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EDITORIAL COMMENTS

EU law as a way of life

A shift is taking place in the self-description of the European integration project. The European Union has long been depicted as a unique institutional construction with a transformative effect on the living conditions of the peoples of Europe. But, in the *State of the Union Address* on 14 September 2016, the President of the European Commission, Jean-Claude Juncker, departed from this classic account. A "better Europe" is "a Europe that protects", "a Europe that preserves the European way of life".[1] What is needed is not another institutional reform or another big institutional project but, according to Juncker, a reminder of "what it means to be part of this Union of Europeans". There is a notion that the Union is more than an elaborate institutional machinery. It is more than a special type of relationship between its Member States, and between them and the Union's institutions. The Union amounts to a special type of everyday life. It exists in order to provide a social space that creates patterns of social interaction and identification. The Union is as much an existential project as it is an institutional one.

This shift responds to a particular context. In Juncker's words, the Union is currently facing an "existential crisis". No longer perceived as an engine of peace, stability and prosperity, it is instead accused of producing divisions, instability and inequalities. Moreover, in many European countries, the European Union and its style of regulation are seen as a threat for traditions, values and lifestyles that people hold dearly.[2] In her speech at Lancaster House on 17 January 2017, Theresa May opportunistically endorsed this sentiment claiming that "our political traditions are different … and as a result supranational institutions as strong as those created by the European Union sit very uneasily in relation to our political history and way of life". As the Brexit vote illustrates, issues of way of life trump economic and institutional issues

1. State of the Union 2016 speech by Commission President Jean-Claude Juncker to the European Parliament plenary session on 14 Sept. 2016, see <ec.europa.eu/commission/state-union-2016_en> (last visited 1 March 2017).

2. Editorial comments, "The critical turn in EU legal studies", 52 CML Rev. (2015), 881–888.

for peoples in Europe today. Many leaders and public intellectuals tend to adopt and adapt to their own national context George W. Bush's famous statement that "the American way of life is not up for negotiation". In this context, it is appropriate to consider, as suggested by the President of the European Commission, what "the farmer in Lithuania, the single mother in Zagreb, the nurse in Valetta or the student in Maastricht" have "in common". Is there something special that links them together? Is there a *"European way of life"*?

One way to consider this question is to investigate the practices and beliefs that may amount to a genuine "Europeanization of everyday life".[3] We expect such studies to show that individual experiences of Europeanization are not limited to physical mobility within the Union and exposure to the cultural symbols forged by the European Union (a flag, an anthem, a single currency). Being European also means virtual mobility, imagining a potential future involving free movement, consuming products or experiencing culture from other Member States at home, having relatives in another European country, commanding European languages, interacting with Europeans through social media, vindicating consumer or worker rights deriving from EU legislation. The numbers of people affected by the legal and institutional arrangements established by the European Union are much larger that one would assume by reference to free movement alone.[4] However, one would be wrong to infer from this that all Europeans feel part of the same inclusive community. Studies in social sciences show that proximity and the development of social interactions may also bring about frictions and tensions between groups.[5] Clearly, the conditions for the creation of a bond of allegiance to the Union as a whole are not met.[6] Developing cross-border activities does not provide individuals with a sense of belonging to an overarching community of life and destiny. Most Europeans are well aware of living in relatively standardized societies, being subject to common legal and social norms, and sharing certain beliefs, fears and commitments. However, the vast majority still perceive themselves as first and foremost members of a national community – not to mention separatist movements in various Member States nurturing stronger

3. EUCROSS project, "The Europeanisation of Everyday Life: Cross-Border Practices and Transnational Identities among EU and Third-Country Citizens" <www.eucross.eu/cms/> (last visited 1 March 2017).

4. As shown by the EUCROSS project, ibid.

5. Magnette "How can one be European? Reflections on the pillars of European civic identity", 13 ELJ (2007), 664–679.

6. Kantner, "Collective identity as shared ethical self-understanding: The case of the emerging European identity", 9 *European Journal of Social Theory* (2006), 501–523.

ties to subnational entities. Moreover, it has been shown that the connection to Europe is socially stratified: young, highly educated, urban and mobile citizens regard Europe as part of their identity, whereas older, less educated, rural and immobile citizens continue to rely on national roots and community.[7] Recent European political dramas such as the euro-crisis or the United Kingdom's decision to leave the European Union may have strengthened this dichotomy.[8]

Sociological and anthropological studies of the Union can be credited with an attempt to uncover the social, cultural and existential layers of European integration. But is it not possible to study these aspects legally? EU law is not just a functional instrument of integration. It is not just a matter of knowing how to frame the economic, social and political spheres in order to achieve the basic goals of integration – the creation and regulation of the internal market. It is also about constituting a new social reality – new forms of real or imagined life.[9] For individuals, it is being able to participate in life with underlying ideas about what it means to be a "child" or a "mother", a "consumer" or a "worker". It may be that life with EU law concepts is very different from life without these concepts. This, at least, was suggested by Advocate General Szpunar in the *Rendón Marín* case, stating that the ECJ's case law on EU citizenship was "the result of close cooperation between the Court of Justice and national courts and of advances, both fortunate and logical, within the societies of the Member States and within European society taken as a whole, whose members are merely integrating into their everyday life the status of citizens of the Union conferred upon them by the Treaty".[10] It would certainly be an exaggeration to make EU law the main driver of everyday life: a life cannot be reduced to abstract concepts. Yet, it would also be a mistake to deny any impact of EU law on the personal experience of Europeans and on their social and cultural environment. Granted, this point can steer us, European lawyers, to contribute to this field by exploring the experience of individuals with legal Europe. What does it mean to live with EU law? What kind of good is EU law in everyday life? What kind of existential loss is it to lose EU law?

7. Bauböck, "The new cleavage between mobile and immobile Europeans" in F. de Witte, Bauböck and Shaw (Eds.), "Freedom of movement under attack: Is it worth defending as the core of EU citizenship?", EUI RSCAS Working Paper No. 2016/69.

8. Polyakova and Fligstein, "Is European integration causing Europe to become more nationalist? Evidence from the 2007–9 financial crisis", 23 *Journal of European Public Policy* (2016), 60–83.

9. Chalmers, "The unconfined power of European Union law", (2016) *European Papers*, 405–437.

10. Opinion in Case C-165/14, *Alfredo Rendón Marín* v. *Administración del Estado*, EU:C:2016:75, para 117.

Europe as a self-proclaimed "area of human hope"

In 1961, Pierre Duclos raised the issue of whether such a thing as "the European" could exist. His answer is one we have become accustomed to:

> "Yes, the European exists as a distinctive legal category. In the legal realm, a new creature just emerged; it is a centre of legal norms placed in between the 'national' and the 'citizen of the world', whilst, simultaneously, a European institutional terrain emerges, in between the state and international level."[11]

The European is a holder of rights. Rights to produce, trade, work, travel, consume and develop all kinds of activities are granted to individuals in order to allow them to participate in the marketplace, the workplace, the education system or the healthcare system of other Member States. It allows them to move across borders and to navigate between the institutional and legal structures of the Member States. We Europeans are turned into agents of a socio-economic order created and regulated by the Union's institutions. By the same token, we are offered "an amplified bundle of options"[12] or, to put it more emphatically, "a special area of human hope" as mentioned in the preamble to the draft Treaty establishing a Constitution for Europe. From the outset, what was then EC law and is now EU law has created a distinctive form of individual agency based on a series of transnational activities: it permits Romanian workers to be admitted to the German labour market, Dutch importers to import freely from France, British patients to access the Hungarian healthcare system, employees living in Belgium to commute to and work in Luxembourg, and much else besides.

But, as is well known, the construction did not stop there. The progressive re-interpretation of EU law with a view to secure the "corollaries" required to fully enjoy free movement rights has resulted in the emergence of a new figure beyond that of the figure of the rational agent who is given an enlarged space of autonomous action. On the one hand, the focus shifts from cross-border action to social integration. EU citizens are provided with basic conditions – a social and family status – to enable them not only to move but also to integrate into the society of any other Member State.[13] As a perfect illustration, a right to permanent residence is granted to Union citizens after five years of lawful

11. Duclos, "L'Européen: exploration d'une catégorie juridique naissante" (1961) *Revue Générale de Droit International Public*, 136–146.

12. Preuss, "Problems of a concept of European Citizenship", 1 ELJ (1995), 267–281.

13. Case 186/87, *Cowan* v. *Trésor public,* EU:C:1989:47; Case C-60/00, *Carpenter*, EU:C:2002:434.

presence in the host society. I am European through receiving the opportunity to reside in another Member State and to become a "quasi-national" with regard to the main aspects of my social life in the host Member State. On the other hand, the concern pertains as much to individual agency as to inter-personal and institutional relations. EU law allows individuals to establish links with *inter alia* family members, education systems or healthcare systems in different Member States. I am European through receiving the opportunity to develop a set of social relations of my own in different Member States, whether they are personal bonds or institutional affiliations.

This fine existential construction has raised some serious concerns. It seems possible to divide these into two main issues. First, it has been pointed out that this construction does not have the kind of context and infrastructure essential for it to be deployed concretely. The language and appearances of emancipation exist, but the EU seems unable to create the background conditions to make it real.[14] It does not possess the power, the resources and the legitimacy required to ensure the genuine integration of all Member States' nationals in other Member States' societies. The *Dano* ruling[15] and the exclusion of economically inactive citizens from equal treatment in the recent case law of the Court are cases in point. Regardless of whether this exclusion is legally justified or not, this clearly shows that the form of social integration promoted by EU law is a partial one that only benefits some Union citizens.

The other concern with this construction is that it seems to be at odds with any shared understanding of social life and the good of communities. By empowering individuals across borders and discarding the rooted bonds distinctive of thick communal groups such as nation States, it seems to destabilize the local tissue of social relations and solidarities. Individuals fashioned by EU law sound like abstract and isolated creatures, with a feeling of homelessness and engaged in a form of free-riding. This view resonated in Theresa May's statement on 5 October 2016 that "if you believe you're a citizen of the world, you're a citizen of nowhere. You don't understand what the very word 'citizenship' means".[16] The Brexit vote may well illustrate the fact that EU law does not engender a social world that many UK and perhaps many EU citizens would be happy to live in. There seems to be a gap between the "area of human hope" as contemplated and constructed by EU law and the world as perceived by citizens.

14. F. de Witte, "EU citizenship, free movement and emancipation: A rejoinder" in F. de Witte, Bauböck and Shaw, op. cit. *supra* note 7.

15. Case C-333/13, *Elisabeta Dano and Florin Dano* v. *Jobcenter Leipzig*, EU:C:2014:2358.

16. <www.telegraph.co.uk/news/2016/10/05/theresa-mays-conference-speech-in-full/> (last visited 1 March 2017).

To help fill this gap and offer an alternative to UK citizens leaving the Union, the MEP Charles Goerens recently proposed creating a "European associate citizenship for those who feel and wish to be part of the European project", decoupling Union citizenship from Member State nationality.[17] With such a regime, EU law would go beyond creating the figure of the quasi-national of a Member State by instead constituting the individual as a genuine European connected to the Union as a whole.[18] Regardless of its feasibility and desirability, it is highly disputable how this proposal could address the issues raised by the current legal construction. However, such proposals invite us to consider alternative constructions that are enshrined in the case law of the Court of Justice of the European Union.

Europe as shelter

The European Union cannot offer the kind of special relationship which forms the bedrock of the bond provided by nationality. Yet, in some specific cases, it may work as a shelter. This was famously the case in *Rottmann*.[19] To recall: in the course of moving from Austria to Germany, Mr Rottmann, an Austrian national, applied for and was granted German citizenship thereby losing his Austrian citizenship. He was subsequently deprived of his new citizenship on the grounds that he had obtained this status by deception. As a consequence of the withdrawal decision by the German authorities, he became stateless. He was legally cut off from any institutional bond and social relations. Faced with the threat of Mr Rottmann being deprived of the benefit of EU citizenship rights, the Court held that the decision withdrawing nationality could only be lawful if it was proportionate. This might be regarded as a contestable disregard for national identities in order to serve purely EU-centred purposes – the preservation of EU rights. Yet, another reading is possible. As acknowledged by the Court itself, the duty to demonstrate loyalty towards the

17. Goerens, "Amendment 882" in European Parliament Committee on Constitutional Affairs, "Draft report on possible evolutions of and adjustments to the current institutional set-up of the European Union: Amendments 686–1039" (2014/2248 (INI)), pp. 99–100. Goerens has since withdrawn the amendment with the intention that the "associate citizenship" proposal and consequent treaty reform may become part of the European Parliament's demands on the United Kingdom's withdrawal. See <www.independent.co.uk/news/uk/home-news/brexit-latest-news-theresa-may-european-union-associate-citizenship-eu-charles-goerens-a7562416.html> (last visited 1 March 2017).

18. For a similar proposal arguing for the constitution of a core European citizenry, see Garner, "After Brexit: Protecting European citizens and citizenship from fragmentation", EUI Department of Law Working Paper No. 2016/22.

19. Case C-135/08, *Janko Rottmann* v. *Freistaat Bayern,* EU:C:2010:104.

home State is part of the duties constituting the status of a national, and this should be respected. As a matter of principle, it prevails over the enjoyment of EU rights. To support the Court's decision, a consideration of another sort should then be adduced. It is implicit in the judgment, yet it may be central: it is the idea that statelessness is not easily compatible with the European way of life. In exceptional situations in which the existence of European individuals as persons living a decent life is challenged, and in the absence of any domestic connection, the Court seems inclined to offer a provisional area of protection, whilst encouraging national authorities to further consider the case and cooperate.

The recent *Petruhhin* judgement seems to convey a similar message.[20] The case concerns an Estonian national who was arrested in Latvia and subject to an extradition request filed by the Russian authorities. Mr Petruhhin was prosecuted for attempted large-scale organized drug-trafficking. He appealed against the extradition decision on the grounds that he enjoyed the same rights in Latvia as a Latvian national and that, consequently, the Latvian State was required to protect him against unjustified extradition. The Court agreed that he ought not to be discriminated against on account of his nationality but also went on to consider that extradition pursues the legitimate aim of avoiding impunity for offenders enjoying free movement within the Union. However, just as in *Rottmann*, an extradition would only be lawful if strictly proportionate. In the case, as made clear by the referring court, the risk of being subject to inhuman or degrading treatment in Russia could not be ruled out. In this context, it would be preferable to rely on judicial cooperation between Member States. The significance of the central statement made in this judgment, according to which "in its relations with the wider world, the European Union is to uphold and promote its values and interests and contribute to the protection of its citizens",[21] is notable. In the absence of a readily available domestic mechanism of protection, the Union itself should assume the task of protecting its citizen from the risk of losing basic standards of European life. Note however that EU law does not provide Mr Petruhhin with a fully-fledged status: it operates as a transitional mechanism for ensuring that national authorities will exchange information, cooperate and carefully consider his case.

Petruhhin is a variant of *Rottmann*. Both cases are underpinned by the notion advanced by Jean-Claude Juncker in his speech that "our European

20. Case C-182/15, *Aleksei Petruhhin* v. *Latvijas Republikas Ģenerālprokuratūra* EU:C:2016:630; see also pending Case C-191/16, *Romano Pisciotti* v. *Bundesrepublik Deustchland*.

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

way of life is our values".[22] This notion was forcefully brought to the fore in *Kadi*[23] and *Schrems*.[24] However, it may prove much easier to find the proper institutional design for protecting European citizens from external threats, as was the case in *Kadi* and *Schrems*, than to protect an individual citizen from internal threats whilst circulating in Europe. In the latter case, the Union ultimately depends on the willingness of national authorities to cooperate and take care of the citizen. In *Rottmann* as in *Petruhhin*, the Court made clear that it is for national authorities to decide on withdrawal or extradition.

Europe as good society

The Union may exceptionally and provisionally be a shelter for Europeans deserving of protection. In some very specific cases it may also work as a moral infrastructure producing an assessment of Europeans' moral worth. Ironically this was made clear in a famous case involving a third-country national residing illegally in Europe. Mr Ruiz Zambrano is a Colombian national living in Belgium whose application for asylum and subsequent applications to have his situation regularized were refused. Accordingly, he was likely to be expelled from Belgium. However, his case was described by the Court as one of a man who enjoyed stable family relationships, assumed the role of caretaker for his children and showed a willingness to create "real links" by finding employment and paying taxes. Whilst illegally resident in Belgium, he and his family were registered in the municipality in which they lived. 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".[25] Such behaviour may be regarded as that of a "good citizen" in any national society. Thus, it makes the individual concerned worthy of acquiring a place within the "European territory". The fact that his children acquired Belgian nationality and are Union citizens as a

22. In the White Paper on the Future of Europe, released 1 March 2017, presenting 5 possible scenarios for the EU to develop up to 2025, the role of European values, such as peace, freedom, tolerance and solidarity, is again accentuated: "Change in all things may be inevitable, but what we want from our lives and the European values that we hold dear remain the same." Cf. p. 16. Available through <europa.eu/rapid/press-release_IP-17-385_en.htm> (last visited 2 March 2017).

23. Joined Cases C-402 & 415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council and Commission,* EU:C:2008:461.

24. Case C-362/14, *Maximillian Schrems* v. *Data Protection Commissioner,* EU:C:2015:650.

25. Case C-34/09, *Gerardo Ruiz Zambrano* v. *Office national de l'emploi,* EU:C:2011:124, para 16.

result of being born in Belgium constitutes the ground for granting this protection. But the real criteria against which his situation is assessed are the criteria of a communal life in a "good society": participation in family, integration in the workplace, and compliance with the values of the host society.[26] Refusing to grant Mr Ruiz Zambrano a right of residence and a work permit in Belgium would mean deportation from Europe for the whole family and consequently depriving the children and their parents of the possibility of having a decent and secure life as established by European standards.

The recent *Rendón Marín* case was a test case for this proposition.[27] As is well known, the *Ruiz Zambrano* judgment met strong resistance among national governments. Following that judgment, the Court took a step back; the precedent has been invoked in several cases since then, but each time in vain. Moreover, Mr Rendón Marín, also a Colombian national with children who are Union citizens, unlike Mr Ruiz Zambrano, has a criminal record: he was sentenced to nine-months imprisonment in Spain where he lives. In previous cases, the imposition of a prison sentence by a national court was sufficient to show "that the person concerned has not respected the values expressed of the society of the host Member State".[28] Just as there are "good citizens", there are "bad" ones. These are deviant people who are deemed to stand outside society and who should be separated from it through expulsion. In light of this background, it comes as a surprise that, in this case, the Court allows the criteria set out in *Ruiz Zambrano* to apply. A residence permit cannot be refused to Mr Rendón Marín on the sole basis of a criminal record if that refusal has the consequence of forcing him and his children to leave the European territory. How is this justified? Apparently on the ground that an expulsion would deprive the children of the possibility of effectively enjoying their EU citizenship rights. The Court may have been further convinced by the fact that Mr Rendón Marín was not considered to be a real danger to society; he was awaiting a decision on his criminal record to be removed from the national register. Even more importantly, the referring court reported that he was taking good care of his children.[29] Relying on the children's best interests and on Mr Rendón Marín's personal conduct, constructed as being in compliance with the values of the host society, the Court considers that he is a "good European" who is therefore worthy of protection.[30]

26. On the concept of good society see Etzioni, "Law in civil society, good society, and the prescriptive State", 75 *Chicago-Kent Law Review* (2000), 355–377.

27. Case C-165/14, *Alfredo Rendón Marín* v. *Administración del Estado*, EU:C:2016:675.

28. Case C-400/12, *Secretary of State for the Home Department* v. *M.G.,* EU:C:2014:9.

29. Case C-165/14, *Rendón Marín*, para 15.

30. Case C-165/14, *Rendón Marín*, paras. 85–86; contrast Case C-348/09, *P.I.* v. *Oberbürgermeisterin der Stadt Remscheid,* EU:C:2012:300: on this case, see Azoulai and

Yet again this casuistic construction is intrinsically unstable. The Union is fairly limited in its capacity to articulate social values. It cannot easily interfere with the "moral autonomy" of Member States. As often repeated by the Court, EU law "does not impose upon the Member States a uniform scale of values".[31] The best the Union can do is control and validate the value choices adopted by national constituencies against the broader standards of European society mentioned in Article 2 TEU. It is only in some very specific cases, in which the possibility for Union citizens to have a decent life in Europe is at stake, that it will assume the role of stating and underscoring the values that Europe cherishes.

Decent Europe

What would be lost if we lose EU law is not only transnational forms of life, albeit in which there may be a distinction between privileged and non-privileged people and mobile and immobile citizens, but also discrete instances in which genuine forms of European decent life are made possible. It is not mere chance that forms of decent life mainly benefit children and criminals: these are cases in which the appeal to Europe as a civilizing force is most needed, and these are cases which naturally create identification patterns for people.

At 4 am on Friday 24 June 2016, UKIP's Nigel Farage addressed his supporters and welcomed the Brexit vote as a victory for "ordinary people", "decent people".[32] All over Europe, populist leaders contrast the Union's machinery, agents, regulations and free-movers with *common decency* and *ordinary people*.[33] The French Front National's Marine Le Pen sees the Union as "shaping a new man, uniform in his tastes and torn away from his national culture".[34] She places this in opposition to nationals, who are rooted in traditions, local cultures and conventional roles. Her "decent people" turn out to be only some of the people. Mr Rottmann, Mr Petruhhin, Mr Ruiz Zambrano or Mr Rendón Marín would certainly not qualify. Life with the

Coutts, "Restricting Union citizens' residence rights on grounds of public security. Where Union citizenship and the AFSJ meet: *P.I.*", 50 CML Rev. (2013), 553–570.

31. Joined Cases 115 & 116/81, *Rezguia Adoui* v. *Belgian State and City of Liège; Dominique Cornuaille* v. *Belgian State,* EU:C:1982:183.

32. <www.independent.co.uk/news/uk/politics/eu-referendum-nigel-farage-4am-victory-speech-the-text-in-full-a7099156.html> (last visited 1 March 2017).

33. The concept of common decency famously originates in George Orwell's work. It is given a different meaning, a nationalistic one, by populist leaders.

34. "L'Union européenne entend façonner un homme nouveau, uniforme dans ses goûts, et arraché progressivement à sa culture nationale" (*Pour que vive la France*, cited in Eltchaninoff, *Dans la tête de Marine Le Pen* (Actes Sud, 2017), p. 79).

standards of decent society as established and enacted by EU law is very different from life with the concept of ordinary people put forward by populist leaders.[35]

This is not to suggest that the Union always lives up to these standards. The subjection of asylum seekers illegally entering Europe to strict State surveillance and control is a good illustration of this. True, EU law and the Court may be credited for introducing some safeguards for individuals against blind coercion.[36] Yet, these safeguards maintain these individuals in the position of objects of institutional cooperation. These individuals are subject to risk analysis upon their arrival in Europe; when rescued they are either forcibly returned or placed in a reception centre for migrants in the host Member State; and if granted asylum they may be relocated or assigned a safe living place but with no possibility to move and limited opportunities to develop social and family relations.

For the asylum seekers arriving on the shores of Europe or for Union citizens excluded from equal treatment in other Member States, EU law maintains a form of distance. They may well be the targets of key EU policies (migration policy, social policy, social inclusion policy, consumer policy …), however EU law fails to provide them with genuine forms of social integration. This contrasts with the way it treats the more privileged Union citizens and *Ruiz Zambrano* type of third-country nationals. For the latter, EU law typically aims to provide, if only on a case by case basis, a *European way of life* in a decent society. The latter achievement – albeit for a limited number of people – is precious. It should be considered as an invaluable resource not only to inform migration issues, but also more generally to inspire current European leaders in times of "existential crisis".

35. On the concept of decent society, see Margalit, *The Decent Society* (Harvard University Press, 1998).

36. See Case C-63/15, *Mehrdad Ghezelbash* v. *Staatssecretaris van Veiligheid en Justitie,* EU:C:2016:409; Joined Cases C-411 & 493/10, *N.S* v. *Secretary of State for the Home Department and M.E and Others* v. *Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform,* EU:C:2011:865.