An inspiring parallel between the Italian and Hungarian jurisprudence with a view to reducing statelessness

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Abstract: Un parallelo stimolante tra la giurisprudenza italiana e ungherese al fine di ridurre l'apolidia – The right to a nationality is a fundamental human right proclaimed by Article 15 of the Universal Declaration of Human Rights, implying the right of each individual to acquire, change and retain a nationality. Therefore, putting individuals at risk of not having a nationality and potentially becoming stateless constitutes a human rights violation in itself. Statelessness and its implications comparable to legal non-existence persist in Europe as a rather unseen, yet pressing and mostly intergenerational human rights issue affecting thousands of 'non-nationals' in the area of freedom, security and justice, despite the existing international human rights instruments related to statelessness that most EU Member States have acceded to. This paper draws a parallel between the Italian and Hungarian statelessness related jurisprudence, reflecting on the Hungarian Constitutional Court decision declaring that the lawful stay requirement in the statelessness determination procedure breaches international law and the positive decision of the Civil Court of Rome changing a previous refusal of citizenship of a Romani woman born and raised in Italy. The latter case also constitutes an important milestone in the eradication of Roma statelessness in Europe. The paper concludes that these cases set an example for other EU Member States with stateless populations, as well as for Yugoslav successor states with EU membership aspiration to bring about long-awaited legislative changes allowing stateless individuals to be recognized as nationals in countries of the enlarging area of freedom, security and justice in line with the EU's founding values, including equality, the rule of law and respect for human rights.

Keywords: reducing statelessness, statelessness determination, nationality laws, Roma statelessness

1. Introduction

Article 1 of the 1954 UN Convention Relating to the Status of Stateless Persons provides that a stateless person is someone "who is not considered as a national by any State under the operation of its law," establishing statelessness as a status under international law. For millions of people worldwide, statelessness is an everyday reality. Concerned individuals fall into a void of non-existence and their lack of recognition entails a constant rejection from belonging somewhere. Notwithstanding, nationality is not solely a component of one's identity. The enjoyment of the right to a nationality[1] serves as a gateway to the enjoyment of

[1] Proclaimed by several binding international legal instruments, including the 1948 Universal Declaration of Human Rights, Article 15; 1965 Convention on the Elimination of All Forms of Racial Discrimination, Article 5 (d) (iii); 1966 International Covenant on Civil

other fundamental rights. Therefore, not having a nationality creates a legal barrier to enjoy fundamental civil, political, economic, cultural and social rights in terms of education, health care, free movement and family life that most people take for granted. Statelessness emerges both at the individual and group level, predominantly among ethnic minorities. Ethnic discrimination is also one of the main reasons for intergenerational statelessness in Europe. Article 2 of the 1997 European Convention on Nationality provides that nationality constitutes a legal bond between a person and a State, without reference to the person's ethnic origin. Nationality legislation providing for the acquisition and loss of nationality traditionally belongs to the sovereign matters to be governed by States. Government policies relating to nationality issues have been changing over the last decades as a result of major geopolitical shifts and conflicts and the implications of the recent migration flows relating to statelessness are apparent[2] in the European context.[3] Statelessness is more than a legislative gap or an inconvenient miscalculation of decision-makers bringing about previously unforeseen consequences. It is a severe human rights violation which, if remains unsolved, may perpetuate the existence of laws preventing many from becoming *de iure* citizens of a state enjoying its protection in all aspects of life.

Notwithstanding the fact that over the course of the last decades there has been immense progress in international human rights law, including the UN statelessness conventions (the 1954 UN Convention Relating to the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness), as well as other regional instruments relating to statelessness[4] reflecting on the manifold vulnerabilities of stateless individuals, statelessness remains a largely hidden issue in Europe, mostly passed down from generation to generation. The fact that statelessness has been increasingly addressed in recent years in the international fora, as well as at the state level[5] around the globe is partly the result of the pivotal work and collaborative efforts of the UNHCR (the UN Refugee

and Political Rights, Article 24 (3); 1979 Convention on the Elimination of All Forms of Discrimination against Women, Article 9; 1989 Convention on the Rights of the Child, Article 7; 1997 European Convention on Nationality, Article 4.

[2] See: K. Swider, *Protection and Identification of Stateless Persons through EU Law*, *Amsterdam Centre for European Law and Governance Working Paper Series*, 2014/5. pp. 21-22.; European Network on Statelessness, *Submission of the European Network on Statelessness to the European Commission Consultation on the future of Home Affairs policies: An open and safe Europe – what next?*, London: 2014.

[3] K. Berényi, *Statelessness and the refugee crisis in Europe. Forced Migration Review Vol. 53*, 2016. pp. 69-70.

[4] See, Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality 1963; European Convention on Nationality, 1997; Convention on the avoidance of statelessness in relation to State succession, 2006.

[5] In recent years, statelessness has been increasingly addressed at the universal (UN), regional (EU, CoE, OSCE) and national levels, as well as by non-state actors (NGOs, academia). See e.g. *UNHCR Guidelines on statelessness; UNHCR statelessness related ExCom Conclusions*; relevant resolutions adopted by the UN Human Rights Council, policy informs and ad hoc queries elaborated by the *European Migration Network*; *Council Conclusions on statelessness; EU Action Plan on Human Rights and Democracy (2015-2019)*; *EU Guidelines on human rights dialogues with non-EU countries; Addressing the human rights policy impact of statelessness in the EU's external action; Practices and Approaches in EU Member States to Prevent and End Statelessness*, *Submission of the European Network on Statelessness to the* European Commission Consultation on the future of Home Affairs policies: An open and safe Europe – what next? 2014.

Agency)[6] and other pro-nationality NGO stakeholders who have been mainstreaming the rights of stateless persons. The vast majority of EU Member States acceded to universal and regional statelessness related conventions but they still seem to retain extensive sovereignty over who they are willing to recognise as their nationals. This state approach largely contradicts universal human rights which on paper apply to everyone, irrespective of their nationality or the absence thereof, as well as international obligations that the state already chose to align itself with when adopted legal instruments, including explicit provisions on the individual right of everyone to a nationality. Whereas Parra suggests that the sovereign discretion of states in the field of nationality has been gradually eroding since the adoption of these legally binding instruments providing for the right to a nationality,[7] States continue to play the main role in deciding on the acquisition and loss of nationality. For the sake of further advancing the reawakening dialogue on statelessness in Europe, this chapter explores whether there could be a correlation or even an interaction between the motives of Hungarian and Italian human rights jurisprudence relating to such a tangible issue as nationality. Key findings relating to the landmark rulings of the Hungarian Constitutional Court, the Italian Court of Cassation and Civil Court of Rome are drawn from the reviewed nationality regimes and changes thereof, the factual backgrounds of the mentioned cases, the reasoning behind the decisions, the judicial opinions (dissenting opinions, parallel statements), as well as academic and policy papers touching upon statelessness in Hungary and Italy.

2. Statelessness in the European context

According to UNHCR estimates[8] statelessness affects approx. 10 million people around the world of whom approximately 600,000 reside in Europe, including stateless populations who have lived in the same country for generations. Statelessness may occur due to diverse circumstances, yet, in Europe this man-made phenomenon has mainly arisen due to the dissolution of Yugoslavia, Czechoslovakia and the Soviet Union following which many of those who left the former federal states (and migrated to other countries e.g., Italy, Croatia, Slovenia, Slovakia, Romania, Bulgaria, Latvia, Estonia) were left without the nationality of an existing state. They owned personal documents which identified them as citizens of a country that did not exist anymore and did not seek to acquire the nationality of their new country of residence within a reasonable timeframe (also failing to register the birth of their children).

[6] At the time of its creation, the UNHCR was mandated to provide international protection and to seek durable solutions for stateless refugees who are covered by its Statute and by the 1951 Refugee Convention. Later the UN General Assembly designated UNHCR as the body to examine the cases of persons who claim the benefit of the 1961 Convention. In 1994, the UN General Assembly further entrusted UNHCR with a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons. Over time, UNHCR has elaborated a number of guidelines relating to statelessness, then in 2014, UNHCR launched its #Ibelong campaign with the aim of eradicating statelessness in 10 years, by 2024.

[7] J. Parra, *Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws with International Agreements to Reduce and Avoid Statelessness*, *Fordham International Law Journal*, *Volume 34 2011*.

[8] UNHCR Figures at a Glance. Web. 17 June 2009.

Therefore, despite living in another country for decades or being even born there, today the affected individuals still do not possess identity documents (issued by the authorities of their country of residence) and thus citizenship. Consequently, from generation to generation they face limited access to education, health care and work in their country of decades-long residence.

Statelessness and its implications comparable to legal non-existence therefore continue to persist in Europe as a fairly hidden, highly intergenerational phenomenon despite all the existing international human rights instruments, including those relating to statelessness that most EU Member States have acceded to. Therefore, statelessness remains a pressing human rights issue concerning several thousands of individuals labelled as non-nationals or persons of unknown nationality in the area of freedom, security and justice. Also, a considerable number of stateless Roma and other national minorities live in EU countries who fled racism and nationalism in the successor states of the ex-Yugoslavia looking for shelter in other European countries, many in Italy, for instance. Therefore, the impact of statelessness deriving from state disintegration or ethnic discrimination persists in several EU Member States today but the situation is particularly urging in countries of the former Soviet Union which are now Members of the EU (Latvia, Estonia, Lithuania) and countries of the ex-Yugoslavia all aspiring to obtain EU-membership. Given that most EU Member States have ratified the 1954 UN Convention Relating to the Status of Stateless Persons obliging them to provide stateless persons with fundamental rights and a certain extent of protection, only Belgium, Bulgaria, France, Hungary, Italy, Latvia, Slovakia, Spain and the United Kingdom have put in place self-standing status determination procedures.[9] At the time of writing, in the Netherlands a legislative amendment package envisaging to introduce a statelessness determination procedure was recently subject to public consultation in which pro-nationality NGO stakeholders actively engaged.[10] With regard to the countries under consideration, both Hungary and Italy are States Parties to both UN statelessness conventions and have established dedicated procedures which have been challenged by Hungarian and Italian judges. Thus, the relating cases of jurisprudence to be explained further on, undeniably demonstrate the dedication of Hungary and Italy to implement the UN statelessness conventions in good faith with a view to complying with their international obligations.

3. Tackling statelessness in Hungary: protection approach turning into foreign policy commitment

Before the recent migration flows, the Office of Immigration and Asylum (OIA) encountered relatively few stateless persons. Even though Hungary did not have any particular stateless population or other historical relevance to mainstream the rights and protection of the stateless, Section 2 (b) of the Act XXXIX of 2001 on

[9] Statelessness determination procedures assist States in meeting their commitments under the 1954 UN Convention relating to the status of stateless persons would therefor play a vital role in identifying persons of concern.

[10] European Network on Statelessness. *Joint submission of ASKV/Refugee Support and the European Network on Statelessness to the consultation by the Ministry of Security and Justice in the Netherlands*, London: 2016.

the Entry and Stay of Foreigners, defined statelessness as a distinct ground for issuing a humanitarian residence permit. This commitment was greatly inspired by the awareness-raising activities of the UNHCR and the Hungarian Helsinki Committee.[11] Accordingly, Hungary has been widely viewed as an exemplary state with regard to statelessness, being state party to all statelessness related international instruments.[12] Hungary's esteem in this regard was further amplified when the Government of Hungary adopted a new self-standing statelessness determination procedure by law (governed by Act II of 2007 on the Entry and Stay of Third-Country Nationals, hereinafter: TCN Act). At the time, this was applauded as a pioneer step encouraging other EU Member States to establish similar self-standing status determination procedures.

Looking at the Hungarian procedure, it provides for guarantees similar to those included in the refugee status determination procedure[13] in terms of protection needs. The procedure views statelessness as a self-standing ground for protection, providing for a distinct protection status for stateless persons, to be established through the dedicated status determination procedure. The Hungarian authorities (OIA) play an active role in informing potential stateless applicants, who they come across through the immigration or alien policing procedures about the procedure. In the following section, the Hungarian statelessness determination procedure shall be discussed in sum.

A potentially affected person may initiate the procedure via written or oral application at the regional Directorate of the OIA (which is the competent authority for conducting statelessness determination procedures in Hungary) closest to the applicant's place of residence. Then the applicant makes an oral statement that is registered. During the procedure applicants can use their mother tongue or any other language that they understand. The submission of the application is free of charge whereas costs related to interpretation and legal aid are borne by the State. Nevertheless, the Hungarian Helsinki Committee also provides free legal aid to both asylum-seekers and stateless persons. Based on the cooperation agreement between the OIA and the UNHCR, the latter is granted a set of rights during the procedure, as it may participate in it at any stage. Whereas the burden of proof lies mainly on the applicant, in reality, the authority plays an active role in establishing relevant facts in substantiating national ties upon request by the applicant. The TCN Act includes a lowered standard of proof in statelessness determination procedures, allowing the applicant to substantiate the

[11] The Hungarian Helsinki Committee (HHC) is one of the leading non-governmental human rights organisations in Hungary and Central Europe. Its main areas of activities focus on protecting the rights of asylum-seekers, stateless persons and other foreigners in need of international protection, as well as monitoring the human rights performance of law enforcement agencies and the judicial system. The HHC is a member of the European Council on Refugees and Exiles (ECRE), the European Network on Statelessness (ENS) and is an implementing partner of the UNHCR.

[12] The 1954 UN Convention on the Status of Stateless Persons, the 1957 UN Convention on the Nationality of Married Women, the 1961 UN Convention on the Reduction of Statelessness, the 1997 European Convention on Nationality and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.

[13] T. Molnár, *The Hungarian Constitutional Court's Decision on the Compatibility of the Hungarian Statelessness Determination Procedure with International Law, Hungarian Yearbook of International Law and European Law, The Hague, Eleven International Publishing*, 2016. 593-602.

grounds of their claim, in case proving is not possible. Considering the vulnerabilities of children, ex-officio guardians are appointed to assist to cases where unaccompanied minors are involved. The judicial review of first instance (administrative) rejection decisions is available and the proceeding judge may both annul the administrative decision and grant stateless status to the applicant. In case of recognition, stateless persons acquire a humanitarian residence permit, a (stateless) travel document and access to free primary and secondary education. However, the TCN Act hardly provides anything about stateless persons' access to the labour market or particular social benefits, nor does it foresee any financial support for recognized stateless individuals which raises particular concerns in terms of health care and accommodation.[14]

Ever since the reform of the Hungarian stateless regime and the establishment of the self-standing status determination procedure in law back in 2007, Hungary has been striving to address the rights and protection of stateless persons in the international arena which was also included as a distinct goal in a strategy document for 2009-2014.[15] It provides that "Hungary [...] wishes to further represent the issue of the protection of stateless persons on the international plane, among others by disseminating the practical experiences gained from the exemplary Hungarian procedure for the recognition of stateless status.[16]"

Additional efforts were made by the Hungarian EU Presidency in May 2011 to put statelessness on the EU agenda by inviting EU Member States to discuss the protection of stateless persons, as well as the prevention and reduction of statelessness. After the Hungarian EU Presidency, in November 2011 the EU Global Approach on Migration and Mobility (GAMM) was adopted providing that "The EU should also encourage non-EU countries to address the issue of stateless persons, who are a particularly vulnerable group, by taking measures to reduce statelessness."[17]

Shortly after the adoption of the GAMM in December 2011, Hungary made important statelessness related pledges, seeking to amplify Hungary's commitment to advance the implementation of the UN statelessness conventions and offer to share best practices and expertise in the field of statelessness. In addition, Hungary pledged to withdraw the declaration made relating to Articles 23-24 of the 1954 UN Convention Relating to the Status of Stateless Persons, allowing the enjoyment of stateless persons' rights relating to access to public relief, labour legislation and social security to all recognized stateless persons in Hungary. (Accordingly, the declaration was duly withdrawn as of 3rd July 2012.) Furthermore, Hungary declared that it would adopt a quality evaluation and development mechanism in statelessness determination which has been put in place since then. In addition, a Quality Assurance Manual has been prepared by the OIA and the UNHCR's Hungary Unit.[18]

[14] For further details on the procedure, see T. Molnár, *Statelessness Determination Procedure in Hungary*, *4 Asiel & Migrantenrecht*, 2013. pp. 271-277 and J. Tóth, *'Hungary'*, *In D. Vanheule (ed.), International Encyclopaedia of Laws: Migration Law. Alphen aan den Rijn, Kluwer Law International*, 2012. pp. 183-192.
[15] Government Strategy 11.
[16] Government Strategy of Hungary for Cooperating in the Area of Freedom, Security and Justice of the EU for 2009-2014.
[17] European Union. The EU Global Approach on Migration and Mobility (GAMM), Brussels, 2011. p. 17.
[18] T. Molnár, *Statelessness Determination Procedure in Hungary*, *4 Asiel* & *Migrantenrecht*, 2013.

Despite all these positive pursuits, the TCN Act (providing for the legal and procedural framework of the dedicated procedure) and thus the status determination procedure included one quite unreasonable and restrictive provision that only allowed lawfully staying third country nationals to initiate the statelessness determination procedure in Hungary, providing that:

> "Proceedings aimed at the establishment of statelessness shall be instituted upon an application submitted to the alien police authority by an applicant lawfully staying in the territory of Hungary, which may be submitted by the person seeking recognition as a stateless person (hereinafter referred to as the 'applicant') orally or in writing" (Art. 76(1) of the TCN Act).

This entails that (potentially) affected individuals arriving and staying irregularly in Hungary were automatically excluded from recognition, thus protection, and did not have access to the status determination procedure. This restrictive provision was included in the TCN Act with a view to preventing abusive statelessness claims, submitted in bad faith with the aim of avoiding removal from the territory of Hungary. In reality, unlawfully staying applicants were generally allowed to submit an application, nonetheless, their unlawful stay was mostly considered as grounds for rejection. Obviously, not being able to regularize their unlawful stay, irregularly staying stateless applicants did not really get a chance to be recognized as stateless persons and obtain due protection. This was the vicious circle for many stateless persons staying in Hungary, waiting to be able to legalize their stay and become members of the Hungarian society. (Hence, the OIA earlier declared that a humanitarian residence permit issued on the grounds of an ongoing asylum procedure may not be viewed as a proof of lawful stay in case of asylum-seekers who had previously entered the territory of Hungary irregularly. Therefore, until the Constitutional Court's landmark decision, this provision fundamentally challenged the integrity of the Hungarian protection regime in large. In addition, it prevented stateless persons genuinely in need of protection to be able to gain access to the dedicated procedure and be recognized as stateless persons. Turning to relevant international conventions, unlawful stay is not articulated among the exclusion clauses[19] listed by the 1954 UN Convention Relating to the Status of Stateless Persons.

3.1 Hungarian Constitutional Court decision eliminating 'lawful stay'

In September 2014, a complex individual case was referred to the Constitutional Court in a proceeding initiated in order to review an administrative decision of the OIA which had rejected the statelessness claim of an applicant born in Somalia to a

pp. 271-277.

[19] The 1954 UN Convention shall not apply: (1) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance; (2) To persons who are recognised by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; (3) To persons with re spect to whom there are serious reasons for considering that: (a)They have committed a crime against peace, a war crime, or a crime against humanity, as defined in international instruments; (b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country; (c)They have been guilty of acts contrary to the purposes and principles of the United Nations.

Nigerian mother and a Somali father arriving to Hungary as an illegal migrant. The Hungarian Helsinki Committee and the UNHCR closely monitored the developments and participated in the case as third party interveners. In 2010, the applicant launched his first claim to be recognized as a stateless person in the framework of the established statelessness determination procedure. This claim was refused by the OIA, mainly due to the absence of proof of his lawful stay in the territory of Hungary which, as mentioned, was a prerequisite to submit this claim under Article 76(1) of the TCN Act. Then the applicant initiated a second procedure by bringing about new evidence, as a result of which the OIA changed its earlier position and agreed to the fact that the applicant had proved his statelessness. Nonetheless, it refused to grant him stateless status. The initiating judge submitted a petition and solicited the Constitutional Court in order to bring about the annulment of the contested provision[20] for breaching Hungary's international obligations borne under the 1954 UN Convention Relating to the Status of Stateless Persons[21] which would also interfere with the provisions of the Fundamental Law of Hungary.[22]

The turning point was brought by the Constitutional Court's decision[23] made on 23 February 2015, proclaiming that the lawful stay precondition foreseen in the TCN Act is unconstitutional because it interferes with Hungary's international obligations set out in the 1954 UN Convention Relating to the Status of Stateless Persons by narrowing the definition of a stateless person included in Art 1(1) of the same Convention. The Court found that this provision also violates Article Q(2) of the Fundamental Law of Hungary requiring full compliance between domestic law and international law. The Court emphasized that the contested requirement may not be seen as a procedural but as a substantial provision changing the definition of a stateless person as compared to the internationally recognized in Article 1 (1) of the 1954 UN Convention Relating to the Status of Stateless Persons (adopted by Hungary), thus, narrowing the personal scope of the TCN Act. According to the

[20] Art. 25(1) of Act No. CLI of 2011 on the Constitutional Court (hereinafter: CC Act) which provides that '[i]f a judge, in the course of adjudication of a case in progress, is bound to apply a legal act that he/she perceives to be contrary to the Fundamental Law, or which has already been declared to be contrary to the Fundamental Law by the Constitutional Court, the judge shall suspend the judicial proceedings and, in accordance with Art. 24(2) lit. b) of the Fundamental Law, submit a petition for declaring that the legal act or a provision thereof is contrary to the Fundamental Law, and/or the exclusion of the application of the legal act contrary to the Fundamental Law.'

[21] Pursuant to Para. 10 of the Resolution: "According to the judge's motion, Article 1 of the United Nations Convention relating to the Status of Stateless Persons signed in New York on 28 September 1954, promulgated by Act II of 2002 (hereinafter "Statelessness Convention") – in respect of which no state may make any reservations under Article 38 thereof – does not specify lawful stay in the territory of the given state as a prerequisite for determining stateless status, in contrast with Section 76(1) of the Aliens Act. Based on Section 76(1) of the Aliens Act, however, stateless status shall be refused for a person qualifying as a stateless person under Article 1 of the Statelessness Convention if s/he stays in Hungary unlawfully for any reason; therefore, it needs to be seen whether the phrase "lawfully staying" in Section 76(1) of the Aliens Act is in contravention with the Statelessness Convention and thus is in contravention of Articles Q (2) and XV (2) of the Fundamental Act."

[22] Art Q(2) provides that: „In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law."

[23] Resolution 6/2015 (II.25.) of the Constitutional Court on the determination whether the term „lawfully" in Section 76(1) of the TCN Act is contrary to the Fundamental Act and the annulment thereof.

Court, under the 1954 Convention Relating to the Status of Stateless Persons certain rights are to be granted only to lawfully staying stateless persons in the Contracting States, while other rights (*inter alia* right to property, access to courts) must be afforded to all stateless individuals, regardless of the lawfulness of their stay.

Consequently, the Constitutional Court removed the lawful stay requirement from the status determination procedure as of 30 September 2015. In light of the annulment, Section 76(1) of the TCN Act reads as:

> "76 (1) Proceedings for the recognition of statelessness are opened upon the submission of an application to the alien police authority for the recognition as stateless by a person staying in the territory of Hungary (hereinafter: "applicant"). The application may be presented orally or in writing."

Notwithstanding this annulment, the Court refused to declare a general prohibition of application of this provision, as well as in the individual case at hand. The *pro futuro* annulment[24] of the provision of 'unlawful stay' was adopted in order to ensure legal certainty and thereby giving sufficient time for the legislator to make the necessary amendments. Very importantly, the Constitutional Court also pointed out that, in spite of the annulment of the mentioned provision, the act of unlawful entry and stay would not be considered lawful.[25]

The dissenting opinions[26] of eminent judges provide further substantial reflections on this important judgement on statelessness.

First, the parallel statement of Judge Ágnes Czine in support of the majority position to adopt the resolution recognized the UNHCR as "the body most able to interpret issues of international law associated with the 1954 UN Convention and to explore the related practice."[27] Judge Czine viewed the "lawfully" phrase included in Section 76(1) of the TCN Act as "an escape route for the authorities."[28] Czine considered that the Court's decision relating to *pro futuro* annulment was reasonable in the case at hand, as it ensures legal certainty, taking note of the fact that the applicant remains eligible to submit a new application after the resolution enters into force, as of 30 September 2015.[29]

The other judicial opinions reflected rather on whether 'lawful stay' is a direct violation of the Fundamental Law of Hungary or if it is solely in conflict with an international convention, namely the 1954 UN Convention Relating to the Status of Stateless Persons. Judge Dienes-Oehm, whose views were mostly supported by Judge Barnabás Lenkovics and Judge Varga Zs, András, considered that even though the contested provision might be in conflict with an international

[24] Meaning that the annulment of the provision only has legal effects on future cases, therefore, does not apply retroactively.
[25] G. Gyulai, *Hungarian Constitutional Court declares that lawful stay requirement in statelessness determination breaches international law*, *European Network on Statelessness Blog*, Web. 2 Mar. 2015.
[26] Dissenting opinions from constitutional judges dr. István Balsai, dr. Egon Dienes-Oehm, dr. László Kiss, dr. Barnabás Lenkovics, dr. Miklós Lévay, dr. Péter Paczolay, dr. Béla Pokol, dr. László Salamon and dr. András Zs. Varga relating to Resolution 6/2015 (II.25.) of the Constitutional Court of Hungary on the determination whether the term „lawfully" in Section 76(1) of the TCN Act is contrary to the Fundamental Act and the annulment thereof.
[27] Para. 36. of the Resolution 6/2015 (II.25.).
[28] Para. 37. ibid.
[29] Para. 38. ibid.

treaty, this does not entail that it would be necessarily unconstitutional *per se*. Thus, in his view the Court should have obliged the legislator to address this norm conflict with a view to "harmonising international law and Hungarian law, based on Article Q)(2) of the Fundamental Act, if necessary"[30] instead of annulling the law. He also noted that international law itself is based on national sovereignty, therefore, recognition of the *ius cogens* rules of international law is also subject to state authorisations set out in the national constitutions.[31]

The dissenting opinion made by Judge Miklós Lévay, supported by Judge László Kiss and Judge Péter Paczolay further argued that due to the particular norm control nature of the procedure, initiated by a judge, the Court should have declared the inapplicability of the provision of unlawful stay with regard to the given case, in the absence of which the plaintiff remains unable to access the procedure. As a result, he deemed that: "The party initiating the procedure has to bear the detrimental consequences arising out of this," namely those relating to stateless. Judge Dr. Lévay pointed out that "He has no identity papers or travel documents; his circumstances and situation infringe his dignity as a human being."[32] With regard to to *pro futuro* annulment of the provision, he found that "[…] future annulment does not mean that the Constitutional Court could not have decided to prohibit its application based on the particularly important interest of the person initiating the procedure, made obvious in this specific case, while observing the general interest of ensuring legal certainty. Due to the facts and circumstances described above, this would have called for finding that the annulled legal provision cannot be applied to the case in progress."[33]

According to Judge Béla Pokol, supported by Judge András Zs. Varga, the 'lawful stay' provision within the legislative act promulgating the 1954 UN Convention Relating to the Status of Stateless Persons occupies an equal place in the hierarchy of norms, therefore, the Constitutional Court did not have the mandate to annul the conflicting legislation. It has to call upon the body drafting the legislation – the government or legislature – to take the measures necessary to eliminate the conflict.[34] Judge Béla Pokol further explained that later provisions derogate earlier provisions in the event of a conflict. "In the case at hand, the Statelessness Convention was promulgated by a law, and the legal provision currently contested also refers to a provision of law, and arranges the conflict between the two provisions of law according to the principle of *"the latter derogates the former", according to which it is precisely the contested provision of law that has primacy."* This excludes the possibility for the Constitutional Court to nullify that legal provision and the only option available under Section 42(2) of the CC Act is to *"invite the Government or the legislator to take the necessary measures to resolve the conflict within the time-limit set."*[35] In addition, Judge Béla Pokol expressed his concerns relating to the annulment of the lawful stay provision in light of irregular migrants.[36] Finally, Judge László Salamon supported by Judge

[30] Paras. 40-41and Para. 45. ibid.
[31] Para 42. ibid.
[32] Paras. 53-59. ibid.
[33] Para. 60. ibid.
[34] Para. 65. ibid.
[35] Para. 67. ibid.
[36] Para. 70. ibid.

István Balsai also deemed that a conflict between a piece of legislation and an international treaty does not necessarily result in a violation of Article Q(2) of the Fundamental Law, mainly because the latter sets out a state goal by assuming an obligation to ensure conformity between international law and Hungarian law which is not to be interpreted as a normative provision.

Summarizing the justification of the annulment of the contested provision of lawful stay and the essence of the dissenting opinions, it may be concluded that this decision marked indeed a milestone in Hungarian statelessness legislation from a human rights perspective. Eventually, an undue obstacle was removed from the otherwise exemplary dedicated procedure which further enhances the protection of stateless persons in Hungary. It must be mentioned that the UNHCR and the Hungarian Helsinki Committee have been making tremendous efforts to advocate against this provision.

4. Statelessness as an inter-generational issue in Italy

Italy, as mentioned before, has a significant stateless population originating from the post Yugoslav space living in legal limbo for generations. Following the death of dictator Josip Tito in 1980, tensions between the Yugoslav republics emerged and Serbian nationalism increasingly escalated rendering national and ethnic minorities (Bosnian Muslims, Croats and Roma)[37] targets of aggression. From 1992, Bosnian Serb paramilitary organizations committed systematic acts of ethnic cleansing in Bosnia-Herzegovina and Croatia in the form of massacres, rapes and expulsions of non-Serbs, mostly Bosnian Muslims, Croats and Roma. During the Bosnian war many were forced to leave their country and seek shelter in other parts of Europe. Sardelic points out that, following the disintegration of Socialist Federal Republic of Yugoslavia (SFRY), the principle of legal continuity was applied to avoid mass statelessness. Pursuant to the principle of legal continuity, the citizenship of the newly established post-Yugoslav states was granted on the basis of the former republican citizenship. However, citizen registries generally did not reflect on those Roma who lived in informal settings failing to comply with the technicalities of substantiating a citizenship. They were unable to prove their habitual residence in one of the former republics thereby their former republican citizenship due to many Roma had migrated to different socialist republics without due consideration of acquiring the (republican) citizenship of the republic where they temporarily then permanently resided.[38]

The possession of identity documents and/or residence permit remains to be essential to apply for citizenship in their chosen country of residence, later in their life through naturalization. Therefore, albeit many of them might have been living in Italy for decades or even born there, they do not possess Italian citizenship. In addition, failing to properly register the birth of their children

[37] Romani minorities were never constitutionally recognized as national minorities, but were rather informally referred to as an ethnic group in most Yugoslav socialist republics and as such, they were granted fewer cultural group rights, for instance, in the field of education.
[38] J. Sardelic, *Romani Minorities Caught in-between: Impeded Access to Citizenship and de facto Statelessness in the Post-Yugoslav Space. European Network of Statelessness Blog*, Web. 20 Sep. 2013.

poses a severe risk to the latter when applying for citizenship later as adults by not being able to prove their uninterrupted, habitual residence in the country for the period of time necessary for naturalization. This is also due to the fear of deportation that parents often decided not to register their children with their State of origin's Consulate nor their place of legal residence.[39] To overcome this obstacle, Italy has put in place an effective birth registration system, guaranteeing that all children born on its territory may be registered, regardless of their parents' legal situation.[40]

In the Italian context, the largest group of children at risk of statelessness are those children of Roma communities coming from the SFRY. An estimated 15,000 Roma children born in Italy find themselves in such a situation of legal non-existence.[41] Undocumented non-nationals, generations of stateless persons originating from the SFRY have been living on the margins of mainstream Italian society. They are often criminalized and are extremely vulnerable to poverty, prostitution and trafficking in human beings, whereas they are not permitted to legally work nor benefit from free/subsidised education and health care, the same way as regular citizens. Their *de facto* statelessness may be further attributed to their societal discrimination, inadequate housing circumstances, as well as the excluding mindset of the majority population in EU Member States and Yugoslav successor states where the principle of *ius sanguinis* plays a predominant role in granting nationality. This nationality law principle has nationality transmitted by descent and the application of this principle greatly disregards the effective link of residents with the given state.

Despite Italy having one of Europe's oldest statelessness determination procedures, very few have been recognised through the dedicated administrative procedure.[42] During the administrative procedure governed by Article 17, Presidential Decree No. 572/93, the applicant has to submit an application to the Ministry of Interior, attaching a birth certificate, documentation concerning residence in Italy and any other relevant documents. In addition, it can only be accessed by those legally present in Italy. Considering the realities of undocumented stateless individuals, it is apparent that only few of them can comply with these requirements. As a result, in reality most stateless applicants have no chance to have access to the administrative determination procedure in Italy. This entails that in spite of the higher costs of the judicial procedure, it proved to be more accessible for stateless applicants, as well as for those who do not legally reside in Italy, since it is not required that the applicant possesses a residence permit in Italy. For these procedures mainly, the rules of the ordinary civil procedure apply, where the Ministry of Interior is the defendant.[43]

[39] E. Rozzi, *Out of Limbo: Promoting the right of stateless Roma people to a legal status in Italy*, *European Network on Statelessness Blog*, Web. 12 Nov. 2013.
[40] D. Maccioni, *Ending childhood statelessness in Italy*, *European Network on Statelessness Blog*, Web. 30 Jun. 2015.
[41] Council of Europe. Report by Thomas Hammarberg, former Commissioner for Human Rights of the Council of Europe. Strasbourg: 2011.
[42] E. Rozzi, *Out of Limbo: Promoting the right of stateless Roma people to a legal status in Italy*, *European Network on Statelessness Blog*, Web. 12 Nov. 2013.
[43] European Union. European Commission. European Migration Network (EMN), *EMN Inform on Statelessness in the EU*, Brussels: 2016.

Nonetheless, due to the lack of distinct regulation, there are no provisions providing for the exact documents the applicant needs to file to the court to obtain the recognition of their stateless status.[44]

4.1. Shift in Italian Nationality Legislation

Nationality legislations play a crucial role in putting concerned second and third generation immigrants of Bosnian and Roma descent at stake of statelessness. Relating to the acquisition to nationality, Italian legislation (Law 91/1992) provides that "a foreigner born in Italy, who has resided legally without interruption until reaching the age of majority, becomes a citizen if (s)he elects to acquire Italian citizenship within one year of reaching that age". Consequently, those who are unable to prove their legal residence in Italy cannot acquire Italian citizenship when they reach adulthood. Therefore, Italian nationality legislation does not take due account of the second and third generation migrant populations emerging in Italy over the course of the last twenty to fifty years[45] which might suggest a certain extent of discrimination *vis-à-vis* certain minority populations, including those of Roma and Bosnian origins who immigrated to Italy during and after the Bosnian war therefore were not born in Italy.

As a result of intense policy debates in Italy starting in 2011,[46] a working group was established in 2013 that focused on the legal status of Roma under the National Roma Inclusion Strategy, engaging competent Ministries and the UNHCR, as well as reform talks started on nationality legislation favouring *jus soli*. Consequently, in 2013, Article 33 of Decree Law 69/2013 (*Decreto del Fare*) came into force seeking to simplify and rationalize the existing procedures governed by Law 91/1992 in order to reflect better on the situation of young people of foreign origin living in Italy. Decree Law 69/2013 laid down an obligation for the authorities to inform all minors turning 18 registered at birth about their right to acquire Italian citizenship and the procedure they have to undertake to this end. The new provision provides that "children cannot be held responsible for administrative failures of this kind that are attributable to their parents or the public administration." The new provision was first applied in 2016 when the Civil Court of Rome made a positive decision referring to the above-mentioned provision, and thereby, changed a previous refusal of citizenship in case of a Romani woman.[47] The concerned woman of Bosnian origin was born and raised in Italy, fulfilled the conditions for Italian citizenship, yet was first refused to obtain Italian citizenship on the basis that she only managed to acquire a residence permit as a juvenile, suggesting that she was not "legally resident" since birth as required by Law 91/1992.[48]

[44] G. Bittoni, *Statelessness determination procedure in Italy: who bears the burden of proof? European Network of Statelessness Blog*, Web. 6 May 2015.
[45] E. Paparella, *Second-Generation Migrant Women and the Acquisition of Italian Nationality, Gender and Migration in Italy: A Multilayered Perspective, Ashgate Publishing LtD.*, 2016. p. 197.
[46] Greatly inspired by the country-specific conclusions and recommendations made by Thomas Hammarberg in relation to his visit in Italy in May 2011.
[47] Ruling N. 1369/2016 of the Civil Court of Rome.
[48] European Commission. Compilation of the joint COM & LU EMN NCP ad-hoc query on statelessness (Part 1), Brussels: 2016.

The Italian Citizenship Law 91/1992 itself was subject to an amendment bill and was approved by the Lower House of the Italian Parliament on October 13, 2015. Then in November 2015, a bill was submitted to the Senate concerning the procedure for determining the status of stateless persons in the Prefectures – Territorial Government Offices.

The main changes concern:

a) the possibility to request the status of stateless person for anyone who is in Italy, even if they are residing irregularly

b) the issuance of a residence permit by Police Authorities "pending the outcome of the recognition procedure"

c) the possibility for applicants with both regular and irregular status to submit self-certifications concerning their personal details and the length of their stay in Italy when making their applications.

Nevertheless, by applying Article 33 of Decree Law 69/2013, the Court confirmed that the woman is indeed an Italian national. The court deemed that the authorities were disproportionately strict by rendering legal residence conditional on both uninterrupted registered residence and continuous possession of a residence permit, referring to international principles deriving from international legal instruments dealing with the rights of the child and found that a "constitutionally oriented" interpretation of the 2013 provision must apply retroactively in this case.[49] Despite the important policy and legislative changes introduced by the Decree Law 69/2013, children who were born and habitually resided in Italy until reaching the age of majority (18 years old) but did not hold a regular permit of stay for the period required by law for filing the application to acquire citizenship, still face difficulties in applying. In order to lodge an application for the acquisition of Italian citizenship at the competent Municipality requires registration at the local population register office, which can be carried out only in case of possession of a regular permit of stay. Accordingly, the application of all those persons who cannot be enrolled in the population register office is declared inadmissible by the municipal Citizenship Office. In order to facilitate the acquisition of Italian citizenship of concerned second-third generation migrants and solve the problem of holding a regular permit of stay, Maccioni suggests that a permit of stay based on the right to respect for private and family life could be issued to those who are entitled to apply for citizenship.[50]

4.2. Italian court ruling reducing the burden of proof in dedicated procedures

A few weeks after the landmark decision of the Hungarian Constitutional Court decision on the Hungarian statelessness determination procedure in February 2015, the Italian Court of Cassation ruled on a case[51] concerning the Italian statelessness determination procedure in March 2015 in a very similar, proactive law-making spirit. The Court of Cassation reversed a decision delivered by the

[49] N. Garbin - Weiss, Adam. An Italian Recipe for Reducing Childhood Statelessness. European Network on Statelessness Blog, Web. 27 May 2016.

[50] D. Maccioni, *Ending childhood statelessness in Italy*, *European Network on Statelessness Blog*, 2015.

[51] Ruling No. 4262 of 3 March 2015 of the Italian Court of Cassation.

Court of Appeal of Rome which had refused to recognise yet another stateless woman of Bosnian origin living in Italy since birth.

In its decision, the Court of Cassation compared stateless persons to third country nationals who are beneficiaries of international protection, comparing the similarities between these distinct categories based on the direct implication on the burden of proof related to the applicant's lack of nationality in statelessness determination procedures. In its judgment, the Court recalls the definition of a stateless person as proclaimed in Article 1(1) of the 1954 UN Convention Relating to the Status of Stateless Persons, referring to the obligation of the treatment of stateless persons originating from this Convention. In addition, the Court articulated that third country nationals staying in the territory of Italy enjoy fundamental human rights irrespective of having Italian nationality or not.

The Court found that stateless persons have the right to apply directly for the recognition of their stateless status before a judge in civil proceedings soliciting the more effective judicial procedure. Also, the Italian Court of Cassation held that the similarities between stateless persons and beneficiaries of international protection suggest important implications on the extent of burden of proof which must be reduced also in statelessness determination procedures[52]. This would entail that the judge himself should reach out to competent public authorities (both Italian and those of the State the applicant has effective bonds with) for the purpose of collecting supporting information and evidence on the nationality status of the applicant which may substantiate their nationality, by contributing to the evidence submitted by the claimant.

The Court of Cassation also found that the Court of Appeal of Rome did not consider thoroughly the context of the case at hand, as the Court failed to investigate whether the claimant could have acquired the nationality of Bosnia and Herzegovina in practical terms. This would have been vital, considering that if the Court had verified the context adequately, it would have revealed that based on the Law on Citizenship of Bosnia and Herzegovina, the claimant simply had not met the requirements needed to apply for Bosnian citizenship. What is more, the Court of Cassation proclaimed that the stateless applicant did not have Italian nationality and decided to grant her the stateless status.

This ruling has far-reaching implications and constitutes a significant impetus for Italian judges to leverage better their investigative power to adequately substantiate stateless applicants' personal circumstances engaging in collaborative efforts to verify all potential evidence pertaining to the applicant's statelessness thereby lowering the burden of proof of the applicant.

5. Conclusions

This paper has explored the findings of recent Hungarian and Italian case law testifying the genuine dedication of both governments to comply with their international obligations stemming from the statelessness related legal instruments ratified by the two countries, duly implementing provisions

[52] G. Bittoni, *Statelessness determination procedure in Italy: who bears the burden of proof? European Network of Statelessness Blog*, Web. 6 May 2015.

pertaining to statelessness in good faith. In this process, the demonstrated court rulings suggest crucial findings both in terms of preventing future cases of statelessness and duly addressing existing ones with a view to reducing statelessness. In this regard, the extensive contribution of UNHCR and other non-governmental actors to the mentioned legislative and policy changes cannot be overemphasized.

The court findings also justify that fairly simple procedural amendments and low-cost reforms may have the potential to induce long-lasting effects on concerned stateless individuals[53]. Furthermore, they suggest firm commitment to shed light on the importance of individual statelessness determination through dedicated procedures as a first step to address statelessness and the protection needs of stateless persons. In the presented rulings, very similar concerns were addressed by the Hungarian and Italian judges suggesting an important nexus between the two statelessness regimes shedding further light on potential shortcomings and weaknesses of statelessness determination procedures, including facilitation access to the procedure by all stateless persons, irrespective of the lawfulness of their stay, as well as a reduced burden of proof for the applicant.

Therefore, the addressed shortcomings relating to the dedicated procedures may serve as best practices for countries considering to launch a statelessness determination procedure who therefore may not include similarly unreasonable restrictions but empower judges to conduct far-reaching investigation on evidence on the applicant's statelessness. Despite the great improvement entailed by the mentioned decisions, by referring to the definition included in the 1954 Convention, they failed to reflect sufficiently on the practical obstacles faced by *de facto* stateless persons who are by definition not directly included in Article 1(1) of the 1954 Convention which essentially regards the *de jure* stateless.

The significance of the rather inclusive approach of the mentioned decisions in the EU context lies to a great extent in the fact that so far only nine Member States have put in place dedicated procedures, out of the twenty-eight. This indeed leaves room for improvement. Thus, most importantly, the demonstrated examples of Hungarian and Italian jurisprudence set important examples for other EU Member States with stateless populations with no separate identification procedure in place. As such, nationality legislators in Latvia, Estonia, Lithuania, Croatia, Slovakia, the Czech Republic, Slovenia and Romania could build indeed on the momentum generated by the constructive and inclusive Hungarian and Italian findings.

Moreover, the inclusive and progressive approach of the Hungarian and Italian judges may also encourage Yugoslav successor states with EU membership aspirations and considerable stateless population to open a new chapter in their approach to nationality and eventually accede to the UN statelessness conventions. This would be the basis for successful strategic litigation in cases of statelessness, as well as for long due legislative changes allowing to grant nationality to invisible non-nationals in countries of the enlarging area of freedom, security and justice.

[53] United Nations. UN Refugee Agency, *UNHCR, Good Practices Paper - Action 1: Resolving Existing Major Situations of Statelessness*, Geneva: 2015.