

Europe is trembling. Looking for a safe place in EU law

Loïc Azoulai

► **To cite this version:**

Loïc Azoulai. Europe is trembling. Looking for a safe place in EU law. Common Market Law Review, Kluwer Law International, 2020, 57 (6), pp.1675 - 1688. hal-03230201

HAL Id: hal-03230201

<https://hal-sciencespo.archives-ouvertes.fr/hal-03230201>

Submitted on 21 Jun 2021

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.



Loïc AZOULAI, École de Droit Sciences Po (Paris)

EDITORIAL COMMENTS

Europe is trembling. Looking for a safe place in EU law

It can be tempting to draw a parallel between the current moment in Europe and the post-war period. Postwar Europe was marked by an unrestrained belief in reconstruction plans, modernization, and rescue. Europe in times of Covid-19 is likewise engaged in recovery plans and a process of reconstruction of sustainable infrastructures. The recovery instrument called *NextGenerationEU* is presented as a decisive step towards the building of a “fairer, greener and more digital Europe.”¹ With all her strength, Ursula von der Leyen called, in her State of the Union address, for a “Union of vitality”. “We have the vision, we have the plan, we have the investment”, she said.

Nevertheless, an abyss separates our present day from the early days of European integration. It is as if the project has suffered a catastrophe that is changing its nature. The catastrophe consists in Member States and their peoples having undergone such ordeals, and now facing a health crisis threatening the very existence of vulnerable groups of Europeans, that they can no longer look at each other, or even at themselves, without a “weariness”, perhaps a lack of vitality, and certainly with a mistrust, which may not challenge membership as such, but gives it its current sombre hue.

It is true that European integration was born in the shadow of a catastrophe of another magnitude, the Holocaust.² However, as shown by Judt, the reconstruction was built on a high degree of denial, a deliberate exclusion of negative associations: “it was characterized by an obsession with productivity, modernity, youth, European economic unification, and domestic political stability.”³ In the lyrical mode of Sloterdijk, “the inhabitants of this continent, exhausted by the excesses and the pressures of the era from 1914 to 1945, turned their backs on historical passion and developed a post-historical *modus vivendi* instead . . . ‘history’ for Europeans is a discarded option. By entering the shadow of catastrophe they have decided against an existence in tragic and

1. See European Commission, “Europe’s moment: Repair and Prepare for the Next Generation”, COM(2020)456 final of 27 May 2020.

2. See Baquero Cruz, *What’s Left of the Law of Integration? Decay and Resistance in European Union Law* (OUP, 2018).

3. Judt, “The past is another country: Myth and memory in postwar Europe” (1992) *European Union Law*, 83–114.

epic style. They have chosen a form of coexistence in which a civilising force replaces tragedy and negotiation replaces the epic.”⁴ European integration posited Europe as the creation of a new socio-economic order, immune to its past, radical conflicts, and power-based relationships.

The changing significance of past and place in European integration

The words chosen by the drafters and negotiators of the founding treaties set out the themes that were intended to dominate the course of integration. For one thing, they reflect the determination to look forward: making creative efforts, setting up a “powerful unit of production”, constantly improving the living conditions of European peoples. In addition, they reflect the intention to expand beyond the territory of Europe: “this production will be offered to the world as a whole . . . With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent.”⁵ Africa was part of the European growth plan. European integration was originally conceived as an ahistorical and virtually unlimited project.

This does not mean that Europe’s past and the world outside Europe were not repeatedly politically instrumentalized to reassert the European unification project.⁶ That fact, however, did not really inform the operation of the law. Community law was fashioned precisely as an act of creation, abandoning conceptions of international law that referred to history and to the diplomatic traditions of the past: “Community law is a law without a recognized past, born all at once, just like Minerva came out of Jupiter’s head.”⁷ This meant committing to common institutional structures and to common objectives that “required a continuous effort of creation.”⁸ The past and legacies of the past are not matters that fall within the scope of EU law.⁹

4. Sloterdijk, *Theory of Post-War Periods. Observations on Franco-German relations since 1945* (De Gruyter, 2008).

5. Schuman Declaration of 9 May 1950.

6. Larat, “Present-ing the past: Political narratives on European history and the justification of EU integration”, (2005) GLJ, Special Issue “Confronting memories – reflecting history”, 273–290.

7. Mertens de Wilmars, “Arguments de raison et arguments d’authorité dans la jurisprudence de la CJCE” in Haarscher and Ingber (Eds.), *Arguments d’authorité et arguments de raison* (Nemesis, 1988), 73.

8. Pescatore, *The Law of Integration. Emergence of a new phenomenon in international relations, based on the experience of the European Communities* (Sijthoff, 1974), p. 20.

9. See Case C-292/05, *Lechouritou*, EU:C:2007:102; Case C-457/18, *Slovenia v. Croatia*, EU:C:2020:65.

This posture may no longer be tenable. European integration, having succeeded in overcoming the historical passions of the continent and its peoples – nationalism and war –, has become permeated with “memory wars” – those posing a challenge to the idea of the past as *passé*.¹⁰ While it strove to set up a machinery removed from everyday social and political conflicts, it is now vulnerable to “emotional politics” – the political leaders’ use of public fears mirroring the citizens’ distrust of or disgust for established institutions. While the European Community, and then the European Union, worked hard to establish itself and its law as a “structured network of principles, rules, and mutually interdependent relations,”¹¹ it is now prey to amorphous social passions – anxiety, anger, fear. While it was adamant in its inward-looking approach with regard to external relations, being mainly concerned with the protection of its internal rules, policies and structures, and even more so perhaps in the post-cold war world, it is now facing global risks and global threats (climate, health, war, economy, information, migration) which make it difficult for the EU’s internal assets and external interests to coincide.¹² The Union is steeped in the tumultuous waters of the world.¹³ The Covid-19 outbreak plays an accelerating role in these changing parameters.

Perhaps what we have come to realize most saliently during this pandemic is a sense of distinction between what depends on us, and what not. This crisis has exposed our dependency on external infrastructures, understood as a complex of global supply value chains, digital equipment, essential industries, and world trade patterns. The satisfaction of our basic needs relies heavily on resources, means of production, and channels of communication that our home State, or Europe as a whole, do not own or control. It has become clear that interdependence is not just a matter of increasing cross-border transactions and opportunities for social relationships; it can be “weaponized” by external partners in pursuance of economic or geopolitical ends.¹⁴ This is not new. But it has become real. We have neighbours and we have rivals (and

10. Stone, “Memory wars in the ‘New Europe’” in Stone (Ed.), *The Oxford Handbook of Postwar European History* (OUP, 2012). See also pending Case C-800/19, *Mittelbayerischer Verlag*.

11. Opinion 2/13, *ECHR*, para 167.

12. On the legal nexus between external relations and internal EU policies, see Cremona, “External relations and external competence: The emergence of an integrated policy” in De Búrca and Craig (Eds.), *The Evolution of EU Law* (OUP, 2011).

13. Van Middelaar, *Alarums & Excursions: Improvising Politics on the European Stage* (Agenda Publishing, 2019).

14. Farrell and Newman, “Weaponized interdependence: How global economic networks shape State coercion”, 44 *International Security* (2019), 42–79.

neighbours who are rivals) even “systemic rivals”.¹⁵ Our relative position is determined by geographical as well as historical factors. The past is not gone, and we are assigned to a certain geographical place.

Our thoughts were attuned to the future, and we imagined ourselves as self-sufficient, part of a virtually unlimited project, subject to internal limits that constantly shifted by extending our norms and our model. Now we find ourselves limited. Our institutional framework and mental structures are shaken. For European leaders, this means that EU institutions have to “relearn the language of power”, without it being clear what this implies in practice.¹⁶ They conceive Europe as a “geopolitical Europe.”¹⁷ More crudely, it means that Europe is trembling.

Is this reflected in any way in EU law? Is EU law trembling too? In the case law of the Court, we see at least three motifs gathering force and taking form, which point in different directions and are juxtaposed. They reflect, in various guises, the need to find or keep a safe place, a need which today’s Europeans are experiencing.

A value territory

In the field of data protection, the Union is constantly torn between the objective of facilitating international data flows that are essential to trade, and the need to ensure a high level of protection of natural persons’ freedom, privacy and integrity. This is in a context in which, on the one hand, Europe is technically and economically dependent on a new type of infrastructure on a global scale and, on the other hand, Europeans are practically and emotionally embedded in digital networks from which they hardly know how to disentangle themselves.¹⁸ The Court has chosen this area to develop in its case law the highest standards of protection offered to individuals.¹⁹

15. European Commission, “EU-China – A strategic outlook”, JOIN(2019) 5 final of 12 March 2019. See also Meunier and Nicolaidis, “The geopoliticization of European trade and investment policy”, (2019) JCMS, 103–113.

16. Borrell, “Embracing Europe’s Power” (*Project Syndicate*, 8 Feb. 2020) at <www.project-syndicate.org/commentary/embracing-europe-s-power-by-josep-borrell-2020-02>.

17. “This is the geopolitical Commission I have in mind, and that Europe urgently needs”. These are von der Leyen’s words on the occasion of the presentation of her College of Commissioners in the European Parliament Plenary, 27 Nov. 2019, at <ec.europa.eu/commission/presscorner/detail/en/SPEECH_19_6408>.

18. See Fourcade and Klutetz, “A Maussian bargain: Accumulation by gift in the digital economy”, (2020) *Big Data & Society*, 1–16.

19. See Lenaerts, “Limits on limitations: The essence of fundamental rights in the EU”, (2019) GLJ, 779–793.

In *Google Spain*, the question was whether Google Inc., a company based in California, could be held responsible for links provided by its search engine operated through a subsidiary located in Spain. The case concerned Mr Costeja Gonzalez, a Spanish national, seeking to remove links to articles relating to an auction notice of his repossessed home, dating from 1998, that appeared in Google Search results. The Court did not hesitate; it established a link between the activities of Google Spain, the subsidiary situated in a Member State, and those of the operator of a search engine such as Google Inc.²⁰ Thus, Directive 95/46/EC on personal data protection was said to apply to the US operator processing personal data for the purposes of operating its search engine in Europe. This “particularly broad territorial scope” draws its meaning from the objective pursued by the Directive, construed as ensuring “effective and complete protection of the fundamental rights and freedoms of natural persons.”²¹ It is a form of territorial extension, but one that is strictly related to the need to ensure the effectiveness of the Directive.²² As a result, Mr Costeja Gonzalez is allocated a place in Europe and in the world as a “data subject” playing no particular role in public life.²³ As such, he is granted a right to request that the links containing personal information appearing in the list of results from Google Search should be removed.

Can this request be extended worldwide, to entail a de-referencing on all the versions of Google’s search engine? This question was raised in *Google v. CNIL*.²⁴ The ECJ did not doubt that “a de-referencing carried out on all the versions of a search engine would meet that objective [of the Directive] in full”. Indeed, “in a globalized world, internet users’ access — including those outside the Union — to the referencing of a link referring to information regarding a person whose centre of interests is situated in the Union is . . . likely to have immediate and substantial effects on that person within the Union itself.” Yet, the reality of the world is that it is fragmented into sovereign powers: “numerous third States do not recognize the right to de-referencing or have a different approach to that right”. It follows that “the balance between the right to privacy and the protection of personal data, on the one hand, and the freedom of information of internet users, on the other, is likely to vary significantly around the world.” This provided sufficient justification to consider that the right applies “insofar as the Union is concerned”, but not “outside the Union”. This more restrictive approach may

20. Case C-131/12, *Google Spain*, EU:C:2014:317C-131/12, paras. 55–56.

21. Case C-131/12, *Google Spain*, para 53.

22. On the concept of “territorial extension” and its analytical strength in EU law, see Scott, “The global reach of EU law” in Cremona and Scott (Eds.), *EU Law Beyond EU Borders. The Extraterritorial Reach of EU Law* (OUP, 2019).

23. Case C-131/12, *Google Spain*, paras. 97 and 98.

24. Case C-507/17, *Google LLC v. CNIL*, EU:C:2019:772.

be related to the fact that third countries' authorities, possibly under authoritarian regimes, might want to rely on a "European" worldwide approach so as to order de-referencing under their own laws, entailing "a genuine risk of a race to the bottom, to the detriment of freedom of expression, on a European and worldwide scale".²⁵ Territorial extension does not preclude territorial retreat when geopolitical questions arise.²⁶

This self-correcting approach may also be a response to concerns raised in the aftermath of *Schrems*.²⁷ However, *Schrems* was different. It took the movement of extension to an extreme. In *Schrems*, the Commission adequacy decision on the level of protection of data in the US was declared invalid on the grounds that the transfer of personal data to the US did not strictly comply with standards equivalent to EU standards. This decision was the outcome of a difficult negotiation between the Internal Market Director General of the Commission and the US Undersecretary of Commerce.²⁸ It was a typical expression of the Union's "normative power", expanding its own regulatory practices to the rest of the world and therefore imposing its values in cases where Union citizens' rights are at issue, whilst taking into account global economic factors (the competition for markets) and accommodating foreign political factors (US concerns about security). The invalidation of this decision raised difficult practical questions for EU institutions.²⁹ It is clear that third countries may be unwilling to accept the unilateral assertion of EU rights on the international stage and to enforce them. But the thrust of the Court's judgment was not just to insist on strict legal standards; it was to defend core EU values, regardless of any strategic consideration or political implication.

Schrems II is a confirmation of this approach.³⁰ True, the Court does not invalidate the decision concerning the new Privacy Shield Agreement on the ground that it compromises the "essence" of EU fundamental rights, as it did in the first *Schrems* case. However, it points to a lack of limitations and safeguards regarding the power of US authorities, and to a lack of effective remedies for European data subjects in the US. It completes the regime of

25. Opinion of A.G. Szpunar in Case C-507/17, *Google LLC v. CNIL*, EU:C:2019:15, para 61.

26. This approach was followed by the French referring court, in the absence of a domestic legislative provision to the effect that the removal could apply outside the territory of the EU. See Conseil d'Etat, 27 March 2020, req. n° 399922.

27. Case C-362/14, *Schrems*, EU:C:2015:650.

28. See Heisenberg, *Negotiating Privacy: the European Union, the United States and Personal Data Protection* (Lynne Rienner Publishers, 2005).

29. See Lynskey, "Delivering data protection: The next chapter", 21 GLJ (2020), 80–84.

30. Case C-311/18, *Schrems II*, EU:C:2020:559.

protection of data transfers by further empowering national independent authorities and by subjecting data exporters to the duty to verify whether the level of protection required by EU law is respected in the third country concerned. More importantly, it reasserts the model for effective data protection set out in *Schrems*, based on the imperative of ensuring the “continuity” of a high level of protection where personal data is transferred to a third country.³¹

Pragmatic and political considerations do not seem to play any role here. The reference to limits vanishes completely. This jurisprudence gives rise to a sort of “domestic utopia”: a space allowing European data subjects to be at home everywhere and their personal data to flow in such a regulated and protected way that it avoids any disruption.³² This space is rooted in the territory of the Union, where data are collected. However, it is not limited to a given territory, but relates to a pervasive infrastructure, “the ‘backbone’ of the Internet”. A value territory emerges that follows the contours of the “ubiquitous” Internet.³³ The shift from “territorial extension” in the *Google* cases to “value territory” in the *Schrems* cases may be due to the fact that the latter are concerned with individuals embedded in digital networks run by big foreign companies (“too big to care”) collaborating with public authorities for the sake of mass surveillance. In these cases, the Court aims to protect not just individual Europeans, but Europe’s “population” as a whole, i.e. a special kind of collectivity governed by values.³⁴

Note that, in the present context, this coincides with a strong desire to relocate data to Europe. Third countries that are big global players fall short of such European standards. It is not just about the US; it is about China, India, or Russia. And it is not just about personal data; the Commission’s view is that industrial data are even more crucial. Furthermore, the pandemic has made clear the need to reduce Europe’s dependence on foreign infrastructures and technologies. Thus the Commission is willing to build a “European cloud” as part of *NextGenerationEU*.³⁵ This is not conceived as protectionist zeal, but as

31. Case C-311/18, *Schrems II*, para 93. See further Dubout, “La Charte et le territoire. À propos de l’effet extraterritorial de la Charte des droits fondamentaux de l’Union européenne” in Dubout, Martucci and Picod (Eds.), *L’extraterritorialité du droit de l’Union européenne* (Bruylant, forthcoming).

32. This expression is from Roland Barthes. It was coined in a different context and with a completely different meaning in *How to Live Together: Novelistic Simulations of Some Everyday Spaces* (Columbia University Press, 2013).

33. Case C-131/12, *Google Spain*, para 80.

34. See, forcefully, Marzal, “From world actor to local community: Territoriality and the scope of application of EU law”, 31 March 2020, <papers.ssrn.com/sol3/papers.cfm?abstract_id=3549281>.

35. See European Commission, “A European strategy for data”, COM(2020)66 final of 19 Feb. 2020.

a means to secure safe data in Europe and “reach out” to the world.³⁶ This coexists with Commission initiatives to remove illegal content online.³⁷ It is as if territorial relocation, typical of sovereign entities’ forms of action, is the only way to keep committing to a degree of openness to the world in the context of a world falling short of the Court’s “utopian” model of data protection.

A geography of Europe

Union citizenship was originally conceived as an exercise in deterritorialization within the territory of the Union. Its whole point is to facilitate the possibility of moving from one Member State territory to another, making national territories open to and onto an elsewhere. This comes in the form of a Member State obligation to ensure the full integration of Union citizens and family members arriving from other territories. As is well known, this construction is far from perfect, with strict conditions for benefitting from full integration, and with new forms of exclusion in the Court’s case law based on economic productivity and conformity with moral or cultural qualities.³⁸ Yet, its meaning as originally developed by the Court, which allows for a critique of its present case law, is to offer Europeans and their family members a widened “social freedom.”³⁹ It is to allow them to find a location and to develop a set of relationships elsewhere, unburdened by the identification with a nation’s people.

This is vividly illustrated in the case law involving wartime victims. One such case is *Nerkowska*.⁴⁰ Halina Nerkowska, a Polish national, lost her parents, who were deported to Siberia when she was three years old. At the age of five, she was herself deported to the former USSR. In 2002, she was

36. See European Commission, “Data protection as a pillar of citizens’ empowerment and the EU’s approach to the digital transition – Two years of application of the General Data Protection Regulation”, COM(2020)264 final of 24 June 2020.

37. This will take the form of a new Digital Services Act to be presented on 2 Dec. 2020 by the Commission. See in that connection Case C-18/18, *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*, EU:C:2019:821. On this case, Kuczerawy and Rauchegger, “Court of Justice injunctions to remove illegal online content under the eCommerce Directive: *Glawischnig-Piesczek*”, 57 *CML Rev.*, 1495–1526.

38. See Nic Shuibhne, “Limits rising, duties ascending: The changing legal shape of Union citizenship”, 52 *CMR Rev.*, 889–938.

39. See Honneth, *Freedom’s Right. The Social Foundations of Democratic Life* (Columbia University Press, 2015), and De Witte, “Emancipation through law?” in Azoulai, Barbou des Places and Pataut (Eds.), *Constructing the Person in EU Law. Rights, Roles, Identities* (Hart 2016).

40. Case C-499/06, *Nerkowska*, EU:C:2008:300.

granted a pension as a result of her past stay in concentration camps, but payment of this benefit was suspended on the ground that she did not reside in Polish territory. In 1985, she settled in Germany. The Court frames the issue in standard Union citizenship terms. This is a perfect example of the “implicit distancing of the EU judicial machinery from the chaos and complexity of war.”⁴¹ First, a situation such as that of Ms Nerkowska is clearly covered by the right of citizens of the Union to move and reside freely in the Member States. Second, a residence requirement for a pension constitutes a restriction on free movement. Third, the Court accepts that this restriction can be justified on the basis of “the Polish legislature’s wish to limit the obligation of solidarity with civilian victims of war or repression solely to those who have a *connection with the Polish people*”.⁴² Interestingly, however, the Court interprets the residence requirement as “an expression of the extent to which such victims are *integrated in Polish society*”.⁴³ “Society” is a substitute for “people”. Here is a critical move. Society is not a nation’s people. It is structured around groups and subject to continuous change and differentiation. Therefore, a condition of continued residence in national territory throughout the period of payment of the benefit is not deemed necessary to demonstrate a degree of connection to that society. It is enough to consider that Ms Nerkowska lived in Poland for more than 20 years studying and working.

This reasoning is ambivalent. On the one hand, the obligation of solidarity is extended beyond the narrow bounds of national territory. On the other hand, it is not simply as a war victim that Ms Nerkowska is considered a member of the Polish society;⁴⁴ she had to demonstrate that she was involved in the fabric and the growth of that society. Society is not history. It does not care about European wartime pasts and their consequences. As fashioned by EU law, it is a growth-oriented society, one that looks resolutely forwards.

What happens if the Court is forced to look backwards and outwards? That was the case in *Petruhhin*.⁴⁵ The ECJ referred to Article 3(5) TEU and emphasized that “in its relations with the wider world, the European Union is to uphold and promote its values and interests and contribute to the protection of its citizens”.⁴⁶ In *Petruhhin*, the wider world, the “outside”, was Russia. The Court was not prepared to accept the extradition from Latvia to Russia of a Union citizen, an Estonian national. Therefore, it worked out a solution to

41. See forcefully Lyons, “A door into the dark. Doing justice to history in the Courts of the European Union”, (2008) *EUI Working Papers. Law 2008/11*.

42. Case C-499/06, *Nerkowska*, para 35 (emphasis added).

43. Case C-499/06, *Nerkowska*, para 35 (emphasis added).

44. See Opinion of A.G. Poiares Maduro in Case C-499/06, *Nerkowska*, EU:C:2008:132, para 23.

45. Case C-182/15, *Petruhhin*, EU:C:2016:630.

46. Case C-182/15, *Petruhhin*, para 44.

ensure that Latvia and Estonia would cooperate, so as not to allow Mr Petruhhin to be deported outside the territory of the Union where he would be at risk of being deprived of basic standards of European life. *Pisciotti* was different.⁴⁷ In this case, the extradition had already taken place, a prison sentence was served in the US and, more importantly, there was an EU-USA Agreement under which a formal request for extradition was made. Germany was willing to extradite and Italy did not oppose. The Court mentioned this attitude, but did not insist on the responsibility of the Member State of nationality “to make every effort to ensure that the individual remains in the territory of the Union.”⁴⁸ As a result, Mr Pisciotti’s extradition was not precluded. While this may not be explicitly geopolitical, the Court does draw a geography of Europe and its surroundings.

The recent *Ruska Federacija* case refines this vision.⁴⁹ I.N. is a Russian national who had fled to Iceland where he was granted refugee status on account of the criminal proceedings he had been subject to in Russia. He was then granted Icelandic citizenship. Seeking to enter Croatian territory for a summer holiday, he was arrested on the basis of an international wanted persons notice, and Russia requested his extradition. The Russian Public Prosecutor’s Office guaranteed that the purpose of the extradition request was not to prosecute I.N. for political reasons, and that he would be treated according to ECHR standards. Yet, the ECJ decided to apply the *Petruhhin* solution to this case. Russia is still far from us, but Iceland is close: we have a “special relationship”, which “goes beyond economic and commercial cooperation”, the EEA Agreement being “based on proximity, long-standing common values and European identity.” I.N. is regarded as a “market citizen”, being a recipient of services in a Member State, as a quasi-Union citizen enjoying free movement rights, and at the same time as a refugee to be protected, since he was granted asylum by Iceland. He could not be closer to us. UK nationals, as nationals of a former Member State, are close to us too, as is demonstrated by *RO*.⁵⁰ The execution of European arrest warrants issued by the UK is not affected as long as the UK is part of the EU and it guarantees that ECHR, and therefore EU, rights are protected. This does not predetermine the situation that will prevail once the Framework Decision on the European Arrest Warrant is no longer applicable in the UK. But, for the time being, it means that Russia’s word on the ECHR does not carry the same weight as

47. Case C-191/16, *Pisciotti*, EU:C:2018:222.

48. Coutts, “From Union citizens to national subjects: *Pisciotti*”, 56 CML Rev., 521–540.

49. Case C-897/19 PPU, *Ruska Federacija v. I.N.*, EU:C:2020:262.

50. Case C-327/18 PPU, *RO*, EU:C:2018:733.

UK's commitment to remain a "country of Europe".⁵¹ Europe re-emerges as a "particular territorial unit".⁵²

This is also what happens when European history fires back. *K.* and *H.F.* is such a case.⁵³ *K.* is a Croatian national and a long-time resident in the Netherlands. He was recently found to be strongly suspected of participation in war crimes and crimes against humanity committed by special units of the Bosnian army. He was then declared to be an "undesirable immigrant to the Netherlands", on the grounds that his presence was likely to be detrimental to the international relations of the Netherlands, and there was a need to prevent Dutch citizens from coming into contact with such an individual. The story of *H.F.*, an Afghan national, settled in Belgium as a family member of a Union citizen, is similar. The ECJ considers that the presence of these individuals may be regarded as a genuine, present and sufficiently serious threat to the host society within the meaning of Directive 2004/38, despite the fact that they have been peacefully residing in those countries for many years. The Court acknowledges that these are crimes from long ago, that are very unlikely to reoccur outside their "specific historical and social context". Yet, they may be sufficient to show the persistence of "a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU". The tremors of history return. This is where social integration is given limits. The limit is reached when the violation goes beyond a breach of public policy, and affects the very order of human and social relations. Beyond this threshold, Europe reverts to a territory or a collection of territories to be defended. A form of reterritorialization takes place.

A no-place regime

War criminals are treated as marginal Europeans, aliens to society and to Europe as a whole.⁵⁴ It seems that undesired migrants are, and are destined to be, outside Europe. Since 2015, the arrival of migrants whose place of

51. A rather fragmented unit, though. In today's Europe, being a Member State national, a Polish national, does not stop one being considered a "persecuted person" in another country of Europe, such as Norway. See "Norway grants asylum to man claiming persecution by Polish government", *The Guardian*, 12 Oct. 2020, <www.theguardian.com/world/2020/oct/12/norway-grants-asylum-to-polish-man-who-fled-prison-sentence>.

52. See Nic Shuibhne, "The 'Territory of the Union' in EU citizenship law: Charting a route from parallel to integrated narratives", (2019) YEL, 267–319.

53. Joined Cases C-331 & 366/16, *K. and H.F.*, EU:C:2018:296.

54. A parallel may be drawn with the case of European "foreign fighters". See Regulation 2017/458 as regards the reinforcement of checks against relevant databases at external borders, O.J. 2017, L 74/1, and Arts. 9 and 10 of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, O.J. 2017, L 88/6.

destination is Europe is a constant concern, Europeans' shared obsession. The primary aim is to prevent irregular migrants from reaching Europe's shores in the first place. The response to this "risk" and to this panic – a combination of fear, a sense of insecurity, distress, and guilt – is containment.⁵⁵ Containment essentially means strengthened external border controls and policies of externalization. These have been core elements of EU migration policy for years now. They are again central in the new Pact on Migration and Asylum proposed by the Commission.⁵⁶

The migration crisis (both a structural crisis, and a crisis affecting our perception of immigration) has raised awareness of the geography of Europe, surrounded by neighbouring countries and bordering the Mediterranean Sea, with its long coastlines. Our neighbours are seen as "key partners", bulwarks against terrorism and irregular migration. The major targets are Africa, Western Balkans, and Turkey. But they have diverging interests and approaches. The Mediterranean Sea is seen as a dangerous environment for migrants, filled with missing corpses and criminal networks, as well as a space to be put under intensive surveillance ("our sea" – *Mare Nostrum*). The sea is the milieu where the risks of irregular migration to Europe and uncontrolled "secondary movements" within Europe materialize. It is the external limit, an obstacle to Europe's borderless dream.

How is this reflected in EU migration law? Geography and the sea have not always been construed as limits to Europe's dream and EU law's scope. EU protective rules on the free movement of workers were in the past held to apply to professional activities pursued outside Europe. In *Lopes da Veiga*, a Portuguese national employed as a seaman on board a ship registered in the Netherlands applied for a residence permit in The Hague.⁵⁷ The Court stated that free movement ought to apply as long as the legal relationship of employment retained "a sufficiently close link" with the territory of the Union. In *Boukhalfa*, a Belgian national, resident in Algeria, had been employed on the local staff of the German Embassy in Algiers (in the passports section) under Algerian law.⁵⁸ She asked to receive the same treatment as local staff of German nationality subject to German law. The Court ruled that there were sufficient factors (in particular jurisdictional links) connecting the employment relationship to Germany. Her case was thus located within the ambit of EU law.

55. See Costello, "Overcoming refugee containment and crisis", 21 GLJ (2020), 17–22.

56. European Commission, "A New Pact on Migration and Asylum", COM(2020)609 final of 23 Sept. 2020.

57. Case C-9/88, *Lopes da Veiga*, EU:C:1989:346. Portugal acceded to the EU (then EEC) in January 1986, but transitional provisions still applied, so that Mr Lopes da Veiga was not treated as a "favoured EEC national".

58. Case C-214/94, *Boukhalfa*, EU:C:1996:174.

These cases factually resonate, yet substantively contrast, with cases concerning migrants. In *X and X v. État belge*, a Syrian family from Aleppo, fleeing the war, applied for a short stay visa at the Belgian Embassy in Beirut, with a view to applying for asylum in Belgium.⁵⁹ The referring Belgian court asked whether the Belgian authorities were obliged to issue a humanitarian visa on the basis of the Community Visa Code. The ECJ ruled that the situation was not covered by EU law. It insisted that the application of the Visa Code in such a situation would undermine the general structure of the Dublin system and that the asylum procedures Directive did not apply to requests submitted to the representations of the Member States in third countries. In a similar case, the European Court of Human Rights found that the applicants were not within Belgium's jurisdiction despite the fact that proceedings were brought in Belgium.⁶⁰ The ECHR was therefore not applicable. As a result, these people are left without a place in EU law or in Europe. The only connection they have with Europe is through the extension of European border controls on third country territories, and agreements with countries of origin and transit. These agreements are meant to address "root causes of irregular migration". But that is mostly related to economic development. The state of war experienced by these people is silenced.

This approach is echoed in the New Immigration and Asylum Pact. One of the novelties is the introduction of new rules on border procedures. The Commission argues that "the external border is where the EU needs to close the gaps between external border controls and asylum and return procedures".⁶¹ This entails a pre-entry screening applicable to all third-country nationals who cross the external border without authorization, which mobilizes interoperable information systems. This will also be in the form of a new asylum procedure in which the rules on asylum and return combine. Strikingly, in both cases, the persons subject to the screening and border procedure "shall not be authorized to enter the territory of a Member State."⁶² The practical consequences of this are unclear.⁶³ On the insistence of Member States, the no-place regime is repeated in many crossings into Member States territories: in hotspots as well as at some internal borders.⁶⁴

59. Case C-638/16, *X and X v. État belge*, EU:C:2017:173.

60. ECtHR, *M.N. and Others v. Belgium*, 5 March 2020, Application No. 3599/18.

61. Commission, "A New Pact...", cited *supra* note 56, point 2.1.

62. Art. 4 of the proposed Regulation introducing a screening of third country nationals at the external borders (COM(2020)612 final) and Art. 41(6) of the Amended Asylum Procedures Regulation (COM(2020)611 final).

63. See in that context Joined Cases C-924 & 925/19 PPU, *FMS and Others*, EU:C:2020:367.

64. Concerning the French-Italian border, see Conseil d'Etat, 5 July 2017, req. n° 411575.

Our safe place, and perhaps theirs, is at the price of keeping migrants far from us, at least under a legal fiction.

Somewhere in the world

European data subjects are at home everywhere. They live in a utopia. In a utopia there is always the risk of disregard for the reality of the world. Irregular migrants seeking to enter Europe seem to be nowhere. They are located outside our place, in heterotopia.⁶⁵ In heterotopia there is always the risk of disregard for the real lives of people. Union citizens and quasi-citizens are somewhere.

To make sense of the place of Europeans, and thus also of non-Europeans in Europe, it can be tempting to draw parallels, summoning up our geographical or historical imagination. This must be done with caution, and does not always help.⁶⁶ We may be shaken by what is happening to Europe. True, we are eagerly seeking a safe place and a “survival unit,” one that is responsible for taking care of us, protecting us from our own vulnerable condition, supporting the welfare State, keeping us in employment, maintaining our standard of living, and controlling the spread of the virus;⁶⁷ and this safe place and unit seem to be lacking. But our language and work must not tremble. The last thing we need at this particular moment in time are delusions about Europe and its law being the place of “nowhere”, owned by a group of past or present “privileged” people. The ways in which EU law gives, or fails to give, Europeans and non-Europeans a sense of their place in the world is a delicate matter, worthy of a careful methodological engagement, informed by history, social sciences, and other disciplines.

65. The concept of heterotopia is from Michel Foucault, “Des espaces autres”, (1967) available at <foucault.info/documents/heterotopia/foucault.heteroTopia.fr/>.

66. See Azoulay, “On dubious parallels: The transnational Europeans and the Jews. A note on Gareth Davies’ article”, and Davies, “How citizenship divides. A response to Loic Azoulay”, (2020) *European Papers*, 279–282 and 283–286.

67. The concept of “survival unit” is from Norbert Elias (*The Society of Individuals*, Continuum, 2001). See, as applied to Europe, Joly, *L’Europe de Jean Monnet* (CNRS Editions, 2007).