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## **The (Mis)Construction of the European Individual Two Essays on Union Citizenship Law**

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Department of Law

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Two Essays on Union Citizenship Law**

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EUI Working Paper LAW 2014/14

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## **Abstract**

European Union law has developed a concept of Union citizenship based on a right of exit from one's country and a consequential right of entry in another Member State of the Union. 'Empowering' European citizens and enabling them to integrate into other Member States' territories is its main purpose. If we seek to analyse further the concept of Union citizenship, it is almost inevitable that we inquire into the social background of this construction, the individual skills and resources it entails, the state structures and collective goods it affects. This is the puzzle with which the most acute commentators engage. Looked at this way, Union citizenship is about integration of Union citizens into national communities, financial solidarity with other Member States' nationals and recognition of their personal identities. Ultimately it is about transnational integration and new forms of social justice within the Member States. There is, however, another way to engage with the concept. The focus on social integration is replaced by a somewhat more ambitious project: to empower the Union citizens to connect with Europe as a whole. This approach assumes that a proper regime of Union citizenship constitutes not only a right to free movement but a right to enjoy a common way of living. It would allow Union citizens to live, at least partially, in social and moral conditions which denote a far-reaching European society. If we take this project seriously, the problem, then, is as follows: how are we going to shape this project within a conceptual framework based on transnational integration? What does it mean practically to create ties between individuals who have been allowed to disaffiliate from their country of origin? To which 'whole' shall we refer that is not a structured state and yet does not boil down to a mere sphere of individual interests and particular social interactions?

The essays presented here suggest two ways to approach this problem. The first explores the concept of 'the territory of the Union' enshrined in the EU legal discourse as a possible venue for this shift in understanding the project of European citizenship. The second approach tells the story of an individual who feels strongly about being a 'European' with the right to be recognized everywhere in Europe without being part of any definite community. The first paper is an academic article which was commissioned by Dimitry Kochenov for a forthcoming edited volume on *EU Citizenship and Federalism: The Role of Rights* (CUP, 2015). The second is more of a narrative or a tale and is written in French. The first essay builds upon the second. The reason for bringing them together is to show that the literary form may contribute to an understanding of complex legal issues simply by showing a state of legal affairs in its most stylised form.

## **Keywords**

European citizenship - EU Law - Individual - Territory - Values

## Transfiguring European Citizenship: From Member State Territory to Union Territory<sup>□</sup>

### *From Metonymy to Metaphor*

The concept of ‘Union territory’ has been introduced into EU legal discourse as a result of the landmark *Ruiz Zambrano* case.<sup>1</sup> At first glance this concept may appear to be an anomaly. There is no mention of Union territory in the EU treaties – and in fact there is no need for it. Article 4 TEU clearly states that the Union shall respect the territorial integrity of Member States. In this respect, the Union relies entirely on Member States to determine their own territory as sovereign actors, as can be seen in the delimitation of the scope of application of EU law. Article 52 TEU states that the sphere of operation of EU legal norms consists of those territorial areas designated by Member States in accordance with their constitution or constitutional traditions.<sup>2</sup> This is the case in particular for the operation of those EU rules relating to the free movement of persons. However, in an additional exercise of territorial sovereignty, Member States introduced into the Treaties a form of geographical differentiation to the effect that overseas countries and territories as well as outermost regions and other territories which have special positions within Denmark, Finland, France, the Netherlands, Portugal, Spain and the United Kingdom may be excluded from the application of these rules.<sup>3</sup> A somewhat unfortunate consequence of such territorial differentiation is that the citizens of these special territories, who have the status of Union citizens by virtue of their nationality,<sup>4</sup> may be deprived of the enjoyment of EU citizenship rights, whereas Union citizens from Member States’ ‘common’ territory may be deprived of the enjoyment of free movement rights in these special territories.<sup>5</sup>

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<sup>□</sup> Forthcoming in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP, 2015). I should like to thank Dimitry Kochenov and Vincent Réveillère for very helpful comments on a draft of this chapter. The views expressed remain mine.

<sup>1</sup> Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177. The facts are quite well-known but are summarized under section 3 a) *infra*.

<sup>2</sup> See J Ziller, ‘The European Union and the Territorial Scope of European Territories’ (2007) 38 *Victoria University of Wellington Law Review* 51. For a reference to Member States’ constitutions see Case 148/77 *Hansen* para 10; for a reference to the constitutional traditions of the UK see Case C-145/04 *Spain v UK* [2006] ECR I-7961 para 79. In this context, however, the specific situation of the Republic of Cyprus is to be borne in mind. Assuming the consequences of the *de facto* division of the territory of Cyprus, Article 1(1) of Protocol 10 to the 2003 Treaty of Accession provides that the application of the EU law *acquis* “shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control.” (see on this case S Laulhé Shaelou, *The EU and Cyprus: Principles and Strategies of Full Integration* (Nijhoff Publishers, 2010)).

<sup>3</sup> See D Kochenov (ed.), *EU Law of Overseas: Outermost Regions, Overseas Countries and Territories Associated with the Union* (Kluwer, 2011); D Kochenov, ‘The Application of EU Law in the EU’s Overseas Regions, Countries and Territories after the entry into force of the Lisbon Treaty’ (2012) 20(3) *Michigan State international Law Review* 669. On the case of a region with special status see D. Kochenov, ‘Regional Citizenships and EU law: The Case of the Åland Islands and New Caledonia’ (2010) 35 *European Law Review* 307.

<sup>4</sup> The situation is more complicated, however, for British Overseas citizens. As recalled in Declaration 63 to the EU Treaties, the ‘British Overseas citizens’ shall not be considered as ‘British nationals’ in respect of EU law and, as a consequence, they shall not enjoy the EU citizenship status. However, it is to be noted that the British Overseas Territories Act passed in 2002 facilitated access to British (and EU) citizenship. See further I Hendry & S Dickson, *British Overseas Territories Law* (Hart Publishing, 2011).

<sup>5</sup> In *Eman & Sevinger*, the Court made clear that EU citizens residing in the non-European territory of Aruba may be deprived of the right to participate in the European Parliament elections as long as this complies with the general principle of non-discrimination enshrined in EU law (Case C-300/04 [2006] ECR I-8055 esp. para 55-58). Conversely, on the possibility for overseas countries and territories to introduce restrictions on free movement reference is made to Council Decision 755/2013/EU on the association of overseas countries and territories with the European Union [2013] OJ L344/1 and see



Given the significant control that Member States retain over the delimitation of their territory and over the definition of the parts of this territory falling within the scope *ratione loci* of EU law, the question arises as to whether the reference to territory of the Union in *Ruiz Zambrano* can be said to be anything other than mere rhetoric. Certainly, the reference to Union territory could be dismissed as shorthand for the collection of Member State territories of which the Union is composed. Such a reading of the Court's judgment would be consistent with the definition of EU citizenship enshrined in Article 20 and 21 TFEU which refers to 'the right to move and reside freely *within the territory of the Member States*.' The experience of being a European citizen is deeply informed by this reference to national territory. As a Frenchman, I am 'European' by being given the opportunity to reside in Italy and to become 'quasi-Italian' with regard to the main aspects of my social life.<sup>6</sup> This is the result of various mechanisms (including the conferral of rights and the regulation of family relationships) which together allow nationals of EU Member States to enter the territories of other Member States and to be recognised as genuine members of that society. The transnational essence of the concept of EU citizenship is further demonstrated by the fact that a threat to public policy in the host society will result into expulsion from the territory of that State.<sup>7</sup> In short, the treaties establish a transnational paradigm of EU citizenship based on Member State territoriality.

This paradigm does however have structural and conceptual drawbacks. First and most conspicuously, it favours the mobile, informed and skilled citizen over other citizens who may not possess sufficient resources to enjoy the rights conferred on them by EU law, even though they can be affected by the consequences of the application of EU law on the protection of public goods in the Member States. The weakening of social protections offered to people who are not able to make use of EU provisions is a classic example in this regard which has been widely discussed.<sup>8</sup> Secondly and more pertinently for the purposes of this study, this paradigm creates a tension in the development of the concept of Union citizenship. Arguably, there can be no meaningful concept of Union citizenship if there is no way to connect citizenship to Europe as a whole. A proper regime of citizenship would constitute not only a right to free movement, but a right to enjoy a community of values anywhere within the European Union, regardless of territory. It would allow people to live, at least partially, in material, social and moral conditions which refer to a far-reaching European society. However, this is just what EU law, relying on transnational integration, seems incapable of delivering. The legal concept of European citizenship appears to be more concerned with forming ties in a host society that are equivalent to those formed in the home country.<sup>9</sup> Moreover EU law seems incapable of resisting the re-territorialisation of free movement policies advocated, sometimes successfully, by governments of certain Member States in the context of a significant decrease in trust and harmony in the Union, particularly in times of economic and political crisis.<sup>10</sup> As a result, the legal regime which governs EU

(Contd.) \_\_\_\_\_

further D. Perrot, 'La citoyenneté européenne des 'habitants de PTOM' en questions' (2015 forthcoming) *Revue trimestrielle de droit européen*.

<sup>6</sup> On this point in a broader comparative and historical perspective C Schönberger, 'European citizenship as federal citizenship: some citizenship lessons of comparative federalism' (2007) 19 *Revue Européenne de Droit Public* 61.

<sup>7</sup> Articles 27 and 28 of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

<sup>8</sup> See among many references M Dougan, 'The spatial restructuring of national welfare States within the European Union: The contribution of Union citizenship and the relevance of the Treaty of Lisbon' in U Neergaard, R Nielsen & LM Roseberry (eds.), *Integrating Welfare Functions into EU Law: From Rome to Lisbon* (DJØF Publishing, 2009) 148.

<sup>9</sup> L Azoulai, "La citoyenneté européenne, un statut d'intégration sociale" in *Chemins d'Europe: mélanges en l'honneur de Jean-Paul Jacqué* (Daloz, 2010) 1.

<sup>10</sup> This is reflected, in particular, in transitional arrangements for new Member States after the 2004, 2007 and 2013 enlargements, the *de facto* creation of second-class citizens for nationals of Roma origins, border disputes between Member States leading to a crisis of the Schengen system and finally political opposition to free movement of persons in many European countries (see on the last point Editorial comments, 'The free movement of persons in the European union: Salvaging the dream while explaining the nightmare' (2014) 51(3) *Common Market Law Review* 729).

citizenship seems to be doomed to produce individual emancipation and empowerment whilst at the same time producing alienation and frustration.<sup>11</sup>

However, EU law develops and changes through cases. From time to time the consideration of a concrete case provides the opportunity for the emergence of a new perspective on existing foundational EU law conceptions which have hitherto been endorsed by social and political elites and by the main legal actors. *Ruiz Zambrano* is one such case in which a real paradigm shift may be discerned in relation to the shape of the concept of the ‘territory of the Union’. In this case the Court of Justice was not simply using the concept of Union territory as the traditional metonymy to designate the sum of the individual territories of the Member States. Rather, the Court refers to Union territory as a metaphor for a certain conception of the space referred to in Article 2 TEU as ‘a [European] society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’ Following the Court of Justice’s reasoning, leaving European territory means not only leaving Europe in the geographical sense; it means leaving a community of ideals and values; it means being deprived a certain mode of existence corresponding to the standards of European society. As stated in *Ruiz Zambrano*, the territory of the Union ‘transcends’ the ‘territorial framework of national communities’.<sup>12</sup> It stands for the mix of material and immaterial things that determines the sustainability of individual existence; what we may call a ‘European way of life.’ Therefore, we are left with the following problem: how are we going to reconcile the traditional jurisprudence which takes a transnational view of EU citizenship with the emergence of the ‘transcendental’ conception of citizenship as put forward in *Ruiz Zambrano*? How and under which circumstances does EU law reach the point of complete ‘metaphorisation’ of the concept of Union territory? Is this process sustainable and can we build upon it to shift the discourse on Union citizenship?

The formulation set out in *Ruiz Zambrano* can be seen as a kind of ‘legal revolution’ in the void – a fairly isolated and perhaps even ultimately relatively unimportant judicial pronouncement. Not only does the judgment run contrary to any plausible and predictable reading of the applicable EU provisions and jurisprudence, it is also based on a contentious construction of citizenship and poor reasoning.<sup>13</sup> In practice, it has attracted fierce criticism and its significance is likely to be superseded by subsequent cases, if not formally at least practically in the absence of further implementation. Although it is tempting, even sensible, to dismiss *Ruiz Zambrano* for these reasons, I will try to offer a different way to approach the case. In order to explore the possibility of a shift in discourse, I will consider the metaphorical reference to Union territory as a structural reference which came into being as a result of a series of mediations and which has many potential implications. Starting with a case where a neat distinction between the territory of Member States and European territory comes to the surface, I will first try to show how this distinction is progressively reconciled to reach the point where a shift in the frame of reference is made possible. Next I will explore the main conceptual elements of this new framework and the consequences of adopting it. I will conclude by suggesting that there are limits to the operation of this framework.

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<sup>11</sup> See A Somek, ‘Europe: From Emancipation to Empowerment’ *LSE ‘Europe in Question’ Discussion Paper Series*, Paper No. 60/2013, April 2013; M Everson, ‘A Very Cosmopolitan Citizenship: But Who Pays the Price?’ in M Dougan, N Nic Shuibhne, E Spaventa (eds.), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing, 2012) 145.

<sup>12</sup> The expression is borrowed from Opinion of AG Poiares Maduro in Case C-499/06, *Nerkowska*, [2008] ECR I-3993 para 1.

<sup>13</sup> The last point is clearly made by U Šadl, ‘Case – Case-Law – Law: *Ruiz Zambrano* as an illustration of How the Court of Justice of the European Union Constructs Its Legal Arguments’ (2013) 9 *European Constitutional Law Review* 205.

### ***From European Territory to Social Integration***

Commentators are right to point out the close connection between the traditional rights-driven construction of the internal market and the judge-made construction of European citizenship.<sup>14</sup> As an emerging entity arising out of the case law of the Court of justice, the Union citizen is a special descendant of the ‘Community market agent’. A Union citizen can be broadly defined as a natural person constituted by reference to a branch of national law (nationality law) which is granted a space of autonomous action beyond and across the territorial boundaries of the Member States. Originally framed as an ‘internal market’, this space has more recently been reinvented as an ‘*area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured*’ (Article 3(2) TEU). With the area of freedom, security and justice (AFSJ), one is invited to think of the Union not simply as a technical construction preoccupied with interstate economic harmony but as a Union in which individual citizens can live and work, protected by common values. To be sure, the enforcement mechanisms of these values are not quite perfect. Still, there is a clear shift in the rhetoric of the Treaties. We are witnessing a move away from mere economic union to the establishment of a new, broader social union which has its foundations in a set of shared values.

To a large extent this shift has been facilitated by the jurisprudence of the Court of Justice in cases dealing with free movement. First of all, the Court of Justice has facilitated the construction of a meaningful concept of free movement essentially by granting individual rights to reside and enjoy equal treatment in the host Member State. Secondly, together with the EU legislature, the Court has established a link between the exercise of the right to free movement and the need for the fullest possible integration of the migrant individual (and their family) into the society of the host Member State on the basis of considerations of liberty and human dignity.<sup>15</sup> Thirdly, relying on a broad interpretation of free movement law, the Court insisted that individuals should be provided with basic conditions and ‘personal protections’ (a social and civil status including, for example, the right to social benefits granted by host Member States, the preservation of the integrity of family life, and the right to start a family) in order to be able to fully enjoy the rights conferred upon them by EU law.<sup>16</sup> As a result of this process, the Union citizen may be identified as a *person integrable* in the society of any other Member State. This is precisely the point where Union citizens and ‘privileged’ non-citizens such as Turkish nationals diverge.<sup>17</sup> Consequently, when applied in the field of Union citizenship, the principle of non-discrimination enshrined in Article 18 TFEU law takes on a special, positive meaning: it should be conceived of not so much as a prohibition on discrimination against non-nationals but rather as a rule obliging Member States to allow Union citizens access to their territories and to integrate them into their societies.

#### *a) Territoriality in EU free movement law*

By providing the possibility for nationals to leave the territories to which they are affiliated and to opt for different territories, lifestyles and regulatory systems, EU law gives rise to a sense of European territoriality. As noted by Corthaut, ‘seen from this perspective, the free movement of persons is then

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<sup>14</sup> See N Nic Shuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 47 *Common Market Law Review* 1597.

<sup>15</sup> See already Opinion of AG Trabucchi in Case 7/75 *Epoux F.* [1975] ECR 697 and Case C-308/89 *di Leo* [1990] ECR I-4185.

<sup>16</sup> Case 186/87 *Cowan* [1989] ECR 195; Case C-60/00 *Carpenter* [2002] ECR I-6279; Case C-127/08 *Metock* [2008] ECR I-6241. See further E Spaventa, ‘From *Gebhard* to *Carpenter*: Towards a (Non-)Economic European Constitution’ (2004) 41 *Common Market Law Review* 743; N Nic Shuibhne, ‘The Outer Limits of EU Citizenship : Displacing Economic Free Movement Rights’ in C Barnard and O Odudu (eds.), *The Outer Limits of European Union Law* (Hart Publishing, 2009) 168.

<sup>17</sup> Compare Case C-221/11 *Demirkan*, judgment of 24 September 2013 (non-application of *Cowan* – social protection of services recipients – to Turkish nationals) and Case C-138/13 *Dogan*, judgment of 10 July 2014 (application of *Di Leo* – family reunification – to Turkish nationals).

about offering opportunities for self-realization beyond the national boundaries of the state.<sup>18</sup> The European territory exists as a space offering an ‘*amplified bundle of opportunities*’<sup>19</sup> or, to put it more emphatically, as ‘*a special area of human hope*’.<sup>20</sup> It should be clear, however, that territory is not used here in the strict sense of the term. What EU law does is to facilitate the possibility of movement from one Member State territory to another. Such mobility requires the construction of a space which ties together all Member States territories. This interspace is the point of view from which the situation of individuals is to be assessed. It is no more than a fictional space which allows individuals to maintain their legal situation whilst passing from one State territory to the other.

The notion of European territory in the strict sense was expressly rejected in the *Akrich* case. As the Court made clear in this case, EC law ‘*is silent as to the rights of a national of a non-Member State (...) in regard to access to the territory of the Community*’.<sup>21</sup> A third-country national who was family member of a Union citizen claimed the right to enter the UK. In this case the Court construes ‘access to Community territory’ as meaning the first point of access to the territory of a Member State territory from outside Europe. The Court held that only the right to lawfully live with one’s family in the society of another Member State was covered by EU free movement law – crucially not the right of access to that Member State from outside Europe, which remained within the competence of that Member State. The Court’s reasoning in this case is predicated on a distinction between ‘Member State territory’ associated with the free movement of Union’s citizens within the Union and ‘European territory’ associated with access to Europe of third-country nationals. Whilst the former is covered by EU law, the latter is mainly governed by the domestic law of Member States. According to this view, access to the territory is related to the situation of persons subject to state police controls at the external borders of the Union. Of course, the legal situation has changed since this Court’s decision as a result of a rapid development of Union legislation and administrative instruments in the field of migration.<sup>22</sup> Yet the legal concept of European citizenship is still largely based on this paradigmatic distinction.

It is interesting to note that, conversely, under EU free movement law, the question of access is not presented as a distinct legal question. The EU Citizenship Directive provides a right of entry but this right is entirely based on the right of residence.<sup>23</sup> No specific conditions are attached to it. The EU citizenship regime essentially aims to achieve the genuine integration of Union citizens into the *society* of the host Member States whilst the territory as a defined physical space is disregarded. This has been legally the case since the initial application of the free movement of persons in EC law and has been confirmed more recently with the emergence of EU citizenship law and practically implemented with the abolition of internal border controls.<sup>24</sup> Thus we have as an initial distinction:

**Member State Territory = residence = social integration**

**European Territory = access = police controls**

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<sup>18</sup> T Corthaut, *EU Ordre Public* (Kluwer, 2012) at 296.

<sup>19</sup> UK Preuß, ‘Problems of a concept of European citizenship’ (1995) 1(3) *European Law Journal* 267 at 280.

<sup>20</sup> As reminded by L Bialasiewicz, S Elen and J Painter, “the phrase ‘a special area of human hope’ appears in the preamble to the draft Constitution proposed by the Convention” (‘The Constitution of EU Territory’ (2005) 3 *Comparative European Politics* 333 footnote 8).

<sup>21</sup> Case C-109/01 *Akrich* [2003] ECR 9607 para 49.

<sup>22</sup> See further P Dumas *L'accès des ressortissants des pays tiers au territoire des Etats membres de l'Union européenne* (Bruylant 2013).

<sup>23</sup> Article 5 of Directive 2004/38. See already Case 48/75 *Royer* [1976] ECR 498. For an interpretation of *Royer* informed by deep philosophical insights see S Hurri, *Birth of the European individual. Outline of a theory of legal practice* (University of Helsinki, 2011).

<sup>24</sup> Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders [2006] OJ L105/1.

Yet territorial considerations are not absent from the framework of EU citizenship law. Rather they are reintroduced at the different stages of the reasoning of the Court of Justice in this area. This reasoning follows the canonical framework developed in internal market law and is divided into four steps: the applicability of EU law, restrictions to free movement, justification for these restrictions, and the proportionality of the national measure. Each step of the reasoning carries with it a certain conception of territory. The two first steps exhibit a prevailing language of rights. The conferral of EU citizenship rights is certainly meant to reflect a ‘European space of circulation’ challenging the territory as a closed space where the State has exclusive power.<sup>25</sup> Member States are part of a wider context and must be prepared to regard their territory as both the destination and the origin of movement of individuals within the Union.

Territoriality reoccurs at the stage of the justifications put forward by Member States governments. However, in this context, territoriality does not refer to a bounded space – it is the functional and legal area which forms the basis for the organization of society. To elaborate, Member States rely on territoriality to settle stable regulatory systems ensuring what in Article 4(2) TEU are called ‘essential state functions.’ These functions include the protection of the population through the maintenance of law and order (public policy), ensuring social cohesion through the preservation of collective goods (such as welfare protection, education, and taxation) and the conservation of national identity. To be properly and consistently fulfilled, these functions require boundaries, and in particular they require territorial boundaries in order to facilitate the identification of persons and the distribution of social benefits.<sup>26</sup>

Whilst the Court accepts powers which are necessarily limited in terms of territorial application, it does impose specific obligations on States to ensure that the particular circumstances of each specific case are taken into account when exercising such powers. In making any assessment of the proportionality of the national measures, the Court regularly refers to the ‘degree of integration’ of the Union citizen or the ‘real links’ with the host Member State concerned.<sup>27</sup> In this context, the Court is concerned with the personal situation of the Union citizen and their position in the host society which assesses both the where the citizens live and how long they have lived in that Member State: in short, considerations of space and time.<sup>28</sup> The more the citizen is integrated into a Member State, the more he is entitled to be socially integrated and protected from expulsion despite the attempts of that Member State to restrict their right to remain. In other words, the reference to the ‘degree of integration’ works as what I call a ‘counter-limit’ to the limits legitimately imposed by the Member States on citizenship rights.<sup>29</sup> That having been said, the Court sometimes endorses a more formal approach which consists, for instance, of replacing the requirement to examine individual circumstances in each case with a formal residence requirement.<sup>30</sup>

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<sup>25</sup> S Karakayali and E Rigo, ‘Mapping the European Space of Circulation’ in N de Genova and N Peutz (eds), *The Deportation Regime. Sovereignty, Space and the Freedom of Movement* (Duke University Press, 2010) 125.

<sup>26</sup> See L Boucon, *EU Free Movement Law and the Powers Retained by Member States* (EUI, 2014) PhD thesis (Florence).

<sup>27</sup> See e.g. Case C-209/03, *Bidar*, [2005] ECR I-2119. See in general C O’Brien, ‘Real links, abstract rights and false alarms: The relationship between the ECJ’s ‘real link’ case law and national solidarity,’ (2008) 33 *European Law Review* 643; A Iliopoulou-Penot, ‘Le rattachement à l’Etat comme critère d’intégration sociale’ (2013/4) *Revue des Affaires Européennes* 651; PJ Neuvonen, ‘In search of (even) more substance for the “real link” test: comment on Prinz and Seerberger’ (2014) 39(1) *European Law Review* 125. More generally on the many implications resulting from this reference to social integration see S Barbou des Placés, ‘Le critère d’intégration sociale, nouvel axe du droit européen des personnes?’, (2013/4) *Revue des Affaires Européennes*, 689.

<sup>28</sup> For a critical view on this development see A Somek, ‘Solidarity decomposed: being and time in European citizenship’ (2008) 32(6) *European Law Review* 787.

<sup>29</sup> See further L Azoulai (n9).

<sup>30</sup> See for instance Case C-158/07 *Förster* [2008] ECR I-8507; more generally Opinion of AG Sharpston in Joined Cases C-523/11 & C-585/11 *Prinz & Seeberger* [2013] paras 83 ff.

This reasoning has recently been complemented by what the Court calls ‘qualitative elements’. As it held, ‘*the integration objective (...) is based not only on territorial and time factors but also on qualitative elements, relating to the degree of integration in the host Member States.*’<sup>31</sup> The introduction of these elements results in reassessing the degree of integration in light of the normative attachment of the Union citizen to the host society. In this context, the meaning of the degree of integration is changed: factual integration is no longer sufficient but rather what matters is compliance with the structure and values of the host society. This reasoning casts Union citizenship as an attachment to society as a space of values. It is in this space where the new boundary of European citizenship law lies.

To summarize, the whole sequence of reasoning reads as follows:

**right (movement/residence) < limitation (territoriality) << counter-limit (degree of integration: space and time) <<< counter-limit qualified (degree of integration: respect for social values)**

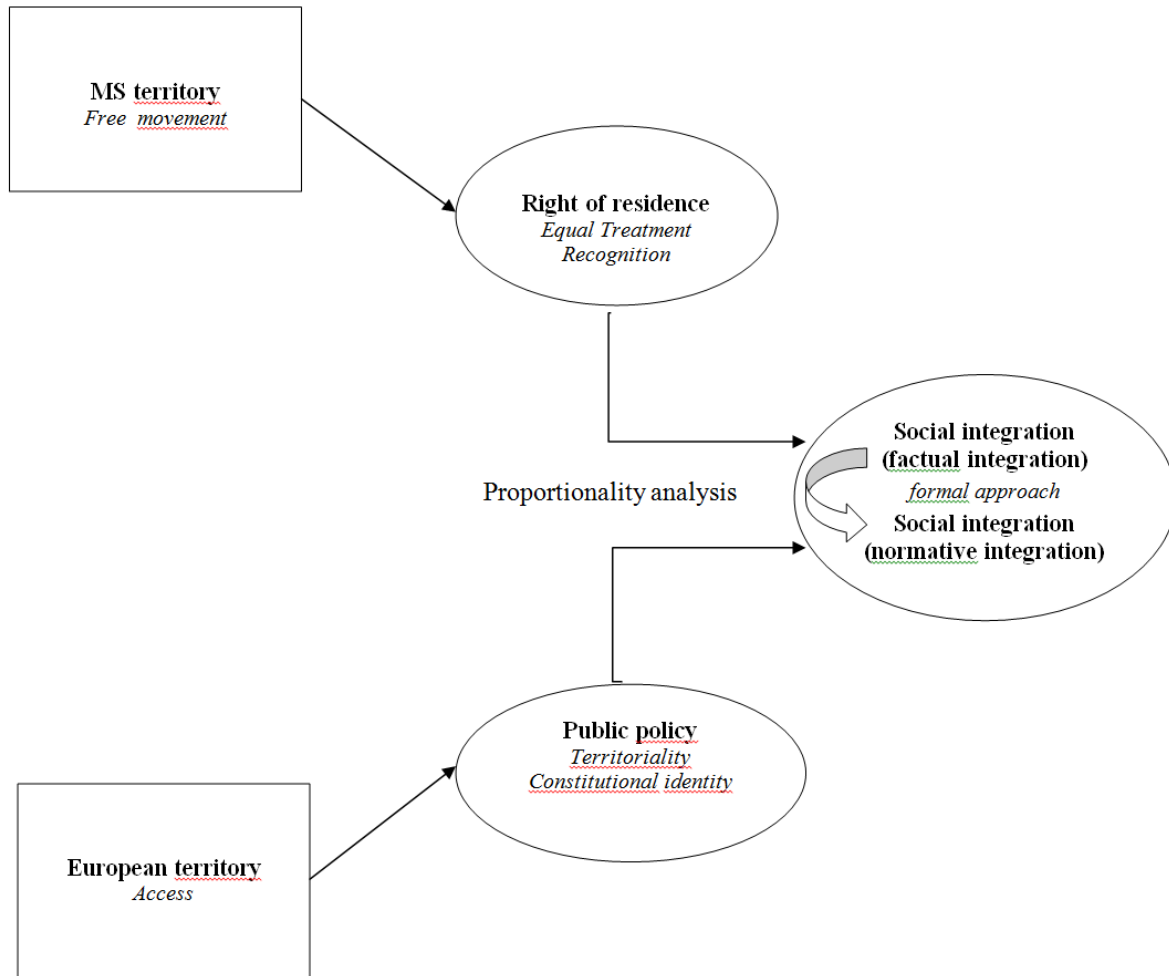
*b) A path to ambiguity*

In the case law different variants of this sequence can be found, each dealing with different kinds of situations and claims. As a result, on different planes the same basic tendency to replace the initial distinction between Member State territory and European territory with two other distinctions can be discerned. An over-simplified reading of the citizenship case law would read as shown in Figure 1.

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<sup>31</sup> Case C-325/09 *Dias* [2011] ECR I-6387 para 64; Case C-378/12 *Onuekwere* [2014] para 25.

Figure 1



Let us take the expulsion regime applicable to Union’s citizens as a first example. It is clearly a rights-based regime. The individual right to free movement prevails, in principle, over the power of the state to control access and residence on its territory. The State is subject to a duty not to expel Union citizens. Therefore it is for the State to justify any attempt to interfere with the citizen’s sphere of freedom. Accordingly, grounds for expulsion are provided for but they are limited and the ‘public policy’ exception must be interpreted strictly. This concept certainly proceeds from the vague notion that the national territory remains under the control of state authorities.<sup>32</sup> Yet, in this context, the Court refers threat to public policy to a ‘perturbation of the social order’.<sup>33</sup> For expulsion to be justified, there must be evidence that the personal conduct of the individual concerned constitutes ‘a genuine and sufficiently serious threat to one of the fundamental interests of society.’<sup>34</sup> The authorities of Member States must assess the situation on the basis of the ‘individual position of the person

<sup>32</sup> This point is somewhat reflected in the following Court’s statement in Case C-100/01 *Ministre de l’Intérieur v Aitor Oteiza Olazabal* [2002] ECR I-10981 para 38: “it does not follow from the wording of Article 48(3) of the Treaty that limitations on the free movement of workers justified on grounds of public policy (*ordre public*) must always have the same territorial scope as rights conferred by that provision” (emphasis added).

<sup>33</sup> Case C-50/06 *Commission v Netherlands* [2007] ECR I-4383 para 43.

<sup>34</sup> *Commission v Netherlands* (n33) para 43.

protected’ – no measure of general deterrence is allowed.<sup>35</sup> Factual integration into the host society including considerations such as how long the individual concerned has resided on the territory, family and economic connections, social and cultural integration shall be taken into account. These considerations work as ‘counter-limits’ to the public policy exception.<sup>36</sup> In recent cases, however, this assessment based on the conduct of the individual has been given another meaning. The Court appears to focus on the respect for the values of the host society.<sup>37</sup> This leads to a significant change in approach since the ‘degree of integration’ is no longer used as a qualifying criterion for protection. It does not amount to a requirement of ‘individualisation’ of the case imposed on national authorities. Rather, the Court focuses on the duty of assimilation whereby the citizen is asked to show a desire to integrate into the society and to respect its values. Accordingly, it is the alleged ‘lack of integration’ which may be used as a legitimate ground for expulsion.

There should be no great difficulty in reading the social benefits and right of residence case law along the same lines. In this context, the principle of territoriality is used to refer to the area which serves to establish the national configuration of social sharing. For instance, the Court deems ‘essential’ the maintenance of ‘*treatment capacity or medical competence on national territory*’.<sup>38</sup> In such cases, the position of the State is endorsed in one of its essential functions. This may not be sufficient, however, to justify a derogation from the application of the right to equal treatment. Indeed, Member States should provide for an individual assessment of the Union citizen’s position. The mere fact of being present and integrated into a host society may be the trigger for the re-establishment of citizenship rights. In some instances, the Court finds that it is the fact of being present, located in the territorial jurisdiction of the State, the mere ‘*fact of a person’s hereness*’ that should force national authorities to grant a right of residence or a social benefit.<sup>39</sup> The *Trojani* case is the best illustration of this logic.<sup>40</sup> Here again we find the ‘counter-limits’ logic focusing on individual situations. In a series of recent decisions, however, the Court has referred to ‘qualitative elements’ as a way to qualify the integration process. Even though this case law essentially concerns the acquisition of the right to permanent residence, hints at this approach can be found in cases relating to social benefits. Genuine integration into the social environment demonstrated by the material or cultural capacities to assimilate and a real contribution to the host society may be required.<sup>41</sup> The logic of situations which characterizes the protection of factually-integrated persons is turned into something else: a logic of assimilation with a view to the maintenance of the perceived cohesion of the host society.

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<sup>35</sup> *Royer* (n23) para 46. Moreover, in this case, protection from expulsion gives rise to a specific procedural protection: Member States must ensure ‘*the genuine enjoyment of the safeguard constituted by the right of appeal*’, a formulation which interestingly prefigures the language used in the *Ruiz Zambrano* case (my own translation from the original French formulation used in *Royer*: “*la jouissance effective de la sauvegarde que constitue, pour elle, l’exercice de ce droit de recours*” – the official English translation reads differently). Requirements of procedural protection are widespread in the case-law focusing on the degree of integration into the host society (on this point see L Boucon (n26)).

<sup>36</sup> See Article 28 of Directive 2004/38.

<sup>37</sup> See Case C-145/09 *Tsakouridis* [2010] ECR I-11979, Case C-348/09 *PI*, judgment of 22 May 2012 and Case C-400/12 *MG*, judgment of 16 January 2014.

<sup>38</sup> Case C-372/01 *Watts* [2006] para 105.

<sup>39</sup> The expression is borrowed to L Bosniak, ‘Being Here: Ethical Territoriality and the Rights of Immigrants’, *Theoretical Inquiries in Law* (2007) 389 at 391.

<sup>40</sup> Case C-456/02 *Trojani* [2004] ECR I-7573.

<sup>41</sup> See for instance the following ambiguous judgments: Case C-542/09 *Commission v Netherlands* [2012] ECR 346 and annotation by F de Witte, ‘Who funds the mobile student? Shedding some light on the normative assumptions underlying EU free movement law’ (2013) 50 *Common Market Law Review* 203; Joined Cases C-523/11 & C-585/11 *Prinz & Seeberger*, judgment of 18 July 2013. See further Opinion of AG Wathelet of 20 May 2014 in the pending Case C-333/13 *Dano*.



To a large extent the same story applies in relation to the case law on surnames.<sup>42</sup> In this context, free movement of citizens essentially means special protection for individuals who have developed multiple affiliations within the Union, whether they are ties of nationality, family or professional connections. EU citizenship law widens the struggle for recognition of identity beyond the boundaries of the Member States. It is not by chance that this regime is particularly beneficial to citizens who are children. Children largely depend on the ties they have with the family and social environment; whilst as future adults they are the vehicle of a widened social sphere transcending the local and national contexts. The core of the regime consists of imposing on Member States the obligation to grant a legal status corresponding to the concrete life of these ‘European individuals’ who are anchored in different points of the European territory. Quite naturally this transnational regime collides with a territoriality concern recognised by the Court as a public policy concern.<sup>43</sup> The attribution and change of surnames is seen as a traditional State attribute absolutely essential to the identification of persons within the polity. Accordingly, in *Garcia Avello*, the Belgian government argued that this immutability of surnames guaranteed by the state is a ‘*founding principle of the social order*’ justified by the objective of promoting integration and equality of individuals into Belgian society.<sup>44</sup> The Court famously replied that naming and parentage ‘*cannot be assessed with the social life of one Member State only.*’<sup>45</sup> The situation of the individual concerned has to be repositioned within a wider social context, recomposed at the European level. This comes down, in practice, to a specific assessment of the individual situation on the basis of social (‘everyday dealings’) and temporal (‘the passing of years’) factors – working essentially as a counter-limit.<sup>46</sup> However, it may well lead, through a relaxation of the standard of proportionality, to the introduction of ‘qualitative elements’ related to the rather uncertain notions of defence of national identity, constitutional identity and constitutional history.<sup>47</sup>

Three remarks may serve as a conclusion to this brief reconstruction of the case law. First, it is quite remarkable that this reconstruction of the case law results in an ambiguous reference, namely ‘social integration’, the purpose of which is to operate a mediation between the individual right to be integrated into the host society and the legitimate prerogative of Member States to preserve social cohesion. In some cases, it is considered as a matter of fact which works as a presumption of ‘integrability’ fostering the duty of national authorities to further integrate the Union citizen (factual integration). In others, it is a precondition for the acquisition of the citizenship rights which must be demonstrated by the individual under the control of the national authorities (normative integration). Hence the contradictory use of the concept of social integration which gives rise to so many difficulties.

Secondly, in the course of this reasoning, a change in the reference to the territory seems to occur. EU law forsakes the spatial dimension for the social dimension. In the EU context, territoriality essentially amounts to the *society* as organized by the state. The state is legitimized as an actor ensuring the social and normative cohesion of the ‘sphere of relations of individuals between themselves’.<sup>48</sup> The group of people resulting from this process is not a traditional political community bound by ‘*the special*

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<sup>42</sup> Most notably: Case C-148/02 *Garcia Avello* [2003] ECR I-11613; Case C-353/06 *Grunkin & Paul* [2008] ECR I-7639; Case C-208/09 *Sayn Wittgenstein* [2010] ECR I-13693; Case C-391/09 *Vardyn & Wardyn* [2011] ECR I-3787.

<sup>43</sup> *Grunkin & Paul* (n42) para 38.

<sup>44</sup> *Garcia Avello* (n42) para 40.

<sup>45</sup> *Garcia Avello* (n42) para 42.

<sup>46</sup> *Grunkin & Paul* (n42) paras 25 and 27. The transposition of *Grunkin and Paul* in German law reflects a form of formalisation of this ‘counter-limit’. The new provision (Article 48 of the Introductory Act to the Civil Code, EGBGB) provides that family names which have been acquired during a habitual residence in an EU country and have been registered there in a register of births are recognised for the purposes of German law, *provided this does not contradict the fundamental principles of German law* (see for analysis C Kohler, ‘La reconnaissance de situations juridiques dans l’Union européenne: le cas du nom patronymique’ in P Lagarde (dir.), *La reconnaissance des situations en droit international privé* (Pedone, 2013) 67).

<sup>47</sup> *Sayn Wittgenstein* (n42) para 92; *Vardyn & Wardyn* (n42) para 84.

<sup>48</sup> See this expression in ECtHR, *E.S. v. Sweden*, Appl. No. 5786/08, judgment of of 21 June 2012, para 57.

*relationship of solidarity between [the state] and its nationals (...) which forms the bedrock of the bond of nationality*'.<sup>49</sup> It is a group whose members are mutually bound by all kinds of connecting factors based on factual integration, residence, family ties, education, employment and ultimately attachment to a set of core values.<sup>50</sup> Unlike closed territorial communities, communities of values are relatively open to new members and subject to continuous adjustment.

Thirdly, values have the characteristic of being both context-bound and highly abstract references. This reference to values in the process of social integration makes possible a constant shifting from the national to the EU level. On the one hand, a multiplicity of social sites hosting Union's citizens may claim to have their own discrete values respected. On the other hand, the Court may rely on the values of Union to control, limit, endorse or even strengthen the normative cohesion of national societies. The relationship between supranational and national values is a fluid one. For instance, in *Sayn Wittgenstein*, the Court states that the objective of observing the principle of equal treatment as enshrined in Austrian constitutional law reflects an important value that should be recognized as a general principle guiding its interpretation of EU law.<sup>51</sup> In *P.I.*, the Court states that the Union can in fact share the particular values of a Member State.<sup>52</sup> On this reading, the process of social integration taking place at the national level is not at odds with the construction of a 'European' individual embedded in a common area of values. Accordingly, a parallel process of integration may be generated which is assessed against the notion of European society put forward in Article 2 TEU. This will be the subject of the following part of this chapter.

### ***From Social Integration to the Territory of the Union***

Instead of following the canonical reasoning, some of the case law of the Court takes a different view. This case law begins with an individual assessment of social integration based on both factual and normative elements, deriving from this either a right to remain in the territory of the Union or a ground for expulsion from the national territory. Thus, instead of a clear distinction between the individual's rights and state prerogatives, a simple figure comes to the foreground. We may call this figure the 'European individual'.

The attributes of the European individual can be deduced from how their relationship with the host society is framed: a 'good citizen' is marked out by *a closer relationship than might be expected from his legal situation*, whereas a 'bad citizen' is marked out by *a relationship which is more distant than the one his situation should allow him to establish*. Gerardo Ruiz Zambrano epitomizes the first figure whereas Pietro Infusino and Nmandi Onuekwere are good examples of the second one.<sup>53</sup> These litigants are Union citizens or family members of Union citizens and all are 'marginal' individuals, separated from the community existing in the host society. Yet different legal regimes are applied to them as represented in Figure 2.

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<sup>49</sup> Case C-135/08 *Rottmann* [2010] ECR I-1449 para 51.

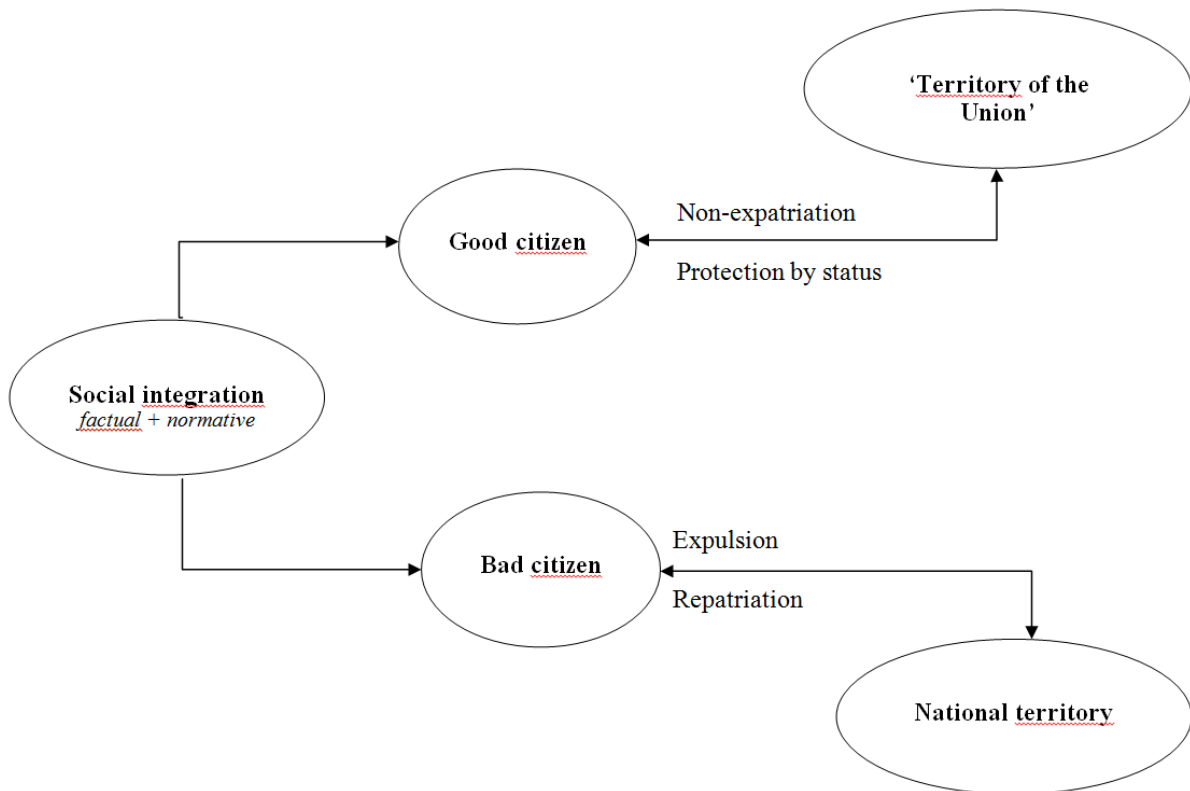
<sup>50</sup> This definition comes close to the notion of space referring to individual and social bonds put forward by H Lindhal in 'Finding a Place for Freedom, Security: The European Union's Claim to Territorial Unity' (2004) 29 *European Law Review* 461.

<sup>51</sup> *Sayn-Wittgenstein* (n42) para 89; see further annotation by L Besselink (2012) 49 *Common Market Law Review* 671.

<sup>52</sup> *PI* (n37) para 28 ; see further L Azoulai & S Coutts, 'Restricting Union citizens' residence rights on grounds of public security' (2013) 50 *Common Market Law Review* 553.

<sup>53</sup> *Ruiz Zambrano* (n1); *PI* (n37); *Onuekwere* (n31).

Figure 2



Note that this sequence is a permutation of the former scheme shown in Figure 1 – the resulting distinction being in a symmetrical, though inverted, relationship to the initial distinction (Member State territory/European territory). The question which then arises is, starting from the same ambiguous notion of social integration, how one is to decide one way or the other: whether to take the good citizen or the bad citizen route. The answer to this question lies in a complex and almost imperceptible process of how the case is framed.

a) *The 'good citizen'*

Mr Ruiz Zambrano is a Colombian national who decided to leave his home country with his family and to seek asylum in Belgium. The Belgian authorities refused his application for asylum and subsequent applications to have his situation regularized. Despite Belgium's refusal and despite not possessing a resident permit, Mr. Zambrano and his wife were able to register as 'residents' in a Belgian municipality and he started to work full-time and to pay taxes. Since the rejection of his residence application in March 2006 Mr. and Mrs. Zambrano have held special residence permits valid for the duration of the judicial action he has brought against Belgium's decision. During this time, Mrs. Zambrano gave birth to two children, Diego and Jessica. The children acquired Belgian nationality as a result of being born in Belgium (and since their parents did not take any specific steps to have them recognized as Colombian nationals). The situation of this family is typical of many migrants in Europe – being formally in a transitory position but seeking leave to remain. They are migrants who are *recognized* and partially included in the administrative and economic life of the country but who are not *authorized* to stay in the territory. Such migrants belong to the category of

individuals who have been provocatively labelled ‘*illegal citizens*’.<sup>54</sup> Moreover, the case concerns children who, in addition to being Union citizens, are dependent on their parents. On the basis of this unique combination of circumstances the Court established that, despite being an illegal migrant currently unemployed in Belgian territory, Mr. Ruiz Zambrano was entitled to a right of residence and a work permit in Belgium, allowing him and his family to be socially integrated into this country.

How can such a revolutionary legal decision be justified? The Court’s decision is expressly based on the possibility that the children could potentially be deprived of the possibility of enjoying the rights (presumably of free movement) conferred on them by virtue of their status as citizens of the Union. Arguably, this is a rather poor justification. Is it really the possibility that the children would lose their right to enjoy free movement which is the justification for a complete reclassification of the status of their father, turning him from illegal migrant to a ‘European’ individual worthy of protection? It is suggested that a clue to the answer to this question is contained in the Court’s odd reference to the ‘*exercise of the substance of the rights*’.<sup>55</sup> This is a hint at what is really at stake in the judgment: the possibility of the whole family having a decent and secure life by European standards.

What may have had an impact on the Court’s decision is the manner in which Mr. Zambrano was represented, namely as an individual well integrated into many aspects of local society. For example, Mr. Zambrano enjoyed stable family relationships, he and his wife had a role of caretakers for their children and he had shown a willingness to create ‘real’ social links by finding employment and paying taxes. Whilst being illegal resident in Belgium, he and his family were registered in the municipality they lived in. More importantly perhaps he manifested a desire for legality and social integration as evidenced by his application to have his situation regularized and his ‘efforts to integrate into Belgian society, his learning of French and his child’s attendance at pre-school.’<sup>56</sup> Such behavior is that of a ‘good citizen’ for whom public policy is in no way a constraint on the individual, but rather a source of ‘enjoyment’. Accordingly, deportation from the Europe would amount to a real ‘expatriation.’ It would mean displacing an individual and its family from a place they came to occupy and which was assigned to them, a place which they were somehow ‘destined’ to live in.

Regarded from this point of view, which is that of the reestablishment of a place and not that of illegal access to territory, all the gaps and shortcomings entailed in the reasoning become less important. For there is an unspoken argument in these paragraphs: the man is leading a communal and ethical life with his family. This argument is reminiscent of one of the Court’s statements in *Carpenter*. In this case, despite the fact Mr Carpenter’s spouse infringed UK immigration law she was nevertheless held to be leading a ‘true family life’ and her conduct was not ‘the subject of any complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety.’<sup>57</sup> She was, in other words, a good wife and a good citizen – a ‘good subject’ irrespective of her husband’s transnational activity.

But is this enough? The mere possibility of losing of the opportunity to quietly live together with one’s family does not trigger protection under EU law. As the Court made clear, ‘*the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union (...), is not sufficient in itself to support the view that the Union citizen will be forced to leave the Union if such a right is not granted*’ and therefore to grant him a right to stay.<sup>58</sup> An individual’s intention to live in Europe is not a sufficient ground for protection.<sup>59</sup>

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<sup>54</sup> See E Rigo, *Europa di confine. Trasformazioni della cittadinanza nell’Unione allargata* (Meltemi, 2007) with a preface by E Balibar.

<sup>55</sup> *Ruiz Zambrano* (n1) para 44.

<sup>56</sup> *Ruiz Zambrano* (n1) para 16.

<sup>57</sup> *Carpenter* (n16) para 44.

<sup>58</sup> Case C-256/11 *Dereci*, judgment of 15 November 2011 para 68.

<sup>59</sup> Case C-87/12 *Ymeraga*, judgment of 8 May 2013 para 38.

Rather the Court searches for objective traces of social integration.<sup>60</sup> In *Ruiz Zambrano*, the Court was concerned with the situation of a family, some of whose members were Union citizens, who had made a local place within the Union territory *the centre of their personal and social life*. It is the consistency and the integrity of this life that have been recognized. In fact there is a strong normative dimension implicit in the reasoning, with the Court going beyond the ‘objective conditions of dignity’ under which the free movement rights are deemed to be exercised.<sup>61</sup> As such, we can see that the Court assumes that Union citizenship is more than the sum of rights laid out in the treaties.

There is something deeper which makes the exercise of these rights possible, something which does not admit any limitations or conditions: what the Court, not coincidentally, calls a ‘status’.<sup>62</sup> Notice that in this judgment the status of Union citizen does not play the same role as in previous decisions: it is not one of the conditions for applicability of the citizenship rights and it is not shorthand for the set of rights conferred on Union citizens.<sup>63</sup> Rather, the status of the individual is what makes these rights meaningful: the idea that *being a European citizen requires a special mode of being in the society which deserves recognition from society*. This may help explain why the Court used Article 20 TFEU (referring to the establishment of Union citizenship) and not Article 21 (referring to the citizen’s rights) as a basis for its construction.

It should be clear that this construction implies that the Court is taking legal possession of the territories of the Member States.<sup>64</sup> The granting of a right of residence to a person not covered by Article 21 TFEU necessarily implies a loss of control by Member States over immigration flows, entry and access to their territory. This is not the first time that the Court has been presented with such a challenge. In the *Metock* case the Court responded to this challenge by relying on the traditional justification based on the effectiveness of free movement rights.<sup>65</sup> A traditional instrumental justification which is by no means satisfactory in this context. For a ‘new deal’ is put forward here. So far in the realm of internal market law the judicial grant of rights to individuals mirrored a commitment to European integration that was broadly agreed amongst Member States to the extent that they could expect long-term benefits from the integration process, even though the application of EU law in individual cases might conflict with their self-interest narrowly conceived. However, with the new construction, this deal is broken: Member States lose exclusive control over the composition of their society and cannot expect any direct or indirect benefit. That this construction would face fierce resistance is no doubt.<sup>66</sup>

In fact, the Court creates a special legal habitat for ‘European individuals’ deserving of protection. It refers it the ‘territory of the Union’ as a proxy for the notion of a far-reaching European society. The foundations for this bold construction were laid in the well-known *Rottmann* case in which the Court constructed a provisional status for an individual – not exactly a ‘good citizen’ – whose status became uncertain whilst moving from one Member State to another.<sup>67</sup> To explain, in the course of moving

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<sup>60</sup> Case C-456/12 *O & B*, judgment of 12 March 2014.

<sup>61</sup> See already preamble of Regulation 1612/68 of the Council of 15 October 1968 on Freedom of movement for workers within the Community 1612/68; rec. 5 of the preamble of Directive 2004/38; *Metock* (n16) para 83.

<sup>62</sup> See on the notion of status in this context the chapter by M Szpunar, this volume. See more generally on the notion of status J Waldron, ‘Is Dignity the Foundation of Human Rights?’ (2013) *NYU School of Law, Public Law Research Paper No. 12-73*.

<sup>63</sup> See further L Azoulai, ‘Comment on the Ruiz Zambrano judgment: a genuine European integration’ (2011) EUI (Florence) (<http://eudo-citizenship.eu/>).

<sup>64</sup> On the importance of the control over territory in the constitution of society, see from an anthropological perspective M Godelier, *Aux fondements des sociétés humaines. Ce que nous apprend l’anthropologie* (Albin Michel, 2007).

<sup>65</sup> *Metock* (n16).

<sup>66</sup> See for instance the reception of *Ruiz Zambrano* by some UK courts: C O’Brien, ‘I trade, therefore I am: legal personhood in the European Union’ (2013) 50(6) *Common Market Law Review* 1643. See more generally the national reports in U Neergaard, C Jacqueson & N Holst-Christensen (eds.), *Union Citizenship: Development, Impact and Challenges* (DJØF Publishing, 2014).

<sup>67</sup> *Rottmann* (n49).

from Austria to Germany, an Austrian national applied for and was granted German nationality, thereby losing his Austrian nationality, but was then subsequently deprived of this new nationality on the ground that he had obtained this status by deception. Faced with the threat of Mr. Rottmann being deprived of the benefit of EU citizenship rights the Court decided to impose on national authorities the obligation to review the proportionality of the decision withdrawing nationality having regard to ‘*the situation of the person concerned in the light of European Union law*’ and this applies ‘both to the Member State of naturalisation and to the Member State of the original nationality’.<sup>68</sup> This amounts to creating a ‘transitional area’ whereby Mr. Rottmann could provisionally exist independently of any other factor connecting him to a Member State, whilst encouraging the German and Austrian authorities to further consider his case and cooperate.<sup>69</sup> It is submitted that this bold decision is not just concerned, as expressly argued by the Court, with ‘the loss of the rights enjoyed by every citizen of the Union’.<sup>70</sup> As acknowledged by the Advocate General and endorsed by the Court, the duty to demonstrate loyalty towards the home State is part of the duties constituting the status enjoyed by an individual as a national and prevails over the enjoyment of rights.<sup>71</sup> Rather this decision is grounded in the underlying idea that statelessness is not easily compatible with the standards of a decent European life. In practice, it means that the Union citizens should be defined not only as parts of home and host societies; they may also represent themselves as being part of Europe as a whole. To be sure, ‘Europe as a whole’ is a much less structured area than the traditional society organized by the state and, ultimately, it is for the national authorities to decide on nationality issues.<sup>72</sup> Yet this reference exists as an original legal construction and may serve to aid Union citizens in need of a legal status in exceptional situations.

*b) The ‘bad citizen’*

However, like Dr. Jekyll has Mr. Hyde, the ‘good citizen’ too has the ‘bad citizen’. The figure is reversible. The bad citizen has the equal but opposite interaction with Europe as a whole: meaning the unavailability of each and every mode of integration into society outlined above. Take for instance the case of Mr I, an Italian national resident in Germany and sentenced to seven and a half years imprisonment for sexually abusing the daughter of his former partner, or the case of Ms G, a Portuguese national resident in the UK and sentenced to imprisonment for child abuse.<sup>73</sup> These cases are construed by the Court as cases of detachment from society. In the Court’s reports, these individuals have seriously troubled family relations, and by threatening children within the family setting they affect ‘the calm and physical security of the population as a whole.’<sup>74</sup> Moreover the imposition of a prison sentence by a national court was such as to show ‘the non-compliance by the person concerned with the values expressed by the society of the host Member States.’<sup>75</sup> Such crimes are not only wrongful acts committed against the host society. According to the Court they

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<sup>68</sup> *Rottmann* (n49) paras 55 and 62.

<sup>69</sup> See further L Azoulai, ‘L’autonomie de l’individu européen et la question du statut’, *EUI Working Paper LAW 2013/4*. It is interesting to compare the *Rottmann* solution based on the creation of a status with case C-146/14 PPU *Ali Mahdi*, judgment of 5 June 2014, in an obligation to actively seek to secure the issue of identity documents for the third-country national is imposed on the Member State but there is no obligation to issue an autonomous residence permit, or other authorisation conferring a right to stay.

<sup>70</sup> *Rottmann* (n49) para 56.

<sup>71</sup> Opinion of AG Poiares Maduro in *Rottmann* (n48) para 33 and *Rottmann* para 51.

<sup>72</sup> *Rottmann* (n49) para 58.

<sup>73</sup> *PI* and *MG* (n37).

<sup>74</sup> *Tsakouridis* (n37) para 47.

<sup>75</sup> *MG* (n37) para 31.

demonstrate a lack of ‘feeling of Union citizenship’.<sup>76</sup> A rather striking expression which resonates with the European sociological tradition.<sup>77</sup>

This doubtful sentimental approach complements to the normative approach outlined above. However, in this context, this approach generates a totally different dynamic. There is nothing more instructive on this point than paragraph 24 of the *Onuekwere* judgment. Enjoyment of permanent residence by Union citizens in host Member States is presented in the Citizenship Directive as a ‘*key element in promoting social cohesion*.’ There is no doubt that in the directive reference is made to the social cohesion of the Union as a whole.<sup>78</sup> Yet, by stating that this objective is perfectly consistent with the fact that the EU legislature made the acquisition of the right of permanent residence ‘*subject to integration of the citizen of the Union in the host Member State*’, the Court changes the meaning of the concept of social cohesion. In this sense social cohesion is not about extending the possibility of creating bonds and promoting new forms of solidarity in Europe. It is mainly about respecting the particular value system of the host Member State.

The result is, instead of an appeal to Europe as a whole, a reallocation of responsibilities among the Member States. On the one hand, the approach in terms of compliance with the values of the host society leads to a certain facilitation in expelling Union citizens. Host Member States are allowed to close their territory to non-national Union citizens which present threat to the cohesion of society. On the other hand, and crucially, home Member States are responsible for taking care of the ‘bad citizens’, deviant and ‘non-integrable’ people.<sup>79</sup> Thus EU law stipulates a form of dual social control; one based on value compliance in the host Member States and the other based on individual’s plan for rehabilitation in the home Member State. This general sketch may be complicated, however, by the fact that home Member States may be held responsible for value compliance in the host State<sup>80</sup> whereas host Member States may be held responsible for the individual’s rehabilitation.<sup>81</sup> As a general rule, however, the Court constructs a case for ‘repatriation’ to the home Member State just as it made a case against ‘expatriation’ from the Union territory in *Ruiz Zambrano*.

The bad citizen is just another side of the personality of the ‘European individual’. When authors complain about the conservative nature of the Court in *P.I.* or *Onuekwere* as well as when they applaud the progress nature of the Court in *Ruiz Zambrano*, they should not forget that these are two sides of the same coin. Both figures are the outcome of a process of re-composition of the area offered to Union citizens by the Union. The ‘territory of the Union’ is a metaphor set out precisely to designate this process of re-composition. Therefore it should not be simply seen as a homogeneous and smooth space where individuals can enjoy new rights and gain access to different forms of life and social protection. The introduction of this reference modifies the distribution of roles between the Union, its Member States and its citizens.

First of all, it modifies the distribution of powers between the Union and its Member States. Member States lose control over their territory to at least some extent, including at the external borders, whilst

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<sup>76</sup> *Onuekwere* (n31) para 24. The expression is found in recital 17 of the preamble to Directive 2004/38.

<sup>77</sup> The notion that a feeling or a sentiment relates individuals to society and links them to each other can be traced back to Durkheim’s and Mauss’ works. In *The Gift: Forms and Functions of Exchange in Archaic Societies*, Mauss refers to ‘[the] fleeting moment when a society and its members take emotional stock of themselves [conscience sentimentale d’eux-mêmes]’. See B Karsenti, *L’homme total. Sociologie, anthropologie et philosophie chez Marcel Mauss* (PUF, 2011) at 413 ; on Durkheim see B Karsenti, *La société en personnes* (Economica, 2006) at 76 ff.

<sup>78</sup> This clearly follows from the reading of the TFEU (Article 174), the directive 2004/38 (recital 17 of the preamble), other EU texts relating to persons (Long-term Residents Directive 2003/109, recital 4) and Opinion of AG Bot in *PI* (n37) para 46.

<sup>79</sup> E Pataut, ‘Intégration et solidarité: quelles valeurs pour la citoyenneté?’ forthcoming (2014) *Revue trimestrielle de droit européen*.

<sup>80</sup> Case C-33/07 *Jipa* [2008] ECR I-5157.

<sup>81</sup> Case C-123/08 *Wolzenburg* [2009] ECR I-09621; Case C-42/11 *Da Silva Jorge*, judgment of 5 September 2012.

the Union is engaged in the control and the validation of values choices adopted by the Member States. This is most obvious in the case of Mr. Ruiz Zambrano, a third-country national who is granted a 'European' status on the basis of his commitment to the community. However this is also true in the case of an individual expelled from the national territory for non-compliance with the values of the host society. In this case, as in *PI*, the process of integration of the person concerned may be assessed not only against the values protected by national criminal law but also against the common values of the Union's public order enshrined in Union's legislation.<sup>82</sup>

Secondly, the reference to the territory of the Union aims to affect the attitude and even the feelings of individuals in society. To the broadened agency resulting from Union's citizenship is added a particular sense of obligation and duty. As a result of this construction, the status of Union citizenship should be seen by the citizens themselves as a broad process of interaction whereby the obligation of Member States to integrate individuals into society is mirrored by the obligation for them to recognize the common space of values they live in, in the particular form of the host society in question.

### **Conclusion**

One question remains: can we build on this construction to shift the discourse on Union citizenship? The answer very much depends on how it is received by the main stakeholders of the European integration project. As expected, in reality it has met with strong resistance. The Court has been so thoroughly taken aback by these reactions that it has taken a step back. The Court of Justice's pronouncements in *Ruiz Zambrano* have been turned into formulaic language and most of their effects curtailed, being subsequently distinguished as referring to:

*'very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made of his freedom of movement, a right of residence cannot, exceptionally, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen would be obliged in practice to leave the territory of the Union as a whole, thus denying him the enjoyment of the substance of the rights conferred by virtue of his status.'*<sup>83</sup>

This formula implies a series of adjustments in order to make the above construction acceptable to the Court's main interlocutors. First of all, the status of Union citizen entirely comes down to a set of rights, which in the case of third-country nationals who are relatives of Union citizens are merely 'derivative rights'.<sup>84</sup> The distinctiveness of the notion of status fades away. Secondly, there is no longer a sense of being anchored in the European territory. There is no absolute right to stay in a given living place and no correlative obligation for the Member States to create the conditions for staying in this place.<sup>85</sup> The prime responsibility for taking care of Union citizens remains with the home country.<sup>86</sup> Finally the reference to the Union territory '*as a whole*' is a way to eschew its metaphorical value and to give it a purely literal meaning. In this formula, the Union territory refers to a physical space: to geographical Europe. As long as the individual concerned has the material means to occupy one part of it, the other elements which contribute to the construction of a living space (social, personal, and emotional ties) are disregarded.<sup>87</sup> As a practical consequence, it is only in very

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<sup>82</sup> Azoulai & Coutts (n52).

<sup>83</sup> *Ymeraga* (n59) para 36.

<sup>84</sup> See for instance Case C-434/09 *McCarthy* [2011] ECR I-3375 para 42; Case C-40/11 *Iida*, judgment of 8 November 2012 para 67.

<sup>85</sup> See further S Iglesias Sánchez, 'A Citizenship Right to Stay? The right not to move in a Union based on Free Movement', this volume.

<sup>86</sup> Clearly in this sense Case C-86/12 *Alokpa*, judgment of 10 October 2013.

<sup>87</sup> Clearly again *Alokpa* (n86).



exceptional situations that protection based on an interference with the substance of EU citizenship rights may be granted, if ever. As a theoretical consequence, the Court reverts back to a conception of European territory as a space which is not easily accessible.

The lessons to be drawn from this short analysis are twofold. First, a profound redefinition of Union citizenship emerges from the case law of the Court focusing on Union territory. Prevalent attempts to construe a genuine regime of European citizenship have resorted to large-scale social and political processes empowering citizens with a ‘constituent power’ making them the ‘ultimate masters’ of the Union, whilst admitting that this perspective is rather unrealistic.<sup>88</sup> With this study, we are led to a different view, namely, that a sense of connection to the whole may be revealed through the judicial consideration of socially contested or morally troubling cases, and that this consideration is driven by the introduction of a metaphorical statement (the ‘territory of the Union’) in the legal discourse. Secondly, however, as has been argued above, there is a real danger that this construction becomes legally and politically moot. To go beyond the limited possibilities offered by a series of individual cases would require the support of the main European and national players. Only if this – extremely unlikely – event were to occur could this legal metaphor become anything more.

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<sup>88</sup> See generally on the notion of political association at the EU level, P Lomba, ‘Constructing a ‘We’: Collective Agency and the European Union’ in *Reflections on the Constitutionalisation of International Economic Law. Liber Amicorum for Ernst-Ulrich Petersmann* (Nijhoff Publishers, 2014) 97.

## II

### **Le bon citoyen ou l'infortune d'être Européen<sup>□</sup>**

*This text is structured as follows: first it sets the scene in a rather stylised way (1), then it tells a story about the misfortune of being a 'European' (2, 3, 4) and finally it provides some legal and academic references in relation to the successive episodes told in this story ('Comments').*

1

Les temps étaient troublés. Partout des voix proféraient des paroles indécentes. Le plus grand nombre cependant préférait se taire. Les gens vivaient avec les autres et avec les nouvelles du monde mais l'idée d'avoir une existence commune les répugnait. Il leur suffisait de se dire : « Tout est convenance, c'est l'Europe! C'est la sécurité. C'est l'inaliénable ». Ces mots faisaient croire momentanément à l'existence d'un ordre rassurant.

Les gouvernants cherchaient en vain la formule qui rendit aux citoyens européens la possibilité d'avoir une vie heureuse et un destin commun. Tantôt ils en faisaient trop, promettant de leur donner sous la forme d'une « Constitution » la communauté de valeurs en laquelle ils purent se reconnaître. Mais personne ne peut être forcé à croire en des valeurs. Tantôt ils n'en faisaient pas assez, appelant faussement « Pacte » ce qui n'était qu'une vague entente entre eux. Les gouvernés étaient floués. Les citoyens se sentaient abandonnés. En coulisses les gouvernants déclaraient crânement : « Nous avons fait l'Europe. Qu'aurions-nous à gagner à faire les Européens ? ».

Face au danger, tous les gouvernants reconnaissaient l'indissociabilité de leurs liens. Cependant, nul ne voulait admettre que cela fût plus qu'une question d'organisation. Sans doute, se disaient-ils, ne suis-je rien sans les autres mais eux ne peuvent rien sans moi. Et c'est ainsi qu'ils s'enfermaient dans un cercle, choisissant de se laisser lier par le sort plutôt que d'être unis par la pensée. « Nous ne sommes pas un tout, disaient-ils. Nous formons un club ; chacun ici est l'égal des autres. Nous sommes un cercle ; nous nous touchons sans nous confondre ».

La contestation montait au sein de petits groupes organisés. Une sorte d'abdication, un consentement à ne rien faire gagnait les esprits les plus alertes. « A quoi bon l'Europe, à quoi bon tout cela ? ». La formule revenait à tout propos. Ainsi l'on renonçait à ce qui avait été. Et ce qui était perdait tout pouvoir d'attraction. L'Europe sortait épuisée de la Grande crise, elle était comme usée, associée à tous les processus de désocialisation : libéralisation, délocalisations, dégradation des conditions de vie, standardisation. Il ne se trouvait personne, semble-t-il, pour empêcher de la laisser se perdre. C'est ailleurs que se cherchaient les voies du salut. Les gouvernements s'efforçaient de créer un espace parallèle où ils ne se lieraient plus qu'à leur guise, libérés du poids de cette Europe « institutionnelle ». Beaucoup formaient le projet de recréer des chapelles et des communautés. La nation, le local redevenaient des lieux communs.

2

A peine arrivé dans ce nouveau pays, l'Européen se présenta aux autorités et leur adressa cette requête :

- Faites en sorte que je puisse m'installer.
- Votre requête est légitime, lui répondit-on.

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<sup>□</sup> Forthcoming in *Mélanges Claude Blumann* (Bruylant, 2015).

Sur quoi on lui demanda de présenter ses papiers. Puis on le pressa de questions sur ses origines et sa vie de famille. Comme il n'avait pas de raison de s'opposer à ces demandes et qu'au fond il avait peu à cacher, il s'exécuta. L'agent enregistra soigneusement toutes ses réponses tout en ne cessant d'examiner sa carte d'identité cherchant on ne sait quoi qui pût l'intéresser. Cela prit un temps considérable.

— Vous êtes des nôtres à présent, lui dit enfin l'agent. Comprenez-nous : organiser l'hospitalité n'est pas chose facile. Il convient de procéder à des vérifications. Nous souhaitons nous assurer que toutes les conditions pour que vous passiez un bon séjour sont remplies. Nous accueillons tant de personnes. Cela engendre un tel de travail ; il nous faut être à jour. Au reste, ce que vous voudrez bien nous dire nous suffira. Il ne nous importe pas de connaître les détails de votre situation.

— Vous êtes le bienvenu parmi nous, ajouta-t-il avec entrain. Vous êtes libre de travailler et de vous distraire.

— Suis-je libre de ne rien faire ?

— Ne rien faire n'est pas un crime. Mais sachez qu'ici nous travaillons à faire œuvre commune : nous sommes attachés au bien-être de nos concitoyens.

Ce pays ne lui était pas tout à fait inconnu. Enfant, sans qu'il en distinguât clairement les raisons, il l'avait reconnu comme sa terre d'adoption. Il pouvait passer de longues heures à tracer les contours dentelés du pays sur les pages de ses cahiers d'écolier. Le peu de choses qui venait de là-bas et qu'il pouvait trouver l'enchantait. Il trouvait en elles une harmonie et une élégance qu'il prêtait volontiers par extension à tous les êtres peuplant ce pays lointain. Manière de s'unir à eux ; manière aussi de s'excepter du lot commun. Cependant, les habitudes changèrent autour de lui. Elles suivaient le commerce qui se développait rapidement et bientôt toutes les choses qu'il convoitait se présentèrent sur les étals des marchés locaux, flanqués comme pour en rehausser la valeur des couleurs du pays d'origine. Il cessa d'en goûter le délicieux exotisme.

Depuis qu'il avait franchi des frontières pour s'installer dans ce pays, les objets qui l'entouraient généraient en lui une sensation d'étrangeté, comme si ce qui était si naturellement produit et présent sur cette terre s'accordait mal avec elle. Cette sensation s'étendait et affectait tout ce qu'il voyait. Ni les choses ni les êtres ne lui semblaient être à leur juste place. Il en vint à l'idée qu'il était peut-être faux de rechercher une place. Il voulait avoir le droit d'être reconnu en tous lieux. L'ennui, c'est qu'il lui fallait pour cela accepter de vivre parmi les autres, de s'exposer à la vue de ses semblables, de faire corps avec eux. Certes, il lui avait été loisible d'élire un nouveau territoire et de pénétrer une nouvelle société. Mais il lui semblait que, pour exister, il fallait encore que celle-ci le choisît. Quelle liberté avait-il ? Celle de se lier, de partager ce qu'il avait, même s'il n'avait rien d'autre que cette volonté de vivre hors de la vie commune.

A force de vivre dans ce pays et de fréquenter des autochtones, il apprit ceci : qu'il est dur de demeurer étranger dans un pays où les autorités ont pour règle de vous traiter comme égal à tous les autres citoyens. Il apprit aussi qu'il n'est pas facile de cesser de l'être. On le prévint que s'il ne prenait pas garde à son comportement, il risquait d'être renvoyé chez lui, où il n'était pas certain de retrouver un toit. Dans son pays, on s'inquiétait. S'il était parti, c'est peut-être qu'il avait commis quelque action coupable. Aucun départ n'est innocent. Il en tira une morale amère : « Si je quitte mon pays, je ne suis plus rien pour lui. Si je cherche à faire mienne la société qui m'accueille, on me reproche d'avoir fui mon pays et on me prive des moyens d'exister. S'établir là il n'y a aucune garantie d'existence, n'est-ce pas l'exigence qui justifie l'appel à l'Europe ? ». Interpelée, l'Europe prit la parole :

— Vous avez tous les droits. Mais prouvez d'abord que vous existez.

Or, exister voulait dire répondre à la loi d'une origine.

— J'ai trahi mon pays, répondit l'Européen. Je ne puis répondre d'aucune origine.

— Dans ce cas, nous vous permettrons de demeurer quelque temps ici.

Disant cela, elle désigna un espace neutre, relativement abstrait mais nullement hostile, où tout semblait permis bien qu'on l'avertît qu'il n'y jouissait d'aucun droit particulier. Il s'y trouva bien : il recouvrait sa souveraineté. Il émit le vœu de prolonger son séjour. Mais, un jour, l'Europe vint et lui dit :

— Ne faites pas l'enfant. A présent, il faut rentrer chez vous.

— Chez moi ?

Il ne savait pas où aller.

3

Il ne souhaitait pas retourner d'où il venait. Rentrer eût signifié usurper une place. Il ne demandait rien d'autre que demeurer là où il se trouvait. Ses hôtes firent comme s'il avait toujours été parmi eux. On ne le déranga que pour s'assurer que le fichier placé au registre central des étrangers qui portait son nom était à jour.

Un homme qui paraissait fort âgé vint le voir.

— Ma femme est une étrangère, lui dit-il. Mon premier mariage fut un échec. A présent, je voyage beaucoup pour mes affaires. L'Europe est mon territoire. Cette étrangère est une épouse fidèle et loyale, tous ceux qui la connaissent l'apprécient, sa conduite est irréprochable et elle a pour mes enfants le plus tendre attachement.

— Pourquoi me racontez-vous cela ? dit l'Européen, gêné par ces propos et cherchant à s'en éloigner.

— Je vous vois chaque jour, répliqua le vieil homme. Vous vous promenez longtemps ; j'ai pour vous une certaine sympathie. Je voudrais vous aider. Ecoutez mon conseil. Ne faites pas parler de vous. Mariez-vous ; faites des enfants. C'est la meilleure manière de vous faire reconnaître.

Il comprit assez vite ce que cet homme voulait dire. La population de ce pays ne se souciait point des questions politiques et sociales, de justice ou de sécurité. Elle se moquait des chiffres et des théories. Elle n'envisageait pas la possibilité du grand nombre. Elle n'était sensible qu'aux vies minuscules. Chose remarquable, elle ne distinguait pas entre les bonheurs privés et les situations d'injustice, accordant aux uns et aux autres la même délicate attention. L'équité était sa loi.

Les gens qu'il rencontrait aimaient à parler par cas. Le cas qui revenait le plus souvent dans leurs récits était celui de cet étranger qui, arrivé dans les pires conditions, rejeté, démuné, incapable de satisfaire aux conditions minimales de l'accueil, s'était si bien conduit qu'il avait fini par être élevé au rang de « citoyen d'honneur ». On racontait qu'interpellé par les autorités alors qu'il rentrait de son travail non déclaré, il n'avait pas fui ; car il s'était reconnu dans cette interpellation. Tels furent à peu près ces propos : « Je ne suis pas né ici. Je ne connais pas l'Europe et je n'ai aucun moyen de la connaître. J'ai ignoré la loi et mes serments n'ont aucune valeur. Cependant, je vous prie de considérer ma conduite et mes actes. Mon seul but est de faire honneur aux miens et à cette ville qui m'a accueilli ». Il n'était pas difficile de discerner dans cette déclaration la vérité d'une vocation. Fallait-il qu'il crût en la liberté pour s'exprimer ainsi. Mais, aux autorités, cela ne suffisait pas. La loi est la loi. C'est faute que de s'y soustraire. Pourtant, les gens se reconnaissaient en lui. L'affaire fut portée en justice. Or, en Europe, le juge étant un, il est double, parlant non seulement la voix du peuple mais aussi celle des autres. Celui-ci eut la force de dire :

— Aimer, être aimé de sa famille, vouloir vivre avec les siens sont choses éminemment respectables. Mais cela ne compte pas. Il faut des circonstances concrètes propices à l'intégration. Assurément, les origines et la condition de cet homme ne plaident pas en sa faveur. Cependant, les motifs qui l'ont

conduit chez nous sont nobles et ses dispositions sont vertueuses. Toute sa vie se rassemble en un centre et ce centre ne se divise pas. Je reconnais l'unité et la dignité de cette vie. En conséquence, j'exige que toute sa puissance d'agir lui soit restituée. Il demeurera : qu'on lui donne un toit, qu'on lui fasse un statut.

Ces paroles étaient gravées. Elles donnèrent aux gens de nouvelles raisons d'espérer. Ainsi une nouvelle loi était donnée ? Une nouvelle alliance passée ? On pouvait croire qu'une vie nue importait plus que la légalité d'une condition. Mais ces paroles déplurent aux autorités qu'elles privaient de leur pouvoir d'intercession. Alors commença une singulière entreprise. De nouveaux cas, semblables, furent jugés et à chaque fois il ne fut question que de jouer avec les mots, remplacer un mot par un autre, employer des formules mortes qui privaient de leur éclat les paroles prononcées. Les autorités ne semblaient avoir appris les mots du juge que pour mieux les ignorer et, les associant aux circonstances les plus triviales, elles les détournèrent de leur sens initial. Lorsque le juge évoquait le « centre » d'une vie, elles recherchaient les éléments matériels qui attestent une vie réussie, négligeant les rapports émotionnels et les exigences morales. Ou bien, lorsqu'il soulignait l'importance de tenir compte des circonstances qui sont dans chaque cas « spécifiques » et « concrètes », les autorités s'évertuaient à inscrire dans la loi des formules abstraites telles que « la protection ne sera accordée que dans les circonstances suivantes :... » : suivait une énumération de motifs laissant place à l'interprétation. Ainsi la loi mettait en question l'équité en l'imitant. Les phrases prononcées étaient encore reconnaissables mais le sens qui les avait vu naître était perdu.

4

Cet exemple éclaira l'Européen sur sa condition. Où situer l'unité de sa propre vie ? Elle ne lui était pas donnée par une famille. Il ne partageait pas le souci du soin. De plus, il n'appartenait pas au monde du travail ni d'ailleurs à aucun groupe. Certes, il prenait sa part à la société marchande mais celle-ci, tout en lui prêtant des qualités de décision qu'il n'avait pas, ne lui restituait aucun nom propre. Il se contentait d'être là ruinant par sa seule présence le sens du mot appartenance. Pourtant, vivre seul n'était pas son but. Il aspirait à la mutualité qu'autorisent les rapports humains.

On lui suggéra de s'engager au service de l'Etat. Il accomplirait ainsi son destin qui était de se lier à une communauté tout en demeurant à l'écart de la vie sociale. Il obtint un rendez-vous avec un magistrat haut placé qui le reçut en souriant.

— J'ai de la sympathie pour votre requête, lui dit-il. Mais nous ne pouvons y accéder que si votre engagement est total. Il vous faudra accepter d'assumer les fonctions les plus délicates et peut-être les plus périlleuses. Le fait que vous ne soyez pas un citoyen de notre Etat ne pose aucun problème. Car, en entrant sur ce territoire, sans le savoir, vous avez conclu un pacte avec nous. Le lien de loyauté qui s'établit naturellement à l'égard de l'Etat qui vous a vu naître et vous a donné un nom ne s'est pas rompu ; il nous a été transmis et nous en avons désormais la garde.

Il s'excita à prononcer ces mots obscurs. Et il ajouta :

— Voyez-vous, c'est cela l'Europe : un partage qui répartit les liens sans en créer aucun, un pont de loyauté qui communique des engagements qu'elle-même est incapable de conclure.

L'Européen ne saisissait pas bien la nature et le sens de cette intervention. Elle lui semblait soutenue par des motifs inavouables. Mais l'essentiel pour lui était qu'elle donnait raison à sa démarche.

Celle-ci trouva moins d'écho auprès des autres magistrats qu'on lui fit rencontrer. Eux s'en tenaient à des principes simples : « Nous vous avons reconnu le droit de demeurer sur notre territoire. Quant à vous incorporer... Les termes de notre Constitution sont clairs : le rapport particulier de solidarité et de loyauté entre l'Etat et ses ressortissants, ainsi que la réciprocité des droits et des devoirs, qui se trouvent au fondement du lien de nationalité, sont des liens sacrés. Aussi proche que vous soyez de

nous, nous ne saurions vous assimiler. Votre corps ne nous appartient pas. Il s'ensuit que votre demande ne saurait prospérer ».

Rejeté hors des hautes sphères de l'Etat, il se retrouvait à errer. Il prit sa voiture et dut parcourir de longues distances car, sans le chercher, il atteignit les confins de l'Etat. Un nouveau pays : c'était peut-être le commencement d'une nouvelle vie. Peu après avoir passé la ligne frontière, il aperçut un homme sur le bord de la route, visiblement un étranger, apeuré et démuné. Il arrêta la voiture et le fit monter. L'homme voulait entrer sur le territoire que lui venait de quitter. Il accepta de l'aider. Il reprit la route dans l'autre sens. Mais, aussitôt qu'ils franchirent la frontière, ils furent arrêtés.

L'Européen comparut devant le haut magistrat qui l'avait reçu tantôt.

— Vous vous êtes rendu coupable d'une méchante action, lui dit celui-ci d'un air tout à fait désolé. Vous avez aidé un passager à entrer illégalement sur notre territoire. Cette action représente une menace directe pour la tranquillité et la sécurité physique de notre population. Vous avez troublé l'ordre. Que souhaitez-vous dire pour votre défense ?

— Mon action n'était pas dirigée contre votre Etat, osa-t-il. Elle n'était animée d'aucun but. J'ai simplement cru devoir répondre à l'appel du cœur.

— Vous vous trompez, reprit le magistrat. Il n'y a plus d'Etat. Chacun peut désormais circuler à sa guise et composer sa vie. C'est la société qui vous accueille et vous protège que vous avez trahie. Se peut-il que vous n'ayez aucun sentiment pour elle et pour les valeurs qu'elle défend ? Je regrette, ma décision est prise : vous devrez quitter le pays et ne plus y revenir.

Sur ces mots, les forces de l'ordre l'emmenèrent.

A ce moment, se tournant vers son assesseur, le magistrat murmura :

— Sans doute, il n'en pouvait aller autrement. Mais, croyez-moi, nous perdons un bon citoyen, je regrette, je regrette vraiment.

## Comments

1

La première citation du texte : « Tout est convenance... » est d'Emmanuel Lévinas in *Sur Maurice Blanchot* (Ed. Fata Morgana, 1975), p.61. Le renvoi à Maurice Blanchot n'est pas hasardeux. Le style et les accents du récit qui précède doivent beaucoup à deux récits de Blanchot rédigés en 1935 et 1936, réunis et publiés sous le titre *Après Coup* (Ed. de Minuit, 1983).

Le second paragraphe renvoie au traité établissant une Constitution pour l'Europe ainsi qu'au récent « Pacte budgétaire », du nom donné au traité sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire. La paternité de ce titre (« pacte budgétaire » ou « *Fiscal Compact* » en anglais) revient à Mario Draghi, l'actuel président de la Banque centrale européenne, dans une allusion directe aux *Papers* d'Hamilton et à la fameuse sentence : « *The origin of all civil government, justly established, must be a voluntary compact between the rulers and the rules* » (1775). Ce point est établi par l'étude de F. Fabbrini : « The Fiscal Compact, the 'Golden Rule' and the Paradox of European Federalism », *Boston College International and Comparative Law Review*, Vol. 36, 2013, p. 1.

Rappelons que c'est Borislav Geremek, alors député européen, qui en 2008 détourna la célèbre formule de Massimo d'Azeglio (« *Abbiamo fatto l'Italia, si tratta adesso di fare gli italiani* ») pour l'appliquer à l'Europe.

L'idée d'une Europe formant un « cercle » ou un « club » de gouvernements liés par le sort et les événements plutôt que par des règles et des institutions supranationales est défendue par Luuk van Middelaar dans son ouvrage *Le passage à l'Europe. Histoire d'un commencement* (Gallimard, 2012). Je discute cette thèse ainsi que les aspects plus généraux de l'appartenance des Etats à l'Union européenne dans une étude intitulée « Appartenir à l'Union » (in *Liber Amicorum en l'honneur du professeur Vlad Constantinesco*, Bruylant, 2014).

2

« Faites en sorte que je puisse m'installer » est la formule qui essaie d'enfermer la condition essentielle du citoyen de l'Union laquelle consiste à jouir du bénéfice de règles favorisant son intégration dans les autres Etats membres. Selon cette conception, la règle de non-discrimination qui est cœur du droit de la citoyenneté doit être comprise non pas tant comme une règle prohibant de discriminer les non-nationaux que comme une règle obligeant à intégrer les ressortissants des autres Etats membres dans la société du pays d'accueil. Cela implique que les autorités nationales sont forcées de revoir et d'élargir leur cadre de représentation et leurs procédures de décision : voy. L. Azoulai, « La citoyenneté européenne, un statut d'intégration sociale », *Mélanges Jean Paul Jacqué. Chemins d'Europe* (Dalloz, 2010), p. 1.

Les formalités imposées à l'arrivée de l'Européen renvoient à l'article 8 de la directive 2004/38 ainsi qu'à l'important arrêt de la Cour de justice du 16 décembre 2008, *Huber* (aff. C-524/06). Sur les conditions plus générales du séjour en vertu de la directive 2004/38 et leur application dans les différents Etats membres, nous renvoyons au travail réalisé dans le cadre du XXVIème Congrès de la FIDE : U. Neergaard, C. Jacqueson et N. Holst-Christensen (eds), *Union Citizenship : Development, Impact and Challenges* (DJØF Publishing, 2014).

L'idée d'une « union des peuples » par l'échange des productions, l'ajustement des préférences et le formatage des habitudes de consommation se dégage clairement des célèbres arrêts de la Cour de justice sur les alcools : CJCE, 27 février 1980, *Commission/Royaume-Uni*, aff. 170/78 ; CJCE, 12

mars 1987, *Commission/Allemagne*, aff. 178/84. Voy. également M. Dani, "Assembling the Fractured European Consumer", *European Law Review* (2011) 36 p. 262.

La leçon apprise par l'Européen sur le caractère essentiellement incertain et même paradoxal de son statut découle de l'ensemble du régime de la citoyenneté de l'Union : individu qu'il convient d'intégrer et qui bénéficie même pour ainsi dire d'une présomption d'intégrabilité, le citoyen de l'Union ne saurait cependant être entièrement assimilé, car ainsi que l'exprime l'avocat général Bot dans l'affaire *Wolzenburg* (aff. C-123/08), « *le droit communautaire n'a pas pour objet d'abolir toute différence de traitement dans le droit d'un État membre entre les ressortissants de cet État et les autres citoyens de l'Union* ».

Dans le même paragraphe, l'Européen passe de la leçon apprise à une morale « amère ». C'est le résultat d'un passage à la limite qui se produit quand l'expérience transnationale échoue faute de trouver des points d'ancrage dans les Etats membres : c'est l'expérience de M. Rottmann dans le cas du même nom (CJUE, 2 mars 2010, *Rottmann*, aff. C-135/08). Ces points d'ancrage demeurent indispensables comme le rappelle Dominique Ritleng dans son étude sur « La citoyenneté de l'Union : d'une citoyenneté interétatique à une citoyenneté fédérale ? » (in *L'Union européenne, un espace à visage humain. Liber Amicorum en l'honneur d'Yves Gautier*, Bruylant, à paraître). S'ils viennent à manquer, la sécurité du statut de citoyen de l'Union n'est plus assurée. Ce passage crée donc la nécessité de forger un nouveau statut qu'on peut appeler « transitionnel » en complément du statut transnational qui découle des règles du traité. Cette notion d'« aire transitionnelle » évoque un peu rapidement le concept développé par D.W Winnicott à propos du développement de l'enfant (D.W. Winnicott, *Jeu et réalité. L'espace potentiel*, Gallimard, rééd. 2012). Cependant, l'idée d'une zone neutre dans lequel les liens à la réalité sont relâchés, condition même de la mise en place d'une bonne structure de développement et d'un rattachement construit à la réalité, n'est pas étrangère à la manière dont la Cour se représente la situation de M. Rottmann, qui est placé sous la protection du droit de l'Union en attendant de recouvrer un lien de nationalité qui puisse le soustraire au statut d'apatride. Sur ce point, voy. L. Azoulai, « L'autonomie de l'individu européen et la question du statut », *EUI Working Paper LAW 2013/4* (disponible sur [www.eui.eu](http://www.eui.eu)).

### 3

L'histoire de l'homme âgé évoque le cas *Carpenter* bien connu (CJCE, 11 juillet 2002, *Carpenter*, aff. C 60/00). Elle attire l'attention sur la justification donnée par la Cour à l'octroi d'un statut de résident à l'épouse d'un ressortissant communautaire qui a enfreint les lois du Royaume-Uni sur l'immigration. Au point 44 de cet arrêt, la Cour évoque le soin apporté par cette épouse à la garde des enfants de son mari ; elle rappelle également que, depuis son arrivée au Royaume-Uni, Mme Carpenter « n'a fait l'objet d'aucun reproche de nature à faire craindre qu'elle constitue à l'avenir un danger pour l'ordre public et la sécurité publique ».

Sur l'opposition de l'équité à la justice, je souhaite renvoyer à l'étude d'Edouard Dubout publiée dans ces *Mélanges*. Dans « L'identité individuelle dans l'Union européenne : à la recherche de l'*homo europeus* », il pointe la nécessité de penser l'individu dans la communauté et sur le fondement d'une réflexion plus générale sur « la question de la justice ». Cela me paraît être une remarque très importante. Et, cependant, l'on ne peut exclure que la question de la justice demeure absente non seulement par défaut d'institutionnalisation des conditions d'une telle réflexion, sur lequel Edouard Dubout insiste lui-même, mais encore par rejet dans les mentalités de toute idée de principe. Il est possible que nous soyons contraints de construire le statut de l'Européen à partir seulement des situations d'injustice particulières qui surviennent ici et là.

Le cas édifiant qui est raconté ensuite est une reprise stylisée du fameux cas *Ruiz Zambrano* (CJUE, 8 mars 2011, aff. C-34/09). L'idée de l'interpellation qui y est insérée vient de Louis Althusser et de sa fameuse théorie de l'assujettissement (« Idéologie et appareils idéologiques d'Etat (notes pour une



recherche) », in *Positions*, Ed. Sociales, 1976 ; le texte peut être trouvé online). Cette théorie a fait l'objet d'un commentaire renouvelé par Judith Butler in *The Psychic Life of Power. Theories in Subjection* (Stanford University Press, 1997). Sur ce commentaire, on lira avec profit P. Macherey, « Judith Butler and the Althusserian Theory of Subjection », *Décalages* (2013) Vol. 1, Issue 2. Signalons enfin le travail de Samuli Hurri qui utilise la notion althusserienne d'interpellation dans sa reconstruction de la jurisprudence de la Cour de justice sur la libre circulation des personnes : S. Hurri, *Birth of the European Individual. Law, Security, Economy* (Routledge, 2014).

Il n'est pas utile de revenir en détail sur l'affaire *Ruiz Zambrano* tant les commentaires qui y ont été consacrés en doctrine sont abondants. L'exercice de réécriture entrepris par la Cour à la suite de cet arrêt est tout aussi documenté : la première pièce a été posée dans l'arrêt *McCarthy* du 5 mai 2011 (aff. C-434/09) ; cet arrêt a été suivi par l'arrêt *Dereci* (aff. C-256/11) dans lequel la Cour souligne que le seul désir de vivre avec les membres de sa famille ne suffit pas. Ont suivi de nombreux arrêts parmi lesquels *Iida* (aff. C-40/11), *Ymeraga* (aff. C-87/12) et jusqu'à *Alokpa* (aff. C-86/12). Bien entendu, il convient d'ajouter que cette série a été abondamment alimentée, mais aussi accompagnée, par une multitude d'actes juridictionnels dans les Etats membres de l'Union (sur laquelle on consultera utilement le dernier rapport produit au Congrès de la FIDE suscité ; également C. O'Brien « I trade, therefore I am: legal personhood in the European Union » (2013) 50(6) *Common Market Law Review*, p. 1643).

Le caractère révolutionnaire de la décision *Ruiz Zambrano* a souvent été relevé –révolution avortée. Ce qui l'a moins été, c'est la nouvelle alliance qui en résultait. Au fond, la Cour prenait dans cet arrêt possession du territoire et de la population des Etats membres. Tout en appliquant en apparence les formes de raisonnement téléologiques classiques, elle s'écartait du point d'équilibre qui avait présidé à l'application des règles du marché intérieur selon lequel les gouvernements acceptaient de perdre, et parfois de perdre gros, dans des situations particulières dans la mesure où, d'une part, ils savaient bénéficier des avantages systémiques et à long-terme de la construction du marché intérieur et, d'autre part, ils demeuraient les interlocuteurs privilégiés et écoutés de la Cour et des institutions européennes. Avec *Ruiz Zambrano*, plus encore qu'avec l'arrêt *Metock* qui l'avait précédé, toutes ces garanties tombaient. On peut dire qu'une véritable « constitutionnalisation » était à l'œuvre : les citoyens entraient en relation directe avec l'Union par l'entremise de la Cour. C'est ce qui, dans les conditions actuelles du processus d'intégration, ne pouvait passer. Sur cette idée de changement d'alliance dans les stratégies des dirigeants politiques, Paul Veyne a écrit un texte stimulant : « L'individu atteint au cœur par la puissance publique », in P. Veyne et al., *Sur l'individu* (Seuil, 1987).

#### 4

La question de l'appartenance des individus a évidemment une résonance profonde dans la théorie politique et sociale. Il est notable qu'elle ait pris dans le droit jurisprudentiel européen une importance sans cesse croissante, d'ailleurs non pas seulement dans le droit de l'Union mais également dans le droit de la Convention européenne des droits de l'homme. On décèle ce thème sous une variété de termes employés par la Cour tels que « liens réels », « intégration » ou « rattachement » (voy. S. Barbou des Places, « le critère d'intégration sociale, nouvel axe du droit européen des personnes ? », *Revue des Affaires Européennes*, 2013/4, p. 689). La notion d'appartenance est expressément utilisée par ex. dans CJUE, 19 juin 2014, *Jessy Saint Prix*, aff. C-507/12, point 41.

L'allusion à la société marchande qui prête des qualités de décision mais ne donne pas de nom est une référence à la figure si présente de l'agent rationnel dans la législation et la jurisprudence européennes : c'est l'individu organisé capable de faire des choix informés et de prendre des décisions autonomes que l'on trouve sous les traits du « consommateur avisé » mais c'est aussi bien celle du patient bien informé dans le directive sur les droits des patients ou encore celle du citoyen capable de s'organiser dans les régimes européens de droit international privé touchant à la famille, que ce soit en matière de divorce ou de succession.

L'idée de s'adresser à l'Etat pour créer un lien communautaire universel renvoie en premier lieu à Hegel : voy. notamment A. Honneth, *Les pathologies de la liberté. Une réactualisation de la philosophie du droit de Hegel* (La Découverte, 2008) ; J.-F. Kervégan, « Le « droit du monde ». Sujets, normes et institutions », in J.-F. Kervégan (dir.), *Hegel penseur du droit* (ed. du CNRS, 2004).

La suggestion d'ouvrir l'accès aux activités impliquant une participation directe et spécifique à l'exercice de l'autorité publique et à le faire sur la base du droit de la citoyenneté de l'Union heurte à l'évidence une jurisprudence constante de la Cour. Mais elle n'est pas absurde et ce passage s'inspire de l'analyse audacieuse de l'Avocat général Cruz Villalón dans les affaires concernant l'accès au corps national des notaires jugées par la Cour en mai 2011 (*Commission/Belgique*, aff. C-47/08 ; *Commission/France*, aff. C-50/08 ; *Commission/Luxembourg*, aff. C-51/08 ; *Commission/Autriche*, aff. C-53/08 ; *Commission/Allemagne*, aff. C-54/08). Dans ses conclusions, l'Avocat général parle d'un pacte et élabore l'idée d'un « cadre de loyauté » (sur lequel voy. notre étude « Le sujet des libertés de circuler », in E. Dubout et A. Maitrot de la Motte (dir.), *L'Unité des libertés de circulation dans l'Union européenne*, Bruylant, 2013, p. 385).

Les « termes de notre Constitution » sont tirés d'un passage du point 51 de l'arrêt *Rottmann* suscité.

Le dernier paragraphe esquisse une discussion sur les fondements moraux du régime de la citoyenneté de l'Union. Elle évoque deux arrêts de la Cour : l'arrêt *Onuekwere* du 16 janvier 2014 (aff. C-378/12) dont elle reprend certains faits et l'idée du « sentiment de la citoyenneté » et l'arrêt *P.I* du 22 mai 2012 (aff. C-348/09) dont elle reprend la notion de « menace directe pour la tranquillité et la sécurité physique de la population » et l'idée d'une socialisation du concept d'ordre public (sur laquelle voy. L. Azoulai et S. Coutts, « Restricting Union citizens' residence on grounds of public security. Where Union citizenship and the AFSJ meet », *Common Market Law Review*, 2013, p. 553).

La distinction opérée par le magistrat (« Il n'y a plus d'Etat/C'est la société que vous avez trahie ») me paraît indiquer l'un des enjeux essentiels en la matière. La responsabilité des citoyens a été classiquement envisagée à travers une théorie des devoirs envers l'Etat et la communauté politique. De là d'ailleurs une difficulté constante, chez les meilleurs esprits, à concevoir une véritable citoyenneté européenne (R. Aron, « Une citoyenneté multinationale est-elle possible ? », *Commentaire*, vol. 14, n° 56, 1991, p. 695). En retour, le régime de la citoyenneté de l'Union s'est clairement construit sur le fondement d'un principe d'anarchie, de contestation radicale des prérogatives de l'Etat (ce point est explicite et avancé sans nuance chez D. Kochenov, « EU Citizenship Without Duties », *University of Groningen Faculty of Law Research Paper Series* No. 15/2013 (disponible online)). La question à présent paraît être celle de savoir non pas comment revenir sur ce principe mais comment le structurer de manière à éviter de tomber dans les pathologies de l'individualisme et de l'indétermination. A côté de l'Etat, la voie de la société semble être ouverte, c'est-à-dire la possibilité de s'adosser sur la vie sociale pour identifier l'infrastructure morale dont il conviendrait de doter le régime des droits de la citoyenneté. Cette idée me paraît déjà à l'œuvre dans la jurisprudence de la Cour comme notre commentaire de l'arrêt *P.I*. tentait de le montrer. Elle peut se revendiquer d'une certaine tradition, comme le montre B. Karsenti dans « Carl Schmitt et les collectifs politiques » (in L. Kaufmann et D. Trom, *Qu'est-ce qu'un collectif ? Du commun à la politique*, Ed. de l'EHESS, 2010). Karsenti oppose à Carl Schmitt la perspective dessinée par Hermann Heller mais aussi déjà par Hobbes. On ne saurait oublier que le concept de « la tranquillité, la sécurité et l'ordre » que la Cour mobilise abondamment dans sa jurisprudence est un concept central chez Hobbes. Cependant, cette idée d'une socialisation de l'ordre public, qui refuse d'assimiler l'individu à l'Etat et qui élargit l'horizon de la recherche des valeurs structurantes au-delà de la société nationale, présente bien des ambiguïtés. C'est d'ailleurs sur des phrases ambiguës que se termine ce récit. C'est de là que devra repartir la réflexion.



