humanitarian reasons" is granted to a Chinese national who had established a de facto union with a Spanish citizen.

[54] In this sense the STSJ (Basque Country), 11–6–99 (*RJCA* 1999/2741) points to the fact that Arts. 2 and 6.5 of Royal Decree 766/1992 recognise that the spouse of a Spanish citizen who is not legally separated " ... has the right to remain in Spain without being subject to any specified number of years of marriage. The legal fact of matrimony alone gives rise to the subsequent obligation on the part of the governing authority to issue a residency card to the spouse of the Spanish national "in all cases."' Therefore, the three-year requirement set out in the 1996 Ministerial Order of 11 April is not applicable.

[55] For more information on visa exemptions due to exceptional circumstances such as family ties see, among others STSJ (Canary Islands) 14–9–99, *RJCA* 1999/3943; SSTSJ (Basque Country) 17–6–99, 13–5–99 and 6–5–98, *RJCA* 1999/2741, 1999/1856 and 1998/3651, respectively.

that he already possessed a residency permit from another country.[56] In the view of the Spanish Supreme Court, family reunification is one of the "exceptional circumstances" referred to by the LOEx (1985) and its Regulation in the granting of waivers to the visa requirement. Moreover it expressed the opinion that the fact that this is an undetermined legal concept does not give the Administration the freedom to adopt arbitrary resolutions.[57]

d) For reasons of public order, public security or public health, the Spanish authorities may block entry even if the subject in question is in possession of all required documents and may refuse to renew/issue residency cards and may order expulsion as well. These decisions, however, should be founded on the personal behaviour of the subject affected (Art. 15 of Royal Decree 766/1992).

e) The expiration of identification documents/passport does not justify expulsion from Spanish territory or the refusal of a visa waiver. An expulsion decision may only be taken if certain conditions are met guaranteeing the defence of the interested party (Arts. 16 and 17 of Royal Decree 766/1992).

f) Moreover "The Ministry of the Interior has the prerogative of authorising entry, transit or permanence in Spanish territory of aliens with faulty documentation (or even with no documentation) or in the case of those that may not have entered the country by means of proper border crossings as long as there is sufficient cause."[58]

g) Moreover, the fact that family reunification is based on frequently occurring situations does not mean that they should not be considered as exceptional circumstances. In this sense the Supreme Court considers that the fact that the frequency of these situations is relatively high should not lead to a restrictive or limiting interpretation of this right given that the "exceptional circumstances" that call for exclusion from the visa requirement do not have the simple meaning of "temporary, opposed to and opposite of frequent, normal or ordinary but rather have a quantitative value equivalent to important, transcendent or weighty independent of the frequency or reiteration with which they are produced".[59]

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[56] Along these same lines, SSTS 24–4–93 (*RJA* 1993/2766; 21–5–94 and 19–12–95, in application of Art. 5.4 and 22.3 of Royal Decree 1119/1986 of 26 May in development of LOEx (1985).

[57] SSTS 24–4–93 (*RJA* 1993/2766; 18–5–93 (*RJA* 1993/3757); 10–7–93 (*RJA*); 8–11–93 (*RJA*); 19–12–95 (*RJA*) 22–6–82 (*RJA* 1982/4829); 13–7–1984 (*RJA* 1984/4673) and 9–12–86 (*RJA* 1987/1023), among others.

[58] Along these lines see SSTS of 1–10–92 and 14–11–92 in *RJ* 1992/7742 and 1992/8937, respectively.

[59] Among other see SSTS 4–4–93 (*RJA* 1993/2766; 10–7–93 (*RJA* 1993/5500); 8–11–93 (*RJA* 1993/8607); 21–5–94 (*RJA* 1994/4277) and 19–12–95 (*RJA* 1995/9422).

2. Reunification with third-state nationals

As was mentioned in the introduction of this work, when referring to third-state nationals we should not limit our distinctions to those that are European Union citizens and those that are kin to a Spanish national or a citizen of another EU country. We may also find differences with regard to the nationality of the alien. In this sense there is a group of states to which efforts are made to apply a more favourable regime in light of the close ties with our country and the fact that they share a cultural identity with our society.[60] This is the case with nationals from the Latin American countries, Portugal, the Philippines, Andorra, Equatorial Guinea and Sephardic Jews when it comes to granting Spanish nationality by virtue of residence (Art. 22.2 of the Civil Code). In these cases the residence time requirement is reduced from ten to five years. Despite this advantage given to certain nationalities, greater emphasis is still given to being or having been a family member of a Spanish national in which case one year of legal residence in Spain is required (spouse who is not legally or *de facto* separated, widow/widower in the same conditions and son or daughter of a Spaniard). This indicates that even with respect to Nationality law, family ties have greater relevance than nationality of origin.

With regard to legislation relating to aliens, the intention was to provide "privileged" treatment to the nationals of these countries but in practice this advantage was limited to expediting the processing of their work permits and waivers from fee payments but they did not receive any special benefit except for the possibility for a waiver of the visa requirement.[61] In the LOEx (1985) greater emphasis was placed on being a family member of a Spanish national independent of the "special" nationality of the alien.[62] This fact is made clear

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[60] Among others see: S. Adroher Biosca, "Los iberoamericanos en el Derecho español" in *RCDI* (1996), no. 636, 1867–1903; A. Álvarez Rodríguez, "Los nacionales de los países iberoamericanos ante el ordenamiento jurídico español: eventual acceso y permanencia en la Unión Europea" in *La frontera, mito y realidad del nuevo mundo*, Serv. Public. Univ. de León, León 1994, 376–378; "La ley española de extranjería: problemas que plantea en materia de discriminación por razón de nacionalidad" in *Cursos de Derechos Humanos de Donostia-San Sebastián*, vol. I, 247–303; J.A. Miquel Calatayud, "El régimen preferencial en materia de extranjería y los nacionales iberoamericanos" in *RCDI* (1993), no. 616, 875–933.

[61] See development of these aspects in the LOEx (1985) in Álvarez Rodríguez "La ley española ... " *loc. cit.*, pp. 275–281.

[62] With regard to the issuing of work permits, the wording of Art. 18.3 of the LOEx (1985) indicates the equality between those that "are married to a Spanish national and are not separated *de facto* or legally (section b), those "that have first-degree kinship ties with the entrepreneur that hires them" (section h), those that are "the spouse or child of an alien with a work permit" (section k), those that are the "descendents of aliens that, having originally had Spanish nationality, reside in Spain" and the "Latin Americans, Portuguese, Philippines ... " (section f). This article must be contrasted with Art. 23 which recognises the fact that the Latin Americans, Portuguese ... shall be given "preferential treatment for employment in Spain with respect to other aliens"

upon analysis of Spanish case law that considers family ties to be one of the "exceptional reasons"[63] that justifies waiver of the visa requirement to obtain a residence permit in light of the constitutional obligation to protect the family.[64]

As has just been pointed out, the possibility for third-state nationals to exercise the right to family life was already envisioned in the previous regulations concerning aliens. Therefore, both the LOEx (1985) as well as its Regulation[65] facilitated the reunification of certain family members of third-state nationals that were legally residing in Spain.[66] This residency permit, regulated by the 8 January 1999 Order,[67] was linked to the sponsoring alien's permit and therefore stipulated the same time limit for legal residence of the said sponsoring alien.

The principle underlying the LOExIS is based on international and constitutional norms protecting and guaranteeing the right to family life and the family privacy of alien "residents" in the conditions envisioned by the Organic Law itself and the international treaties to which Spain is party. This right that is recognised in Art. 16 of the LOExIS is the right to family reunification in and of itself independent of the procurement on the part of the reunified family members of a residency permit in accordance with Art. 17 of the LOExIS before the amendment introduced by Organic Law 8/2000. Reunification is limited to certain family members and is accepted with a view, as has already been stated, to the integration of the alien population in society. Moreover, the fact should be considered that the concept or legal definition of "family" is not the same in the immigrant's country of origin as in the host country.[68]

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according to Art. 18 and are exempt from the payment of fees. The equal treatment given to family members and certain nationalities is therefore made quite explicit in the LOEx (1985).

[63] Art. 7.4 of the LOEx (1985) Regulation; SSTS 4–4–00 (*RJA* 2000/3259) and 14–3–00 (*RJA* 2000/3062).

[64] For more information see SSTS 13–5–93 (*RJA* 1993/3747); 7–3–94, 4–10–94, 10–10–94 and 20–12–94 (*RJA*, 1994/1668, 1994/7411, 1994/7412 and 1995/496)); 22–12–95 (*RJA* 1995/9515); 14–12–97, 24–2–97, 12–12–97 (*RJA* 1997/1486, 1997/1452 and 1997/9355); 3–2–98 and 4–2–98 (*RJA* 1998/1342); (*RJA* 1998/1344).

[65] Arts. 23.2, 28.1 and 2, 30.3, 54, 56.5 and 7 of the Enforcement Regulation of the Organic Law concerning Aliens (1985), approved by Royal Decree 155/1996 of 2 February. See note by E. Sagarra i Trías, in the Information and Documentation section entitled "El Nuevo Reglamento de la Ley de Extranjería de 2 de febrero de 1996", in *REDI* (1996–1), 466–471.

[66] Additional Provision six and Arts. 23.2, 28.1, 30.3, 54 of the LOEx (1985) Regulation.

[67] This Order (*BOE* 13–1–99) and 25–2–99 sets out the general norms and processes applicable to the issuing of visas and residency permits based on family reunification in fulfilment of the norms contained in the Enforcement Regulation of the LOEx (1985).

[68] For information on the different types of marriage and family arrangements see J. M. Espinar Vicente, *El matrimonio y las familias en el sistema español de Derecho Internacional Privado*, Madrid 1996, pp. 23–43 and 149–151, and I. García Rodríguez, *La celebración del matrimonio religioso no católico*, Madrid 1999, pp. 13–70.

The legislators have opted for an *ad hoc* legal definition of the family model rejecting the conflictive method for defining family members that may be reunified and the LOExIS thus enumerates the family members eligible for reunification and the conditions that must be met by each one. If the conflictive method had been followed, the national alien law would have been the reference legislation (in general regulatory of personal status) used to define the eligible family members. Therefore, to avoid possible allusions to public order, it was preferable to expressly and specifically define the family members who may be reunified. Moreover, it is logical that the family members eligible for reunification coincide with the family model envisioned by the public authority law in charge of authorising reunification (*lex fori* or *lex auctoritatis*, according to one's perspective) because that is the existing model in the host country.

The principal effect of family reunification is the procurement of a residency permit in Spain for the same period of time granted to the sponsoring alien (Art. 18.3 LOExIS). According to Art. 19 of the LOExIS, under special circumstances the reunified family members may obtain a residency permit independent of the one granted to the sponsoring alien and the reunified member may thus become a sponsor for further reunification. Thus, once the children of the reunified family members reach legal age and obtain work authorisation they may also have their spouses join them. This is what could be referred to as chain reunification and is unpredictable from a quantitative point of view. In this respect, the proposal for the Directive in its Art. 13 indicates that the maximum term of residence in a Member State as a reunified family member shall be four years after which time the said member acquires his or her own right completely independent of that of the sponsor. Therefore, if this Directive is approved, a work permit will not be necessary in order to be granted a residence permit in the case of the alien children of European citizens.

For reunification to proceed forward, the alien sponsors must have resided legally in Spain for a period of one year and have at least one year left on their residency permit and must apply for reunification residency authorisation in the name of the family members that they intend to reunite. In addition to this application they must prove that they have proper housing and means providing for "sufficient sustenance" to meet family needs (Art. 18.2 of the LOExIS). With regard to what is considered "proper" housing, Art. 44.3,d) points out that it should be "sufficient for the sponsoring alien and his/her family" and this condition must be verified through a report issued by the local authorities that states that the housing is "proper to meet housing needs in the area in which the alien sponsor is residing taking the number of family members into consideration." This report issued by the local authorities may be substituted by a mixed notary's attestation of persons present and a statement describing the housing.[69]

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[69] The final paragraph of section d) lists the following aspects: certificate of fitness for habitation, number of rooms, purpose for which each room is designated, state of the facilities, availability of water, electricity, plumbing, etc.

According to the Directive proposal, proper housing refers to a house the size of which is at least equivalent to that of social housing and meets the general safety and health regulations in force in the Member State. With regard to income levels, the LOExIS Regulation does not refer to a minimum amount but rather to the accrediting income documents given that according to Art. 44.4,c) the amount shall be determined by Ministerial Order based on the number of dependants and the number of individuals that he or she intends to reunify and the CPI will also be taken into consideration. As regards the Directive proposal, this amount should at least be comparable to welfare benefits or the minimum social security pension. An essential requirement is that the family be able to get by without any government assistance (Art. 9.2 of the modified Directive proposal).

Sponsoring aliens are all foreigners included within the scope of application of the LOExIS who are legal residents in Spanish territory and therefore, in compliance with Art. 2 of the said Organic Law, this does not apply to diplomats or consular workers, to the representatives and delegates of the missions or delegations of international organisations with headquarters in Spain, to participants in international conferences held in Spanish territory or to international civil servants assigned to international organisations with headquarters in Spain. The specific reference made by the LOExIS to students and minors does not make it clear whether or not they are included within the general concept of "foreigners" when it comes to family reunification. The LOExIS does however explicitly allow those that have a visa to study or do research in Spain to apply for the "corresponding temporary stay visa allowing for the entry and legal stay of their family members" for the duration of the studies or research. This reunification with an alien student or researcher in Spain does not require any period of prior residence and application can be made together with the application for the study or research visa. In this case the family members that may join the sponsoring alien are "the spouse and children under 18 years of age or who are handicapped" and only in the case of "humanitarian circumstances" may other family members be granted reunification status. The duration of residence in Spain is limited by the time that studies or research are carried out.

Minor children who find themselves alone in Spanish territory are provided for under a special LOExIS regime. In accordance with this new Organic Law, aliens without documents who prove to be minors will be turned over to the authorities competent in issues concerning the protection of minors and attempts will be made in favour of "family reunification" in the country of origin (LOExIS Art. 35.3 and Art. 62 of its Regulation). During this period of time the residence of the minor will be considered "normalised" and in the event that family reunification in the country of origin is impossible and nine months have transpired since that date (LOExIs Regulation Art. 65.2) "a residence permit will be issued" retroactive to the date that the minor was taken into the protective custody of the competent authority. As can be expected, LOExIS Regulation Art. 49.2, c) provides for a visa waiver in the case of this group. The law does not

say anything with respect to the possibility for the minor to initiate the family reunification process once his or her family members have been located because the spirit of the law is just the opposite, i.e. the return of the minor to the family. It is our understanding that an 18 year old minor who has remained in a protective institution for minors until reaching that age acquires the right to reunification with family members in the same conditions as any other foreign national with legal residence in Spain from that time onward.

IV. THE BENEFICIARIES OF FAMILY REUNIFICATION

While in the above sections of this paper we referred to the new legislation relating to aliens as well as the regulations applicable to European Union citizens and those of the EEA, in this section we will focus specifically on the new LOExIS and will point out the differences between the foreign family members of aliens and the family members of Spaniards and Community citizens.

In the LOExIS and its Regulation a strict concept of family is adhered to as is the case with the Directive proposal on family reunification that focuses mainly on members of the nuclear family, i.e. spouse and minor children. In contrast to Spanish law, Community law in the Directive proposal envisions recoguition of this right in the case of de facto association as long as in the Member State in question the status of de facto couples is on a par with that of married couples. In other words, the principle of equality of treatment and comparability between the two types of unions (marriage and de facto association) in force within a Member State should be respected and therefore an effort should be made so that de facto couples may also benefit from reunification. From this perspective and once the Directive proposal is eventually approved and has entered into force, Autonomous Community legislation will need to be considered and analysed to determine whether the laws on de facto associations are comparable to (and not an assimilation of) marriage unions in the sense manifested by the Directive proposal.[70]

Notwithstanding the above, despite focusing on the "nuclear family" as the basis for reunification, both in the LOExIS as well as in the Directive Proposal, children of legal age and senior family members are included as well as long as

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[70] In Spain today there are a number of different Autonomous Community laws on de facto unions: Law 10/1998 of 15 July on stable couples of the Autonomous Community of Catalonia (*BOE* 19–8–98), Law 6/1999 of 26 March, on stable unmarried couples of the Autonomous Community of Aragon (*BOE* 21–4–99); Law 6/2000 of 3 July on legal parity in the case of stable couples of the Community of Navarre (*BOE* 6–9–00), Law 1/2001 of 6 April regulating de facto unions in the Autonomous Community of Valencia (*BOE* 10-5-01), Law 18/2001 of 19 December on stable couples of the Autonomous Community of the Balearic Islands (*BOE* 16–1–02) and Law 11/2001 of 19 December on de facto unions of the Autonomous Community of Madrid (*BOE* 5–3–02).

they depend economically or personally on the sponsoring party. The family members that may be unified in accordance with LOExIS Art. 17 will be the focus of the following analysis:

1. The spouse of a legal resident

LOExIS in its Art. 17[71] allows reunification of the spouse of an alien with legal residence in Spanish territory as long as he is not legally or de facto separated and the marriage was not fraudulent[72] and that only one spouse is involved, this latter aspect applying mostly to men. In the case of reunification with a foreign student or researcher in Spain, the spouse may not be separated legally or de facto and the term does not apply to his/her sentimental partner, the wording of Art. 55 of the LOExIS Regulation being quite clear in this respect.

On a different plain, it is extremely surprising that in Art. 17 of the LOExIS no mention whatsoever is made of "divorce" or the "dissolution of marital ties." The only sense that we can make of this omission is that the legislator overlooked the most elementary difference between "separation" and "divorce" because in the same paragraph of Art. 17 there is a reference to "divorce" or the "dissolution of marital ties":

> "The alien resident who is *separated from his spouse and married for a second or subsequent time* may claim the new spouse and family members as long as he provides proof that *the separation of his former marriages* was through a legal proceeding addressing the situation of the former spouse and family members with regard to shared housing and alimony benefits for the spouse and dependent children." (The emphasis is ours).

In principle, if the spouses separate subsequent to reunification the beneficiary of the reunification shall be permitted to legally reside in Spain. In these cases Art. 41.4, paragraph 5 of the LOExIS Regulation requires that cohabitation in Spanish territory last for a minimum of two years.[73] Art. 13.3 of the Directive

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[71] Art. 5 of the amended proposal for the Council Directive recognises the right to reunification not only in the case of the spouse of the sponsoring party but also of the de facto partner who "shares a lasting relationship with the sponsoring party if the legislation in force in the Member State in question recognises the situation of non-married couples on a par with married couples." This possibility leads us to consider the possibility, once the Directive is in force, for stable couples (de facto unions) to benefit from reunification by applying Autonomous Community regulations at least in the territory of the said Communities.

[72] For more information on control of fraudulent marriages in order to more easily obtain a residency permit see our work "La asimilación e integración del extranjero a través del matrimonio: medios de control internos y comunitarios", in *Actualidad Civil* (1999), no. 18, 3–9 May, 447–463.

[73] Art. 41.4 paragraph 6 of the LOExIS Regulation indicates that the two years of cohabitation shall be accredited through local residence registration or registration in

Proposal elaborates quite a bit more making reference to "widow(er)hood, divorce, separation" and is also more generous in that it only requires a "minimum" residence period of one year with the sponsoring party in order to be granted independent rights. And furthermore, in "particularly difficult" circumstances – physical abuse, for example – Member States are authorised to consider residence permit applications independent of the sponsoring party before the cohabitation/residency requirement has been met.

The LOExIS does not reject the possibility of a new family reunification once the reunified party has become independent of the sponsoring party. The reunified party may therefore become a sponsoring party by virtue of LOExIS Art. 17 which states that regulations will establish the condition by which this new reunification may take place.

In all cases, the reunification of only one spouse is possible. So, if the resident alien decided to reunite a second spouse he must prove that the "separation" (*sic*) of his former marriage(s) was by a legal proceeding guaranteeing the rights of the ex-spouse and the children of the said marriage. With this requirement the Spanish legislator addresses marriage dissolution under Muslim law (*talaq*) that usually leaves the woman with no pension of any sort because only under certain Islamic schools is the husband required to return the dowry.[74] Not only the *talaq* but also any other proceeding leading to separation or the dissolution of marriage ties that fails to respect the right to defence of the two parties. In this sense Art. 41.4, paragraph 7 is very clear:

> "A residency permit shall not be granted to the alien spouse of a resident alien in cases in which another spouse of the latter has already been issued a residency permit."

All of this leads to the affirmation that, although the LOExIS in force does not contain anything in this respect, before authorising reunification of the spouse, the alien must officially certify the existence of marriage ties and, in the event of a former marriage, the validity of the dissolution of that former tie. This requires resorting to the recognition of a foreign public documents procedure and/or a judgement issued by a foreign authority (judicial or administrative). In this way possibly fraudulent situations are prevented like the one that could arise when the first reunited wife is granted her right to reside and work in Spanish territory independent of her spouse. Since it would no longer be considered binding reunification, the sponsoring alien could request family reunification for

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cont.

thc consulate or by means of any other type of proof recognised by law that officially certifies continued residence in Spanish territory during this period of time unless there are concurring circumstances of a family or humanitarian nature that justify this residence.

[74] For insight into the problems caused by these marriages see I. García Rodríguez's book: *La celebración del matrimonio religioso no católico*, Madrid, 1999.

a second wife given that the first wife no longer has a residency permit dependent upon his. In compliance with the former law and its 1986 Regulation, it was possible to exempt the alien from the obligation of filing the visa together with the application for the residency permit under exceptional circumstances such as showing in good faith the existence of a marital bond.[75] Provisions are also made for the visa requirement and possible waivers in accordance with Art. 49.2 of the LOExIS Regulation:

> " ... as long as bad faith is not detected on the part of the requesting party and the following conditions are met:
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> ...
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> d) Aliens married to Spaniards or to legally residing aliens who are nationals of a State that is party to the Agreement on the European Economic Area, as long as they are not legally separated, comply with the circumstances set out in Art. 17 of Organic Law 4/2000, amended by Organic Law 8/2000 and can accredit cohabitation in Spain for a minimum period of one year.
> e) Aliens married to legally residing aliens who are not nationals of a State that is party to the Agreement on the European Economic Area, as long as they are not legally separated, comply with the circumstances set out in Art. 17 of Organic Law 4/2000, amended by Organic Law 8/2000, can accredit cohabitation in Spain for a minimum period of one year and whose spouse has a residency permit valid for at least one additional year."

Although the development of the new regulation as far as case law is concerned remains to be seen, visa waivers for the alien spouses of Spanish nationals are issued without necessarily having sufficient economic means or cohabiting immediately with him or her. This was the general sense of the Supreme Court judgement of 23 January 1999 by virtue of which that right was granted to the alien spouse of a Spanish citizen who was serving a 12-year prison sentence starting in 1988 while she was deprived of freedom as well for a period of 8 years. In this case the "a quo" Court was of the opinion that although family reunification should be understood as one of the exceptional reasons, in the case of the complainant that circumstance was irrelevant because the husband, although a Spanish national, was serving a prison sentence which was an obstacle to the material cohabitation of the spouses and he also lacked the economic wherewithal to support the family. In this sense the Supreme Court pointed out that in applying legislation pertaining to aliens, one cannot fail to consider, as an interpretive element, the content of the constitutional precepts sanctifying the principles of equality and protection of the family (Spanish Constitution Arts. 14 and 39.1) as well as Art. 66 of the Civil Code that

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[75] STSJ Madrid, 21–12–1998, in *RJCA* 1998/5197.

guarantees equality regarding the rights and responsibilities of husband and wife. The Supreme Court goes on to state that the social significance of family reunification should also be taken into account and it should be upheld regardless of the fact that the sponsoring party finds himself in a "precarious economic situation" because reunification should be assessed from the perspective of the family link with the person applying for the dispensation. In order to do this, account must be taken of the authentic or feigned nature of the family reunification sought which leads us to give a certain degree of importance to de facto couples, to emotional bonds and to the fulfilment of family obligations without losing sight of the specific cultural and socio-cultural circumstances of the interested parties which are an indication of the "existence and characteristics of the family".[76] In this case the very special characteristics of the "family" led the Supreme Court to affirm that the fact that the spouses found themselves in a situation of deprivation of liberty does not mean, save evidence to the contrary, an end to "affectio maritalis" which is presumed in light of the subsistence of the legal bond and that established by cohabitation manifested not only when the spouses live together sharing, as the expression goes, "table, bed and sleeping quarters" but also when they show mutual respect, help one another out and otherwise act in the best interests of the family (Arts. 67 and 68 of the Civil Code)" which is the case in the situation at hand.

It is, however, possible to deny the visa waiver in the case of any family member applying for reunification in the event that a judgement of expulsion is issued to the party requesting the reunification or if he or she has been denied entry into Spanish territory.[77]

It has already been pointed out that the directive proposal is quite a bit broader than the LOExIS and its Regulation when it comes to family assessment. First of all because the said Directive is to be developed by the Member States which have diverse conceptualisations of what the family is and second of all because the social and legislative tendency is to move in the direction of legal recognition of de facto union and its increasingly greater equivalence to matrimonial unions.

2. The children of the legal resideut or of his/her spouse

The children of the resident and the spouse that may qualify for reunification are the *natural* and *adopted* children as long as they are under 18 years of age and are not married. With regard to adopted children, Art. 17.1,b) of the LOExIS requires validation of the adoption and proof that it meets the necessary requirements to be considered valid in Spain. It is therefore our understanding that prior recognition of the adoption is required. In the Directive proposal,

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[76] STS of 28–12–1998 (*RJA* 1999/375).
[77] Art. 49.6 of the LOExIS Regulation.

however, what is envisioned is the control itself by the authority granting the adoption or the one that rules on its recognition in that Member State in the event that it was processed by a different authority.[78] And, while the children's age should be under 18, no specific age limit is set out in the Directive proposal in light of the fact that not all Member States share the same legal age. In this respect, Art. 5.3 of the Directive proposal makes reference to the law of the State in which reunification is to take place:

> "The minor children referred to in points (b) and (c) of paragraph 1 must be below the age of majority set by the law of the Member State concerned and must not be married."

In a general sense the Directive proposal includes both the natural and adopted children under legal age that the sponsoring party and his/her spouse or de facto partner have under their care and custody. In the event that the custody were shared, the consent of the other parent would be required in order to move the minor in the case of reunification.

The LOExIS Regulation also provides for the exceptional dispensation of the visa requirement when reunification is of the children of Spaniards or aliens legally residing in Spain.[79] It is assumed that in granting visa waivers the competent authorities will take the specific circumstances of each case into consideration as they did under the former legislation. In this sense the Supreme Court judgement of 14 March 2000[80] considered that the situation of a Moroccan national who was residing illegally in Spanish territory could be considered as an exceptional case justifying a visa waiver in light of the fact that his wife, a legal resident in Spain, was about to give birth to a child to be cared for by the two spouses. This example shows that family characteristics and conditions are taken into consideration with a view to facilitating family reunification.

In the case of children born in Spain and whose parents legally reside in Spanish territory, the LOExIS arranges for the same type of residence held by either of the parents to automatically be acquired by the said children without having to process any visa and without having to procure the visa waiver (Art. 44.6 of the LOExIS Regulation). When this child reaches legal age he/she may obtain a permanent residency permit upon accrediting having resided in Spain "legally and continuously" during the three years immediately prior to the date of application (Art. 42.2,c) of the LOExIS Regulation).

The reunification of unmarried children over 18 who are considered disabled under their national legislation or under Spanish law is also permitted. This criteria does not mean that the child must be considered disabled under both

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[78] Art. 5(c) of the Council's Directive proposal.
[79] Art. 49.2,c) of the LOExIS Regulation.
[80] *RJA* 2000/3062.

legislations; disability recognition under one is sufficient. Therefore, if the child were considered disabled under national legislation and not under Spanish legislation it is our understanding that he or she would have the right to reunification even if over the age of 18. In this case the Directive proposal also recognises the right to reunification for the older children of the "applicant or his spouse or unmarried partner, being of full age, who are objectively unable to satisfy their needs by reason of their state of health" [Art. 5.1 (e)].

In some cases in its dealings with children of legal age the Supreme Court has applied family reunification to the entire "family group" regardless of the age of the reunified member or of his/her economic dependence. This was the case in the Supreme Court judgement of 23 March 1999[81] in which a Moroccan national, of legal age under Spanish law but still considered a minor under his national legislation, was granted a waiver of the residency visa in a reunification case. It was the Supreme Court's decision that:

> "The appealed judgement, having rejected the concurrence of motives for reunification, basing its conclusions solely on the lack of proof of the economic motive of reunification based on the legal age of the requesting party and the lack of proof that he is dependent upon his parents, infringes upon this doctrine and should therefore be overturned without having to examine the first motive for reversal. With regard to the determination of legal age of the requesting party in accordance with his personal law as a Moroccan citizen, reference should be made to Art. 9 of the Civil Code."

Regarding children the LOExIS also provides for the possibility of obtaining an "authorisation"[82] for residence independent of the hosting party when they reach legal age or when procuring a "work authorisation" (Art. 41.4 of the LOExIS Regulation).

3. Minors or disabled persons under the guardianship of alien residents

Disabled persons or minors under the age of 18 *under the guardianship of an alien resident* are also included amongst family members who are eligible for reunification as long as the alien is their "legal representative."

Although we do not know just how the new regulations on family reunification will be applied, we can see from the decisions taken in application of the former legislation that such exceptional circumstances were not considered. This was the case of a minor residing in Spanish territory with his

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[81] *RJ* 1999/3173.

[82] In the case of spouses the LOExIS Regulation uses the term "permit" while in the case of the children speaks of "authorisation" but we feel that the legislator is contemplating the same type of document for legal residence in Spanish territory and that this difference in terminology has no material or formal significance.

aunt, the latter being granted power of attorney by the mother to provide the minor with "the necessary care and attention under her parental authority." Even though the child was provisionally enrolled in a public secondary school the Supreme Court was of the opinion that:

> "... the exceptional nature linked to the assessment of the aims of family reunification requires that the final purpose be stable co-existence founded on the mutual support inherent to conjugal relations or kinship not only with regard to economic considerations but also in the moral and affective realm (judgement of 9 February 1999 [*RJ* 1999\1615], appeal 2503/1993). In the case at hand, however, and abiding by the facts revealed in the Instance Court in the exercise of its exclusive faculty to assess evidence, the interested party, a minor, is the son of Ms. Bertha Lucía M. M. who, by virtue of power of attorney granted on 29 September 1993, authorised the appellant to provide the above-mentioned minor with the necessary care and attention taking the decisions she deemed fit under her parental authority. The said appellant testified as being the first cousin on the father's side of the minor's mother. Based on this fact it was determined that the need for family reunification is not warranted because the person who has parental authority over the minor is not in Spain. Moreover, the acting director of the secondary school *Bachiller Alonso Quesada* stated that the interested party is provisionally enrolled in the school which is normal procedure in the case of foreign nationals who are awaiting recognition of residency status and therefore from this perspective the circumstances required to fully accredit an exception based on being rooted or established by virtue of doing studies in Spain are not met with sufficient assiduousness and use."

The requirement that the sponsoring alien have legal representation over the person to be reunified is one that is not considered when obtaining the visa waiver for family reunification. So, in the case of an alien who files for a waiver for family reunification with his brother with whom he lives and who supports him while he carries out his studies does not have the exceptional nature required by the regulation. The appellant is therefore not included among those exceptional cases referred to in Art. 22.3 of Royal Decree 1119/1986 of 26 May. Based on this, the Supreme Court in its judgement of 9 February 1999 considered that the "the objectives of family reunification are also met when the purpose is to maintain or to re-establish coexistence between siblings only or along with other relatives or with the spouse".[83] However, in this case the Supreme Court considered that the exceptional nature of the case should be

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[83] SSTS of 23–6–98 (*RJA* 1998/5278), 5–6–98 (*RJA* 1998/5138),19–5–98 (*RJA* 1998/4666),4–2–98 (*RJA* 1998/1344), 29–1–98 (*RJA* 1998/674), 12–12–97 (*RJA* 1997/9354), 22–10–97 (*RJA* 1997/7459), 14–1–97 (*RJA* 1997/130), 29–4–96 (*RJA* 1996/3613),11–12–95 (*RJA* 1995/9171), 8–4–95 (*RJA* 1995/3229), and 18–5–93 (*RJA* 1993/3757).

considered in light of the objective of family reunification which requires that the final aim be stable cohabitation based on mutual support not only with regard to economic considerations but also in the moral and affective realm. It is however the Supreme Court's view that:

> "the will of one family member to support another family member economically taking responsibility for the necessary living expenses as in the case at hand is not enough as can be deduced from the study of evidence in the appealed sentence. The fact is that economic support without cohabitation can be provided in circumstances that do not require the geographical transfer of the person receiving the said support."[84]

Prior to that judgement however, in the Supreme Court judgement of 18 May 1993[85] exceptional circumstances were considered in the case of a foreign woman who came to Spain on holiday with her two young children and subsequently filed for the residency visa waiver. This foreign national was divorced with two small children and they resided with one of her brothers who was a Spanish citizen in the town of Benidorm where another brother who was a dentist with a residency permit in Spain also resided. The latter brother stated before a Notary Public that he would take responsibility for his sister and her children. With a view to showing that they were established in Spain, documentary evidence was presented indicating that the children were enrolled in school in Spain and that she (the mother) had been offered a job in a hotel.

In accordance with the LOExIS Regulation, visa waivers based on exceptional circumstances are envisioned in the case of foreign nationals, minors or disabled persons who are legally under the guardianship of a Spanish citizen, of a Spanish institution or of an alien with legal residency status as long as the said guardianship is in keeping with the necessary conditions to "be enforceable in Spanish territory".[86]

4. Senior family members of the resident or of his/her spouse

Senior family members are eligible, as long as they are dependent upon the sponsoring party or his/her spouse and "there are reasons that justify the need to authorise their residency in Spain".[87] From a Community-wide perspective, the Directive proposal not only requires dependency on the sponsoring party "or his/her spouse or de facto partner," but also goes on to add that they should not have "any other family support in the country of origin." The fact is that this last stipulation seems difficult to prove and could give rise to fraud because it would

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[84] *RJA* 1999/1615.
[85] *RJA* 1993/3757.
[86] Art. 49.2,c) of the LOExIS Regulation.
[87] Art. 17.1,d) of the LOExIS.

be very expensive to carry out an investigation in the country of origin on the existence of other family members who could provide for these senior members.

In this section we come across situations in which the reunified family member does not depend economically on the sponsoring party but rather quite the opposite; it is the reunified member who is supporting the family unit. Here we are referring to the case of the children of foreign nationals born in Spanish territory. In the Supreme Court judgement of 2 January 1996, the person filing for the visa waiver for family reunification claimed to have two children who were born in Barcelona in the years 1985 and 1987. The Treasury Council considered that, although there is an undeniable family link, these situations occur so frequently that they can hardly be considered exceptional and are more the norm. With respect to this the Supreme Court stated that the "exceptional reasons" referred to in Arts. 5.4 and 22.3 of the Execution Regulation of Organic Law 7/1985, of 1 July "do not have a merely temporal significance, opposed to and the opposite of frequent, everyday or ordinary but rather are endowed with a qualitative value equivalent to important, transcendent or weighty regardless of the frequency or reiteration with which they occur".[88] It therefore does not make sense to force the interested party to abandon Spanish territory to obtain the visa waiver. Furthermore, establishment in Spain is clear considering that the children are in Spanish territory where they were born.

The case of the grandchildren of the sponsoring parties also came under scrutiny in the Supreme Court judgement of 27 October 1995. In this case a balance had to be struck between the ability to execute the resolution ordering expulsion from Spanish territory and family reunification at the same time. The case focuses on a foreign national who lived in Spain as a child and who now has taken responsibility for his grandparents who are old and ill and need the support of their family. Establishment in Spain is undeniable and there are reasons for family reunification. In the weighing of the circumstances the balance between the interests protected by the regulation that authorises family reunification and the damages that could be suffered if reunification is refused, the inclination is towards consideration of the irreparable damage that could be caused by the interested party's being expelled from Spanish territory, especially in light of the fact that the grandfather of that interested party has Spanish nationality and states that his economic situation is sufficient to be able to meet the needs of his relatives.[89]

And finally it should be pointed out that once any of the reunified family members obtains residency status in their own right under the conditions stipulated in each of the sections and their residency in Spanish territory does not depend on the sponsoring family member, they can then exercise their right to

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[88] SSTS of 24–4–93 y 10–7–93 (*RJA* 1993/2766 and 1993/5500), 8–11–93 (*RJA* 1993/8246), 21–5–94 (*RJA* 1994/4277) and 19–12–95 (*RJA* 1995/9833).

[89] *RJ* 1995/7393.

reunify their family members as long as they meet the requirements set out in the LOExIS and its Regulation.

Moreover, family ties with an "alien resident or a Spanish citizen" is considered an "exceptional situation demonstrating establishment" that grants the right to obtain a temporary residency permit for a period of over ninety days and not to exceed five years in accordance with Art. 41.2,d) of the LOExIS Regulation. In order to take advantage of this, however, the applicant must prove "continued" permanence in Spanish territory for a minimum of three years.

V. FAMILY REUNIFICATION REQUIREMENTS AND PROCEDURES

Analogous to the case of reunification with European Union citizens, the LOExIS and its Regulation for execution[90] require that entry into Spanish territory be made through an official border post,[91] that the applicant have the proper identification document and the corresponding visa in the event that this requirement was not waived (Art. 25.1 and 2 of the LOExIS and Arts. 1 to 3 of its Regulation).[92] With regard to visa requirements it should be considered, on the one hand, that there is a Community Regulation that establishes a list of third countries whose nationals are subject to the visa requirement in order to cross external frontiers[93] although certain exceptions are allowed according to section 4 of that Regulation. It is however surprising that among those exceptions no mention is made of "exceptional circumstances" or of "family reunification." On the other hand, it should not be forgotten that the *Convention applying the Schengen Agreement makes a distinction between two different classes of visas depending on whether their duration is over or under three months.*[94]

Art. 1 of the LOExIS Regulation points out that a valid visa must be obtained

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[90] Approved by Royal Decree 864/2001 of 20 July (*BOE* 21–7–2001).

[91] With respect to official border posts see the Order of 28 February 1995 (*BOE* 6–3–95), amended by the Order of 5 February 2001 (*BOE* 16–2–2001).

[92] For further information on visa waivers see the Order of 11 April 1996 (*BOE* 17–4–96) and the Order of 8 January 1999 setting out the general regulations and procedures regarding the issuing of visas and residency permits for family reunification in development of the LOEx (1985) execution Regulation.

[93] Council Regulation (EC) 539/2001 of 15 March 2001, *OJ* L-81, of 21 March 2001. The Community concept of "visa" is stipulated in section 2 of the Regulation that indicates that it is an authorisation issued by a Member State or a decision adopted by a Member State required for the entry for a specified period of time in that Member State or in several Member States for a total duration not to exceed three months; and the entry for transit purposes through one or several Member States except in the case of airport transit.

[94] For stays of less than 30 days nationals of Bahrain, Kuwait, Malaysia, Oman, Qatar, the United Arab Emirates, Saudi Arabia, the Republic of Yemen, Hong-Kong, Australia and New Zealand are exempt from the visa requirement.

only "when it is required" and should be valid and stamped in travel documents (Art. 5.1 of the Regulation). Among the multiple types of visas that are controlled by the LOExIS Regulation we find the residence visas for aliens who want to establish residence in Spanish territory under "family reunification" (Art. 8). This will be granted to aliens who meet the requirements set out in Art. 17 of the LOExIS as long as a family member with legal residence in Spain has filed the request and a favourable report is obtained (with respect to fulfilment of the conditions established under Art. 18 of the LOExIS) from the competent government authority. Specifically it is Art. 14 of the LOExIS Regulation that refers to the fulfilment of the conditions outlined in the first two sections of Art. 18; i.e. that proper housing and sustenance is provided and minimum residence in Spain of at least one year and an extension of the residency permit for a further year. In this regard, the Directive proposal yields to what is considered appropriate by the different Member States and we may therefore find that the requirements of sufficient economic means and adequate housing can give rise to movement within the Community of foreign nationals with legal residence in a Member State if this means greater facilities in pursuing family reunification. It is important to point out that Art. 9.2 of that Directive proposal specifically states that the family should be supported without the aid of "public financing":

> "The conditions relating to accommodation, sickness insurance and resources provided for by paragraph 1 may be set by the Member States only in order to ensure that the applicant for family reunification will be able to satisfy the needs of his reunified family members without further recourse to public funds. They may not have the effect of discriminating between nationals of the Member State and third-country nationals."

With respect to the procedure, the sponsoring party must first of all file a request for the report from the government authority in the province in which he/she resides for the purpose of accrediting that he/she has been a resident in Spain for at least one year and that he/she has a permit for at least one additional year, has sufficient economic means with which to support family members eligible for reunification and housing for all family members (Art. 14.1 LOExIS Regulation). This request form should be filed at the Office for Alien Affairs or at the police station in the place of habitual residence and should be accompanied by a copy of a valid passport or other travel document, copy of the residence or work permit and renewed residence, documents proving that the applicant is employed and/or has sufficient economic means and a document verifying that the applicant has health insurance coverage if he/she is not enrolled in the Social Security system.[95]

With respect to proof of family tie or ties, the alien documents accrediting this

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[95] According to Art. 44.4 of the LOExIS Regulation, these aspects can be justified with the "last three pay check stubs" or copies of social security payments or income tax payment corresponding to the previous year both in the case of self employed and

situation as well as the age and legal and economic dependence, in order that they be considered valid for the purpose of a residency permit, should meet the requirements set out in the Hague Convention of 5 October 1961, i.e. legalised through diplomatic channels or made subject to the apostille system.

While waiting for the government report to be issued, the family members eligible for reunification should present a copy of the request for the above-mentioned report with registration data and documentation proving kinship and, if need be, proof of legal and economic dependence along with the visa application at the consular office or diplomatic mission closest to their place of residence. It is possible that some of these documents may not be required if so decided by the Government subsequent to a proposal by the Interministerial Commission on Alien Affairs (Art. 14.1 LOExIS Regulation). A registered copy of all documentation will be provided to the visa applicant.

In "exceptional cases" a "visa waiver" may be issued when, in the absence of bad faith on the part of the applicant, the beneficiary is the minor or disabled child of a Spaniard or a foreign national with legal residence in Spain or is under the legal guardianship of the aforementioned; is the spouse of a Spanish citizen or national of a state party to the EEA with legal residence in Spain as long as the said spouse is not legally separated from the applicant and meets the requirements set out in Art. 17 of the LOExIS and the couple has been living together for at least one year; is the spouse of a foreign national with legal residence in Spain and who is not legally or de facto separated and who have been living together in Spain for at least one year as long as the residing spouse is authorised to reside for an additional year.

Once the government report is issued, the competent authority shall inform the sponsoring party of the date when it was sent to the General Directorate for Consular Affairs and the Protection of Spaniards Abroad (Art. 44.5 LOExIS Regulation).

The Foreign Affairs Ministry shall be charged with procuring from the government authority the corresponding report linked to the moment that communication is made that visa application has been made in time and in form (Art. 17.3 of the LOExIS Regulation).

It should not be forgotten that in the granting or refusal of visas it is the State's interests that prevail with respect to the international commitments made and is therefore, as stated in Art. 19 of the LOExIS Regulation, an "instrument designed for the fulfilment of the foreign policy aims of the Kingdom of Spain

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cont.

salaried workers, proof of affiliation in the Social Security System or proof of medical insurance, a report issued by the local authorities stating that adequate housing will be provided for the family members eligible for reunification or a combined notary's certificate of presence and statement bearing witness to the characteristics and size of the housing and a sworn statement to the effect that no other spouse resides with the applicant."

and those of other public Spanish policies or those of the European Union" with a view to forever safeguarding "public order, national security, public health or the international relations of Spain."

Any resolution concerning the concession of visas for the purpose of family reunification should have expressed motives in the case of refusal. The applicant shall be notified of this resolution with all of the guarantees regarding its content and within a period of two months from the date of notification of the granting of the visa the foreign national may pick it up personally. If he/she fails to do so it will be assumed that he/she is no longer interested in the visa.

Once the visa is obtained, the family members eligible for reunification are entitled to a temporary residence visa that should be applied for during the period of validity of the said visa. The residency visa will have the same duration as the one granted to the sponsoring alien and its remaining in force will depend on the continuation of the circumstances that gave rise to the concession (Art. 41.4 of the LOExIS Regulation).

Renewal of the residency permit for family reunification follows the same requirements applicable to renewals of the rest of the residency permits and proof of kinship, age and legal and economic dependency must be presented depending upon the family member in question.

CONCLUSIONS

The purpose of this work was not to present a comprehensive treatise on family reunification in Spanish and Community legislation but rather to provide an outline of the situation as it stands today. We can, however, extract some conclusions from what has been stated in these preceding pages.

1. In consonance with Art. 8 of the European Convention on Human Rights a right to family reunification has been constructed which is dependent upon the balance between the interests of the State and those of immigrants. Any measure taken to limit immigrants' rights should be done in accordance with the principles of weighting and proportionality with regard to public and private interests.
2. The proposed Council Directive and the LOExIS define the right to family reunification as a right inherent to immigration and to "family life" even though that right remains subject to certain conditions and requirements with a view to preventing fraudulent situations and to meeting the social and economic interests of the host State.
3. Community law today in the field of family reunification only regulates the reunification of third-state nationals that are kin to a European Union citizen who has exercised one of his Community freedoms. Therefore, family reunification in the case of those who do not exercise the said freedoms is subject to the Member States' legal systems. This means that only when faced with a situation involving some "Community" element the said legal system shall be applied. This does not mean however that the Member States do not

have to adhere to the principles established by virtue of the different resolutions adopted by the Community institutions.

4. Family reunification, both with regard to internal as well as Community order, is a right that can be exercised only by the sponsoring party and this right is limited by the duration of the residence permit that this party possesses. States may favour or facilitate family reunification by waiving the visa as a requirement for residency.
5. The family members eligible for reunification, spouses, children, and seniors may, in certain circumstances, be granted a residency and work visa of their own and in this case may subsequently become sponsoring aliens themselves. In this sense, successive family reunification has become a new form of "chain immigration" and therefore provisions made for possible "quotas" should bear this circumstance in mind.