

# *The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Rights*

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## **Abstract**

This Article analyses recent developments in Union citizenship, in particular the relationship between Articles 20 and 21 TFEU. In doing so, it divides Union citizenship into a transnational and a supranational dimension with the transnational dimension having two sub-dimensions: social integration and autonomy. It is argued that we are seeing an increased emphasis on the responsibility of the individual citizen in the context of the transnational dimension and a clear linkage between the transnational and supranational dimensions. The result of these two moves is a status which continues to emphasise the relationship between the Union citizen and the communities represented by Member States, while framing this with a more prominent supranational dimension.

**Keywords:** Union citizenship, Article 21 TFEU, Article 20 TFEU, right to territory, territory of the Union, transnational, supranational

## I. INTRODUCTION

A quarter of a century after its introduction, Union citizenship remains a status in flux. Recent years have witnessed a reversal of a rights-centred citizenship developed in the early years of Union citizenship and the assertion of a more restrictive regime for mobile Union citizens.<sup>1</sup> At the same time an important parallel development has

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<sup>1</sup> The development has been noted in the literature. See, for example, N Níc Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 *Common Market Law Review* 889; E Spaventa, 'Earned Citizenship: Understanding Union Citizenship through Its Scope' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017); and the various contributions in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing, 2017).

been taking place on the basis of Article 20 of the Treaty on the Functioning of the European Union ('TFEU'), where we have seen a more progressive development of Union citizens' rights, in the sense that rights are enhanced. The purpose of this Article is to analyse both trends together and to determine what they imply for the broader development of Union citizenship. In doing so, it serves the additional purpose of outlining a framework for understanding the different dimensions of Union citizenship and for mapping changes in its underlying structure.

This approach breaks Union citizenship into two dimensions: transnational and supranational.<sup>2</sup> Transnational rights refer to those rights which are exercised against other Member States in the Union. The transnational dimension of Union citizenship is then further sub-divided into two dimensions of 'social integration' and 'autonomy'. Supranational rights are those that are exercised directly vis-à-vis the Union; rights an individual Union citizen enjoys regardless of movement. To date, discussions of Union citizenship have tended to focus on one or the other of these two dimensions rather than taking a holistic view. However, by considering developments in both dimensions and the relationship between them, we can gain an understanding of the broader shifts in this fundamental status.

The argument of this Article is that we have witnessed a refashioning of the relationship between Union citizens and other Member States on the transnational dimension into one which emphasises the responsibility of the mobile Union citizen towards the society of the host Member State. On the other hand, we have seen a clarification of the supranational dimension as one which is derived from transnational rights to free movement and residence. Taken together, these two developments place an emphasis on the transnational relationship between Union citizens and national communities—a relationship now characterised by individual responsibility—as the basis for a broader European citizenry; it is through transnational rights and thicker relationships amongst individuals and various national communities that a supranational European community can be said to emerge.

The rest of this Article will be structured as follows: Part II will provide an overview of the analytical framework used in this Article, namely of Union citizenship as a status that contains both transnational and supranational elements, representing links to the communities of other Member States and to the Union as a whole. Part III will trace recent shifts in the transnational dimension, namely the rise of a concept of responsibility in the sub-dimension of social integration and the subordination of the autonomy aspect of transnational Union citizenship to its social integration dimension. Part IV will elaborate on the links between the transnational rights of free movement and residence contained in Article 21 TFEU and the supranational status of Union citizenship found in Article 20 TFEU. Finally, a concluding Part V will summarise these developments and draw broader conclusions for the nature of Union citizenship.

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<sup>2</sup> This framework is based on chapters 2 and 3 in S Coutts, *Crime, Citizenship and Community in the European Union* (Hart Publishing, 2019).

## II. THE GEOMETRY OF UNION CITIZENSHIP: BETWEEN TRANSNATIONAL AND SUPRANATIONAL

### A. *The transnational dimension of Union citizenship: Autonomy and integration*

Union citizenship is primarily a transnational citizenship.<sup>3</sup> Its rights are mainly exercised vis-à-vis other Member States of the Union. The main rights of Union citizenship are free movement to and residence in other Member States of the Union and equal treatment with nationals once there. These two rights reflect two aspects of the transnational dimension of Union citizenship: social integration and autonomy. Social integration refers to the vocation of Union citizenship as a status of social integration,<sup>4</sup> or in the words of the Citizenship Directive, ‘a genuine vehicle for integration into the society of the host Member State’.<sup>5</sup> This has been developed by the European Court of Justice,<sup>6</sup> and has been closely linked to the expansion of rights of equal treatment, particularly of access to social assistance. Through the jurisprudence associated with this right to equal treatment in the field of social assistance, social integration became the underlying theme within the development of Union citizenship. In earlier cases its application tended to have an inclusive and individual-friendly impact.<sup>7</sup>

Autonomy on the other hand relates to the ability of individuals not to settle and integrate into another Member State but to move around the Union, free from restrictions and to benefit from the myriad of opportunities—economic, social, cultural—that twenty-eight different states have to offer. This is not the case of an individual moving to and settling in a particular Member State but to move around and to build a life across borders. Union citizens can therefore construct their version of the good life from a variety of different sources. This aspect of Union citizenship

<sup>3</sup> Such a presentation thus fits within the transnational school of thinking about the European Union as described by Lacroix and Nicolaïdis. See the description of this transnational school in J Lacroix, ‘Is Transnational Citizenship (Still) Enough?’ in D Kochenov, G de Búrca, and A Williams (eds), *The EU’s Justice Deficit?* (Hart Publishing, 2015), pp 177–80, citing J Lacroix and K Nicolaïdis, ‘European Stories: An Introduction’ in J Lacroix and K Nicolaïdis (eds), *European Stories. Intellectual Debates about Europe in National Contexts* (Oxford University Press, 2010). See also A Iliopoulou Penot, ‘The Transnational Character of Union Citizenship’ in M Dougan, N Níc Shuibhne, and E Spaventa (eds), *The Empowerment and Disempowerment of the European Citizen* (Hart Publishing, 2012). This corresponds to what Magnette terms the horizontal dimension of Union citizenship. See P Magnette, *La Citoyenneté Européenne* (Editions de l’Université de Bruxelles, 1999), pp 158 ff.

<sup>4</sup> See L Azoulay, ‘La Citoyenneté Européenne, un Statut d’Intégration Sociale’ in G Cohen-Jonathan et al (eds), *Chemins d’Europe: Mélanges en l’honneur de Jean Paul Jacqué* (Daloz, 2010). See also S Barbou des Places, ‘The Integrated Person in EU Law’ in L Azoulay, S Barbou des Places, and E Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing, 2016).

<sup>5</sup> 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, Rec 18 (‘Citizenship Directive’).

<sup>6</sup> For an overview of the role of the concept of social integration in the development of Union citizenship see Azoulay, note 4 above, and Barbou des Places, note 4 above.

<sup>7</sup> See, for example, *Martinez Sala*, C-85/96, EU:C:1998:217, *Grzelczyk*, C-184/99, EU:C:2001:458, and *Bidar v Sec. of State for Education and Skills*, C-209/03, EU:C:2005:169.

is most closely associated with the right of free movement and can be seen at work in cases related to the recognition of names,<sup>8</sup> and the right to family reunification,<sup>9</sup> where an emphasis is placed on the removal of any disincentive for an individual to live in a Member State of his or her choosing,<sup>10</sup> including in returning to his or her own Member State.<sup>11</sup> Rights acquired in one Member State, such as rights to family life or a particular name, must be recognised upon return to one's home Member State. They are, in the words of AG Sharpston "“passported” and remain with the EU citizen on his return to his home Member State’.<sup>12</sup> Rights to carry welfare rights throughout the Union as found in Regulation 883/2004/EC may also be explained by the underlining logic of autonomy.<sup>13</sup>

While the concepts of social integration and autonomy are described here as distinct for the purposes of analysis, in their operation they are inter-related and complementary. Both free movement and autonomy are necessary in order for an individual to move to, and integrate within, the society of another Member State. Equally, in order to enjoy the different opportunities offered by the different Member States, an ability to fully form part of their societies may at times be necessary. Indeed, the emphasis on autonomy or integration may change over the course of a particular life. What is important is the totality that is offered individuals, ie the wide-ranging ‘bundle of opportunities’ created by the opening of different national communities across the Union that is at the heart of transnational citizenship.<sup>14</sup>

While they are complementary and imbricated in their operation, there is an underlying tension between these two dimensions of Union citizenship and the underlying visions of the individual they offer. Social integration reflects a conception of life that is more communitarian, grounded in reciprocal obligations and rights between the individual and the broader community and one whose life and perhaps identity is constructed through relations with others. Importantly, that community is one located at the national level.<sup>15</sup> Autonomy places an emphasis on individual choice allowing

<sup>8</sup> See the classic cases of *Garcia Avello v Belgian State*, C-148/02, EU:C:2003:539 and *Grunkin Paul*, C-353/06, EU:C:2008:559.

<sup>9</sup> Most emblematic being perhaps *Metock v Minister for Justice Equality and Law Reform*, C-127/08, EU:C:2008:449.

<sup>10</sup> See in particular *ibid*.

<sup>11</sup> See especially *Minister voor Vreemdelingenzaken en Integratie v Eind*, C-291/05, EU:C:2007:771.

<sup>12</sup> Opinion of AG Sharpston in *O & B and S & G*, C-456/12 and C-457/12, EU:C:2013:837, para 95. See also the use of the concept of vested rights to explain the ‘name’ case of *Grunkin-Paul*, EU:C:2008:559 in JJ Kuipers, ‘*Cartesio and Grunkin Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law*’ (2009) 2(1) *European Journal of Legal Studies* 66.

<sup>13</sup> Regulation 883/2004 on the coordination of social security systems [2004] OJ L166/1.

<sup>14</sup> U Preuß, ‘Problems of a Concept of European Citizenship’ (1995) 1(3) *European Law Journal* 267, 280.

<sup>15</sup> Although as noted by Azoulai, it is a rather fragmented concept of integration, referring to specific sites of social or civil integration rather than a coherent national whole. See L Azoulai, ‘The European Individual as Part of Collective Entities (Market, Family, Society)’ in L Azoulai, S Barbou des Places, and E Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing, 2016).

the individual to move around various national communities and be at home in any or indeed in none—selecting from the various options offered to construct a life across the Union. It acts to some extent against, or at least in disregard of, state interests in social closure and maintenance of social cohesion.<sup>16</sup> Furthermore, the concept of autonomy and the freedom it represents necessarily has a different reference point within which rights are enjoyed, one that extends beyond the individual Member States and extends to the Union as a whole. It therefore forms a bridge between the transnational and the supranational; rights remain exercised against a Member States by the mobile Union citizens, but those rights escape the boundaries of a Member State's territory and begin to operate in the context of the wider Union territory, a phenomenon which can begin to generate supranational understandings of values.<sup>17</sup>

*B. The supranational dimension to Union citizenship: 'Genuine enjoyment of the substance of the rights of Union citizenship'*

Social integration and autonomy, based on the rights of free movement and residence contained in Article 21 TFEU in combination with the principle of non-discrimination on the grounds of nationality found in Article 18 TFEU, represent the transnational dimension of Union citizenship as a form of interstate citizenship, although as noted, autonomy begins to generate pressures towards the formation of a supranational reference point. Rights are exercised against *other* Member States—Member States other than one's home Member State or Member State of nationality—on a reciprocal basis. There are no supranational, autonomously generated Union citizenship rights as such, enjoyed independently of movement. As a consequence, outside cases of circular migration, discussed below, one cannot rely on the status of Union citizenship against one's own state, a situation which is governed by national law in accordance with the division of competences within the Union.

That situation changed in 2010 with the judgments of *Rottmann*,<sup>18</sup> and *Ruiz Zambrano*.<sup>19</sup> In both cases, a Union citizen was able to rely on his status as a citizen of the Union against his Member State of nationality without any other connecting factor to Union law.<sup>20</sup> These findings were not based on the rights found in

<sup>16</sup> See for example the desire by Belgium to secure integration through a uniform application of naming rules in *Garcia Avello*, note 8 above, para 40.

<sup>17</sup> See generally Coutts, note 2 above, Conclusion.

<sup>18</sup> *Rottmann v Bayern*, EU:C:2010:104, C-135/08.

<sup>19</sup> *Ruiz Zambrano v ONEm*, C-34/09, EU:C:2011:124.

<sup>20</sup> In *Rottmann*, the individual concerned had previously moved from Austria to Germany, a fact which for AG Maduro ensured Mr Rottmann's case was not a purely internal situation (see Opinion of AG Maduro, *Rottmann*, note 18 above, para 11). In its judgment, the Court of Justice, without referring to prior movement, found simply that Mr Rottmann's status as a Union citizen was sufficient to bring the matter within the scope of Union law (see *Rottmann*, note 18 above, para 42). This revolutionary aspect of the judgment, while noted (see in particular D Kochenov, 'Case C-135/08, *Rottmann v Friestaat Bayern*' (2010) 47(6) *Common Market Law Review* 1831), was overshadowed by the more immediately relevant finding that the Court of Justice was imposing constraints on the operation of nationality law.

Article 21 TFEU—which as inter-state rights only apply in cases of movement to another Member State—but on Article 20 TFEU and the status of Union citizenship it proclaims. In *Rottmann*, the Court of Justice found that when removing nationality from an individual, a Member State was necessarily removing his status of Union citizenship and had, as a result, to conduct a proportionality assessment taking into account the consequences for that loss of status in Union law.<sup>21</sup> In *Zambrano*, it found that removal of a parent of a Union citizen was prohibited where the inevitable result would be the removal of the Union citizen child from ‘the territory of the Union’.<sup>22</sup> This would have ‘the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union’, an outcome which was prohibited by Article 20 TFEU.<sup>23</sup>

The revolutionary potential of *Zambrano* was quickly recognised. In constitutional terms, by modifying the so-called purely internal rule, *Zambrano* potentially expanded the jurisdiction of the Court of Justice and ultimately the scope of Union law in a radical manner, turning Union citizenship itself into a means of defining the scope of Union law and ultimately the jurisdiction of the Court of Justice.<sup>24</sup> The result would have been a possible totalising effect on EU law, expanding its potential reach across the full range of economic and social life and undermining significantly the restrictions inherent in the current federal bargain.<sup>25</sup> From the perspective of Union citizenship, it contained the potential of a truly federal citizenship, generating its own set of autonomous rights enforceable throughout the Union.

Whether this in fact took place depended on what was entailed by the *Zambrano* test, which it will be recalled, prohibited any Member State measure that had the effect of depriving a Union citizen of the ‘genuine enjoyment of the rights conferred by Union citizenship’. The limited reasoning in *Zambrano* itself offered little guidance and later cases were a disappointment in this regard.<sup>26</sup> In subsequent Article 20 TFEU cases, it became evident that the *Zambrano* test applied only ‘in exceptional circumstances’,<sup>27</sup> and that fundamental rights violations alone could not trigger application of Article 20 TFEU.<sup>28</sup> Furthermore, the Court increasingly associated

<sup>21</sup> *Rottmann v Bayern*, note 18 above, paras 55 ff.

<sup>22</sup> *Zambrano v ONEm*, note 19 above, para 44.

<sup>23</sup> *Ibid*, para 42.

<sup>24</sup> Something advocated for in for example D Kochenov, ‘On Tiles and Pillars: EU Citizenship as a Federal Denominator’ in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017).

<sup>25</sup> For an account of this federal bargain in the context of Union citizenship see N Níc Shuibhne, ‘Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?’ in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017).

<sup>26</sup> For a critique of the reasoning of the Court, or absence thereof, see N Níc Shuibhne, ‘Seven Questions for Seven Paragraphs’ (2011) 36(2) *European Law Review* 161. For an exploration of what this might entail see D Kochenov, ‘The Right to Have *What* Rights? EU Citizenship in Need of Clarification’ (2013) 19(4) *European Law Journal* 502.

<sup>27</sup> *Iida v Stadt Ulm*, C-40/11, EU:C:2012:691, para 71, speaking of ‘very specific situations’.

<sup>28</sup> *Dereci and Others v Bundesministerium für Inneres*, C-256/11, EU:C:2011:734, para 71.



this ‘genuine enjoyment of the substance of the rights of Union citizenship’ with the traditional, market-derived, and economically restricted rights of free movement and residence contained in Article 21 TFEU.<sup>29</sup> While the future of supranational status developed in *Rottmann* and *Zambrano* remained open, it seemed devoid of substance, with its potential being severely limited.

### III. THE RESTRICTION OF TRANSNATIONAL RIGHTS

In what might be termed the golden age of Union citizenship, both dimensions operated largely to empower individual citizens by expanding rights and limiting Member State action which restricted those rights. Both free movement and the right of equal treatment reduced the ability of Member States to place restrictions on movement or access to various benefits. The concept of social integration was deployed alongside the principle of proportionality to secure rights for individuals to equal treatment in social assistance matters; before withdrawing social assistance, an individual assessment was required.<sup>30</sup> This was to be based on the particular circumstances of the Union citizen and in particular the degree of their integration into the host society and the burden they would represent on the national welfare system.<sup>31</sup>

This expansive rights-based and individual-friendly development of Union citizenship has come to a halt in the past decade where the story has been one of restriction and retrenchment. There has been voluminous commentary on the so-called restrictive trend in the jurisprudence of the Court of Justice.<sup>32</sup> While acknowledging the restrictive effect of these developments, this Part argues that this trend, confirmed in more recent cases, reflects a reworking of both aspects of the transnational dimension of Union citizenship. Firstly, the concept of social integration has not been abandoned, rather it has been refashioned to place a greater emphasis on the role of the individual for their integration with the rise of a responsabilised Union citizen, with the result that Member States are empowered to operate greater closure against those citizens deemed irresponsible in the eyes of Union law. It has thus shifted from a principle of inclusion to one of exclusion. Secondly, the autonomy dimension of Union citizenship has become subordinated to the social integration dimension of Union citizenship and of national interests more generally.

<sup>29</sup> *Ymeraga v Minstre du Travail, de l'Emploi et de l'Immigration*, C-87/12, EU:C:2013:291, para 37; *Iida v Stadt Ulm*, note 27 above, para 72.

<sup>30</sup> D Kramer, ‘Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed’ (2016) 18 *Cambridge Yearbook of European Legal Studies* 270, p 292.

<sup>31</sup> See in particular *Pensionsversicherungsanstalt v Brey*, C-140/12, EU:C:2013:565.

<sup>32</sup> Although some contend that developments do not represent such a radical change and merely reflect a natural development and application of the underlying secondary legislation. See for example G Davies, ‘Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication’ (2018) 25(10) *Journal of European Public Policy* 1442.

### A. *The refashioning of social integration*

As noted above, social integration has been a *leitmotif* in the development of Union citizenship from the perspective of both the legislature and the Court of Justice. This concept has played a key role in at least two areas of Union citizenship law: access to social benefits and protection from expulsion on the grounds of public policy and public security. In both areas, the concept of social integration has been incorporated within a proportionality test. In recent years, the Court of Justice has restricted the rights of individuals and increased the ability of the Member States to either refuse welfare benefits or expel unwanted individuals. Both moves can be seen as placing greater responsibilities on the individual in the context of the integration process, by identifying a number of criteria of contribution and appropriate behaviour towards the society of the host Member State.

#### 1. *Access to social assistance for the non-economically active and the importance of contribution*

The restriction on the right to equal treatment to social assistance for the non-economically active, has attracted the most attention politically and academically over recent years.<sup>33</sup> The political context, especially that of Brexit, is well known, as is the string of cases that reasserted the ability of Member State to restrict access to welfare benefits after the expansive jurisprudence of previous decades. The judgment of *Dano* is key here in finding that enjoyment of the right of equal treatment contained in Article 24 of the Citizenship Directive was premised on the applicant fulfilling the conditions of residence contained in the Directive,<sup>34</sup> in particular Article 7, effectively turning economic activity or self-sufficiency into conditions for the access of equal treatment.<sup>35</sup> At the same time, the Court of Justice retreated from the need for an individualised assessment on the basis of proportionality—so important in expanding the rights for individuals—in favour of deferring to the legislature on this matter.<sup>36</sup> The result was a clear shift not only in the outcome of the cases as less plaintiff friendly,<sup>37</sup> but a shift in the legal operation of the principle of non-discrimination in the context of Union citizenship and a reinforcing of Member State control in policing the boundaries of the welfare communities.

<sup>33</sup> The scholarly treatment has been extensive. For a selection see the contributions in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing, 2017). See also Shuibhne, note 1 above; Spaventa, note 1 above; M Ferrera, 'The Contentious Politics of Hospitality: Intra-EU Mobility and Social Rights' (2016) 22(6) *European Law Journal* 791.

<sup>34</sup> Citizenship Directive, note 5 above, Art 24.

<sup>35</sup> *Dano v Jobcenter Leipzig*, C-333/13, EU:C:2014:2358.

<sup>36</sup> For an assessment of this case law in terms of interpretation technique and the balance between the legislature and the Court, see M van den Brink, 'Justice, Legitimacy and the Authority of Legislation within the European Union' (2019) 82(2) *Modern Law Review* 293.

<sup>37</sup> Contrary to most interpretations, Davies argues for a certain degree of continuity in the jurisprudence of the Court on these matters. See Davies, note 32 above.



The *Dano* line of jurisprudence does not mean the end of the social integration paradigm or abandoning the gradualist approach to rights acquisition based on the degree of integration in the host society. Following *Dano*, it would appear that an individual assessment based on the personal circumstances of individuals by national authorities is no longer required, leading to possible instances where meaningful integration is overlooked in the application of the Directive.<sup>38</sup> However, as *Alimanovic* demonstrates, the Court is not abandoning the gradualist assumptions associated with social integration but rather is deferring to the legislature on this matter.<sup>39</sup> In this sense, the relationship between the rights contained in Articles 18 TFEU and 21 TFEU on non-discrimination and free movement, respectively, and the conditions in Directive 2004/38/EC are reversed. Whereas previously, the conditions were viewed as restrictions on the rights flowing from the Treaty and hence needed to be justified and proportionate, now they are seen as constitutive of those rights and need to be fulfilled prior to any enjoyment of the right to equal treatment.<sup>40</sup>

On a more general level, economic contribution is woven into *Dano* and other cases as a means of demonstrating the deservingness of the applicants by virtue of their attitude and behaviour towards the host community. Certainly, *Dano* and other cases are focused on the need to ensure that the migrant citizen does not undermine the welfare systems of Member States. This is certainly true but does not capture their full importance. What is important is not whether the individual mobile citizen somehow ‘pays his way’ in a literal sense and is a net financial contributor to the host Member State. Kramer illustrates clearly the shift towards an earned citizenship in the recent jurisprudence of the Court of Justice in which ‘the welfare state can be reinvented as a tool for integrating the alien into an active, self-supporting citizen from whom particular efforts are expected to lead a meaningful existence in his or her “host society”’.<sup>41</sup> More important than net financial contribution is the disposition this demonstrates in the mobile citizen and his attitude towards the host society. Note in *Dano* the depiction of the applicant as unable and unwilling to engage in any form of economic activity.<sup>42</sup>

This is demonstrated by more recent judgments extending the right of social assistance to the self-employed in circumstances where the individual’s economic contribution—and in particular direct contribution in terms of social insurance or taxation contributions—are limited at best. In both *Gusa*,<sup>43</sup> and *Tarola*,<sup>44</sup> the Court of Justice

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<sup>38</sup> For a critique of this and a call for a (return to) more holistic and less economically focused assessment of the degree of an individual integration, see C O’Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing, 2017), ch 9. Similarly, Neuvonen argues for a greater focus on inter-subjective dimension of integration, ie between individual Union citizens rather than between Union citizens and (host) Member States. See P Neuvonen, *Equal Citizenship and Its Limits in EU Law: We the Burden?* (Hart Publishing, 2016).

<sup>39</sup> See in particular *Alimanovic and Others*, C-67/14, EU:C:2015:597, para 60.

<sup>40</sup> See Kramer, note 30 above, pp 289–90.

<sup>41</sup> *Ibid*, p 280.

<sup>42</sup> See *Dano v Jobcenter Leipzig*, note 35 above, para 39.

<sup>43</sup> *Gusa v Minister for Social Protection et al*, C-442/16, EU:C:2017:1004.

<sup>44</sup> *Tarola v Minister for Social Protection*, C-483/17, EU:C:2019:309.

extended the right to job seekers allowance to self-employed individuals who had found themselves out of work after having worked sporadically in the years immediately preceding their welfare claim. A number of aspects of the judgments point towards what really concerned the Court. The fact that the applicant found himself without work due to circumstances ‘beyond his control’<sup>45</sup> appeared as a thread running through both judgments and justified the applicants retaining their statuses as jobseekers; the degree of control the individual had over his situation, and thus the extent to which he was responsible for the needy situation he found himself in, appears key. The clear implication being that those who can be deemed responsible for their situation of need are not entitled to the protections offered by Union citizenship.<sup>46</sup> Indeed, the difference in the way in which the Court considers the two groups becomes explicit in *Gusa*, when it finds that treating employed and self-employed persons differently for the purposes of them retaining the status of worker and thus being eligible for social assistance on the same basis as nationals

would be particularly unjustified in so far as it would lead to a person who has been self-employed for more than one year in the host Member State and who has contributed to that Member State’s social security and tax system by paying taxes, rates and other charges on his income, being treated in the same way as a first-time jobseeker in that Member State who has never carried on an economic activity in that State and has never contributed to that system.<sup>47</sup>

It should be noted, however, that in both cases the self-employed activities carried out were of a minimal and sporadic nature and financial contributions to the state would have been limited. What was important was not whether an individual had, in some literal accounting exercise, contributed sufficiently to the coffers of the state to cover any subsequent need for assistance, but whether he had made the requisite effort and contributed sufficiently so as to be considered part of the community of solidarity of the host Member State. We remain in the realms of solidarity between the host community and a migrant Union citizen; it is just now the migrant Union citizen must demonstrate, through their economic activity, the necessary willingness to contribute and become part of this community. The ultimate effect is a restriction of individual rights but what we are also witnessing is not so much an unambiguously restrictive trend for its own sake—indeed *Gusa* and *Tarola* are illustrations of rights-friendly judgments willing to go beyond the text of the Directive to secure individual rights—but a reconfiguration of the concept of integration and contribution within the welfare communities of the host Member States, with a greater emphasis on the role of the individual and his or her willingness to make the appropriate effort and contribution.<sup>48</sup>

<sup>45</sup> *Ibid.*, paras 46–49.

<sup>46</sup> Of course, this does rely on a not unproblematic view of what it means to be in control or otherwise of one’s situation where individual choices interact with environmental factors and personal capabilities in a complex manner. I am grateful to Dimity Kochenov for this point.

<sup>47</sup> See *Gusa v Minister for Social Protection et al.*, note 43 above, para 44.

<sup>48</sup> This does lead us back to the old exclusionary tendencies in market citizenship, where those not conforming to current ideas of productivity and contribution fall outside the scope and protection of

## 2. *Expulsion and integration: The responsibility of the Union citizen*

The trend towards emphasising the responsibility of the mobile Union citizen for his integration into the host Member State, as well as a more explicit link with the social integration paradigm, can also be seen in the second area in which transnational citizenship rights have been restricted in recent years; expulsion on the grounds of public policy and security. This restrictive trend, somewhat in opposition to the strict wording of the Citizenship Directive,<sup>49</sup> is evident in two groups of cases.<sup>50</sup> Firstly, the definition of public security, and secondly, the conditions for obtained enhanced protection from expulsion under Article 28(3) of the Citizenship Directive.<sup>51</sup> Again, the ability of Member States to exclude migrant Union citizens who do not adopt the required attitude of integration towards the society of the host Member State is enhanced and the national community is underlined as the main site of social integration for Union citizens.

Firstly, the Court of Justice has interpreted the terms ‘public policy’ and ‘public security’ and the newer term ‘imperative grounds of public security’ in an expansive manner, thereby facilitating the expulsion of migrant Union citizens. This has remained premised on the concept of social integration combined with a moralistic and offence-based understanding of the concepts of public policy and public security, allowing Member States to exclude individuals from the host Member State for offences against the norms of the host society.<sup>52</sup> This became explicit in the recent judgment of *K & HF*,<sup>53</sup> holding that an individual found to have been involved in war crimes a number of years ago outside the Union could still constitute a current threat to the public policy and public security of the host Member State. This was the case if his subsequent conduct demonstrated a ‘disposition hostile to the fundamental values enshrined in Articles 2 and 3 [of the Treaty on European Union (‘TEU’)], such as human dignity and human rights’.<sup>54</sup> The concept of public security

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(*F*’note continued)

this status they supposedly enjoy as fundamental. See especially O’Brien, note 38 above, on this point.

<sup>49</sup> See van den Brink, note 36 above.

<sup>50</sup> See D Kochenov and B Pirker, ‘Deporting the Citizens within the European Union: A Counter-intuitive Trend in Case C-348/09 *PI v Obergurgermeisterin der Stadt Remscheid*’ (2013) 19(2) *Columbia Journal of European Law* 369; L Mancano, ‘Criminal Conduct and Lack of Integration into the Society under EU Citizenship: This Marriage is not to be Performed’ (2015) 6(1) *New Journal of European Criminal Law* 53; S Coutts, ‘The Absence of Integration and the Responsibilisation of Union Citizenship’ (2018) 3 *European Papers* 761.

<sup>51</sup> Citizenship Directive, note 5 above, Art 28(3).

<sup>52</sup> For this reading of *Tsakouridis*, C-145/09, EU:C:2010:708 and *PI*, C-348/09, EU:C:2012:300, see S Coutts, ‘Union Citizenship, Social Integration and Crime: Duties through Crime’ in L Azoulai, S Barbou des Places, and E Pataut (eds), *Constructing the Person in EU Law* (Hart Publishing, 2016), and Coutts, note 2 above, ch 4.

<sup>53</sup> *K and HF v Belgische Staat*, C-331/16 and C-366/16, EU:C:2018:296. For a comment, see S Coutts, ‘The Expressive Dimension of the Union Citizenship Expulsion Regime: Joined Cases C-331/16 and C-366/16, *K and HF*’ (2018) 3 *European Papers* 833.

<sup>54</sup> *K and HF v Belgische Staat*, note 53 above, para 60. It should be noted that the Court did mention ‘conduct [presumably current] of the individual concerned that shows the persistence’ of such a

was stretched to cover any ‘direct threat to the peace of mind and physical security of the population of the Member State concerned’;<sup>55</sup> the mere presence of an unsavoury character amongst the community and the disturbance that may cause is, it seems, sufficient to justify exclusion from that national community.

In addition to judgments providing an expansive definition of the concepts of public policy and public security, the Court has also handed down a number of judgments making the enhanced protection offered by the Citizenship Directive to longer term residents more difficult to acquire. In *Onuekwere*,<sup>56</sup> *CS*,<sup>57</sup> and more recently *B & Vomero*,<sup>58</sup> the Court of Justice held that periods of imprisonment cannot be counted towards the acquisition of permanent residence, meaning the enhanced protection that status brings with it under Article 28(2) of the Citizenship Directive is also lost.<sup>59</sup> It further found that acquisition of permanent residence was a prerequisite for the acquisition of the enhanced protection enjoyed by residents of ten years or more provided by Article 28(3), thereby indirectly importing an economic condition into the acquisition of Article 28(3) protection.<sup>60</sup> Finally, it found that periods of imprisonment may or may not count towards the acquisition of the enhanced protection under Article 28(3). This would depend on an overall assessment of the ‘integrative links’<sup>61</sup> between the individual and the host society and the extent to which he or she had become ‘disconnected from the society of the host Member State’.<sup>62</sup> This assessment is to be based on various factors including the individual’s prior level of social integration, the nature of the crime and his attitude while in prison.<sup>63</sup>

As with the jurisprudence on social assistance, this body of case law can be read as restricting the rights of Union citizens and indeed this is precisely the outcome of the cases. The corollary however, as with the social assistance cases, is the reworking of the concept of social integration from a protective principle, allowing individuals to resist expulsion,<sup>64</sup> to one that places obligations of good behaviour on the individual

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(*F* note continued)

disposition. Nonetheless, in preceding paragraphs the Court left no doubt that ‘past conduct alone may constitute [a present threat]’ (para 56) and concluded that the ‘exceptional gravity’ of the initial crimes may lead to the conclusion that the threat to the interests of society is persistent (para 58).

<sup>55</sup> *Ibid*, para 42.

<sup>56</sup> *Onuekwere v Secretary of State for the Home Department*, C-378/12, EU:C:2014:13.

<sup>57</sup> *Secretary of State for the Home Department v CS*, C-304/14, EU:C:2016:674.

<sup>58</sup> *B and Vomero*, C-316/16 and C-424/16, EU:C:2018:256.

<sup>59</sup> Citizenship Directive, note 5 above, Art 28(2). See *B and Vomero*, note 58 above, para 49.

<sup>60</sup> Acquisition of permanent residence is premised on the individual having fulfilled the conditions of economic activity or self-sufficiency found in Article 7 of the Directive. See O’Brien, note 38 above, for the difficulties encountered by individuals, even those resident for many years, in fulfilling the conditions of *continuous* economic activity necessary to secure permanent residence under Article 16 of the Directive.

<sup>61</sup> *B and Vomero*, note 58 above, para 38.

<sup>62</sup> *Ibid*, para 44.

<sup>63</sup> *Ibid*, paras 70–75.

<sup>64</sup> See for example *Ofanopoulos and Oliveri v Land Baden-Württemberg*, Cases C-482/01 and C-493/01, EU:C:2004:262.

towards the host society, of a certain attitude to undo his ‘disconnection’ from the society of the host Member State in order to ensure his continued membership of that host Member State. Again, national communities and the policing of those boundaries are enhanced in this vision of Union citizenship through a refashioning of the concept of social integration.

Finally, if proof is needed of the renewed centrality of social integration in the operation of Union citizenship and that this social integration is very much integration into the national community, we need go no further than the judgment of *Lounes*.<sup>65</sup> *Lounes* is important from the perspective of Brexit—to ensure the protection of Union rights for Union citizens who may wish to naturalise as UK nationals<sup>66</sup>—and also from the perspective of family reunification rights.<sup>67</sup> It is also important for the logic upon which these outcomes were based namely that the integration of the migrant Union citizen should not be hindered or made less attractive, something that that would occur if she was to lose Union citizenship rights of family reunification once her naturalisation had taken place.<sup>68</sup> The culmination of the integration envisaged by Union citizenship law is *naturalisation*, ie full membership of the national community of the host Member State; it is integration into the national community of the host Member State that is aimed at and moreover, as pointed out by Advocate General Bot, is facilitated by the residence rights guaranteed by Union law.<sup>69</sup>

#### *B. The subordination of autonomy to social integration and the national community*

In the other dimension of transnational citizenship, namely autonomy, there has been a parallel but somewhat different shift in the jurisprudence of the Court of Justice. Here, the restriction of rights has not been as forthright and indeed the development is not unidirectional.<sup>70</sup> What we have witnessed is a more nuanced jurisprudence from the Court of Justice and an effort to balance the radical transnational autonomy offered by Union citizenship, with a certain respect for national identities and social integration. Presumably, this has been driven by the desire to avoid abuse of Union law, but it has the additional effect of curtailing a more radical and socially disconnected model of Union citizenship while asserting the primacy of national communities. Two moves can be discerned in the case law. Firstly, the subordination of autonomy to social integration through the use of the concept of ‘genuine residence’

<sup>65</sup> *Lounes v Secretary of State for the Home Department*, C-165/16, EU:C:2017:862.

<sup>66</sup> See G Davies, ‘*Lounes*, Naturalisation and Brexit’ (*European Law Blog*, 5 March 2018), <https://europeanlawblog.eu/2018/03/05/lounes-naturalisation-and-brexite>.

<sup>67</sup> On this, see V Réveillère, ‘Family Rights for Naturalised EU Citizens: *Lounes*’ (2018) 55(6) *Common Market Law Review* 1855.

<sup>68</sup> *Lounes v Secretary of State for the Home Department*, note 65 above, para 58.

<sup>69</sup> See Opinion of AG Bot in *Lounes v Secretary of State for the Home Department*, note 65 above, para 84.

<sup>70</sup> *Coman*, C-673/16, EU:C:2018:385, in particular stands out as example of the older cases of family reunification based on mutual recognition and the passporting of status, here the status of spouse.

in *O&B*<sup>71</sup> and more recently in *Coman*.<sup>72</sup> Secondly, a greater assertion of Member State interest and in particular their interest in constitutional and linguistic identity in the so-called ‘name’ cases.

Much like social assistance claims, family reunification is an area of much controversy and litigation in the field of Union citizenship, with the Court creating liberal rights of family reunification for migrant Union citizens.<sup>73</sup> These rights were also ‘passported’ back to the Member State of nationality in the situations of circular migration.<sup>74</sup> The result was the ability to circumvent national migration law by movement to another Member State.<sup>75</sup> This approach was curtailed somewhat in *O & B*, in which the Court balanced the rights of the individual to move around the Union free from obstacles—meaning the right to maintain a family upon return to the Member State of origin—on the one hand, with the need to avoid abuse and to ensure that individuals had made ‘genuine’ use of their citizenship rights on the other hand. Only rights acquired in the course of ‘genuine’ residence in another Member State—residence in accordance with the conditions in the Citizenship Directive,<sup>76</sup> which in *Dias* were held to constitute the ‘qualitative elements’ of social integration in addition to those of time and geography<sup>77</sup>—could be retained upon return to the Member State of residence. Union citizenship as a status of social integration appears to be privileged in this judgment; the *primary* goal of Union citizenship is to enable an individual to move to and integrate in another Member State and only under these conditions are genuine family ties developed and protected that can then be passported around the Union. Certainly, an element of autonomy remains and an individual must be facilitated in his choice to return to his Member State of origin, but this is subordinated to the telos of, or at least preconditioned by, social integration in another Member State.

This development of autonomy but only as a consequence of prior social integration is confirmed in the more recent judgment of *Coman*.<sup>78</sup> *Coman* is demonstrably autonomy enhancing and notable for its outcome in ensuring a same-sex couple can continue to be considered as spouses even on return to a Member State (Romania) that does not permit same-sex marriage. In other words, it enabled a Union citizen to make use of the legal options offered by the plural Union legal order to acquire

<sup>71</sup> *O and B*, C-456/12, EU:C:2014:135.

<sup>72</sup> *Coman*, note 70 above.

<sup>73</sup> With *Metock v Minister for Justice Equality and Law Reform*, note 9 above, being the high-water mark of such an approach.

<sup>74</sup> For the original case, see *The Queen v Surinder Singh*, C-370/90, EU:C:1992:296, and more recently, *Minister voor Vreemdelingenzaken en Integratie v Eind*, note 11 above. Opinion of AG Sharpston in *O & B and S & G*, note 12 above, who speaks of how rights are ‘passported’ at paragraph 95.

<sup>75</sup> Indeed, in *Carpenter v Secretary of State for the Home Department*, C-60/00, EU:C:2002:434, only temporary service provision abroad was involved.

<sup>76</sup> *O and B*, note 71 above, paras 51–53.

<sup>77</sup> *Secretary of State for the Home Department v Dias*, C-325/09, EU:C:2011:498, para 64.

<sup>78</sup> *Coman*, note 70 above.



a right not available to him in his home Member State. However, following *O&B*,<sup>79</sup> and unlike earlier cases such as *Eind*,<sup>80</sup> ‘genuine residence’ in the second Member State where the marriage was contracted emerges as a necessary precondition to the ability to passport rights.<sup>81</sup> To-ing and fro-ing without making a genuine commitment to another Member State will not generate rights to be passported throughout the Union; use of the ‘bundle of options’ referred to by Preuß<sup>82</sup> does not come automatically but only on foot of some form of integration in another Member State. It is a social vision of rights and freedoms, where freedom and rights are developed in a social context and where that social context is a national one. In this sense, the tendency of earlier autonomy cases to lead to the development of a supranational space is reversed, rights are both national in their legal origins, originating from national legal systems even if they subsequently move beyond those systems and also in the context in which they are acquired. The pure autonomy of earlier cases is subordinated to the now dominant telos of social integration. Only now with a reworked notion of integration incorporating greater responsibility for individuals and possibility of exclusion.

This trend is complemented by a corresponding move to restrict or at least balance the autonomy or free movement of individuals with reference to the interests of Member States and in particular constitutional or linguistic identity. Early name cases, in particular *Garcia-Avello*<sup>83</sup> and *Grunkin Paul*,<sup>84</sup> were paradigmatic examples of autonomy, allowing Union citizens to passport their preferred name around the legal orders of the Member States, who were obliged to set aside their own legislation in this area to facilitate the choice and the future transnational life of the individual concerned. In more recent judgments, the Court has stressed the need to strike a balance between the rights of the individual to autonomy and personal identity and the interests of Member States and the Court stresses the ability of Member States to limit free movement rights in order to uphold constitutional values and national identity.<sup>85</sup> A similar point is raised in *Coman*, in which the Court, while dismissing a justification based on national identity on the substance, did acknowledge with reference to Article 4(2) TEU that national identity must be respected and may in different circumstances justify the restriction of free movement rights.<sup>86</sup>

The recent past of the transnational dimension of Union citizenship has been presented as one of restriction of individual rights. While this is certainly the case, it requires nuancing. It ignores the rise of rights under Article 20 TFEU, to be explored in the next Part, but also misses some transnational cases which do in fact result in

<sup>79</sup> *O and B*, note 71 above.

<sup>80</sup> *Minister voor Vreemdelingenzaken en Integratie v Eind*, note 11 above.

<sup>81</sup> *Coman*, note 70 above, para 40.

<sup>82</sup> Preuß, note 14 above, p 280.

<sup>83</sup> *Garcia Avello*, note 8 above.

<sup>84</sup> *Grunkin-Paul*, note 8 above.

<sup>85</sup> See *von Wolffersdorff*, C-438/14, EU:C:2016:401, and *Freitag*, C-541/15, EU:C:2017:432, in particular.

<sup>86</sup> *Coman*, note 70 above, paras 43–44.

positive outcomes from the perspectives of individual applicants. *Gusa*<sup>87</sup> and *Tarola*<sup>88</sup> both extend social assistance to individuals in need and whose contribution to the host Member State was sporadic. While *B & Vomero*<sup>89</sup> confirms the exclusionary core of the earlier judgments of *Onuekwere*<sup>90</sup> and *CS*,<sup>91</sup> it does soften the somewhat stark findings of that judgment through an individualised assessment and strongly implies that the individual *B* should enjoy the enhanced protection offered by Article 28(3) of the Citizenship Directive. *Coman*, despite the need for prior ‘genuine residence’ in the Member State where the passported right was acquired, is empowering for Union citizens, enabling them to use the autonomy offered by Union citizenship and the various options it offers to secure recognition of marriage and family life throughout the Union.<sup>92</sup> Finally, not explored here but worth mentioning, a set of cases has developed the procedural and to some extent substantive obligations placed on Member States in Article 3(2) of the Citizenship Directive<sup>93</sup> to favour family reunification for persons falling outside the core family.<sup>94</sup>

It is important not to deny the overall restrictive tendency in the case law on social assistance and public security, nor the fact that this creates substantial obstacles for the enjoyment of the supposedly fundamental status for those who do not contribute in the appropriate manner or who are deemed troublesome by society. However, an exclusive focusing on the restrictive outcomes misses an underlying trend of relevance to the nature of Union citizenship and the polity of which it is a membership status. Alongside at times restrictive and exclusionary outcomes, recent jurisprudence also entails a reconfiguration of the concept of social integration based on a responsabilisation of the Union citizen, a prioritising of social integration over individual autonomy and a corresponding affirmation of the national community as a site of social integration to the operation of Union citizenship and the development of the rights—both of social integration and equal treatment but now also free movement and autonomy—with which it is associated.

#### IV. THE DEVELOPMENT OF THE SUPRANATIONAL DIMENSION OF UNION CITIZENSHIP

In parallel to the reconfiguration of the transnational dimension of Union citizenship by an emphasis on social integration at the cost of autonomy and highlighting the role

<sup>87</sup> *Gusa v Minister for Social Protection et al*, note 43 above.

<sup>88</sup> *Tarola v Minister for Social Protection*, C-483/17, EU:C:2019:309.

<sup>89</sup> *B and Vomero*, note 58 above.

<sup>90</sup> *Onuekwere v Secretary of State for the Home Department*, note 56 above.

<sup>91</sup> *Secretary of State for the Home Department v CS*, note 57 above.

<sup>92</sup> *Coman*, note 70 above.

<sup>93</sup> Citizenship Directive, note 5 above, Art 3(2).

<sup>94</sup> See *Secretary of State for the Home Department v Rahman and Ors*, C-83/11, EU:C:2012:519; *Secretary of State for the Home Department v Banger*, C-89/17, EU:C:2018:570; *SM v Entry Clearance Officer, UK Visa Section*, C-129/18, EU:C:2019:248.

of individual responsibility within social integration, we have seen the revitalisation of the *Zambrano* doctrine after a number of years in which it was applied restrictively in practice and underdeveloped conceptually. In *Rendón Marín*<sup>95</sup> and *CS*<sup>96</sup> and more emphatically in *Chavez-Vilchez*,<sup>97</sup> the Court of Justice has firstly loosened the overly restrictive test developed in *Dereci*<sup>98</sup> for the application of family reunification rights on the basis of Article 20 TFEU described in Part II above, and secondly, particularly in combination with the denaturalisation case of *Tjebbes*,<sup>99</sup> has developed the concept of ‘the substance of the rights of Union citizenship’ so enigmatically mentioned in *Zambrano* itself.<sup>100</sup> It has become increasingly evident that these rights are indissociable from the transnational rights of free movement and residence. The effect of the turn towards responsibility of the mobile citizen and the underlying importance of national communities as the context within which transnational rights are generated and enjoyed, resurfaces in Article 20 TFEU judgments.

In *Rendón Marín*, *CS*, and *Chavez-Vilchez*, the Court loosened the heretofore restrictive *Zambrano* test, expanding the range of persons who may now benefit from the right of family reunification contained in that case. *Rendón Marín* and *CS* were both cases dealing with the possible removal of a third country national (‘TCN’) from the Union for public policy reasons, with the consequence that the Union citizen family member would also be forced to leave the territory of the Union.<sup>101</sup> Both indicated that a right to reside may exist under Article 20 TFEU, but that this could be limited under conditions analogous to those contained in the Citizenship Directive.<sup>102</sup> Importantly, the test for determining whether the Union citizen would be forced to leave the territory of the Union was loosened somewhat, particularly in *Rendón Marín*, where now the national authorities would have to determine if ‘in fact’<sup>103</sup> the family could reside elsewhere in the Union. In *Chavez-Vilchez*, the Court of Justice went further in developing a more holistic and less formalist test regarding whether the Union citizen would be forced to leave the territory of the Union, centred on the notion of dependency between the Union citizen child and the primary caretaker and, drawing on the Charter of

<sup>95</sup> *Rendón Marín v Administración del Estado*, C-165/14, EU:C:2016:675.

<sup>96</sup> *Secretary of State for the Home Department v CS*, note 57 above.

<sup>97</sup> *Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others*, C-133/15, EU:C:2017:354.

<sup>98</sup> *Dereci and Others v Bundesministerium für Inneres*, note 28 above.

<sup>99</sup> *Tjebbes v Minister van Buitenlandse Zaken*, C-221/17, EU:C:2019:189.

<sup>100</sup> *Zambrano v ONEm*, note 19 above, para 43.

<sup>101</sup> *Rendón Marín v Administración del Estado*, note 95 above; *Secretary of State for the Home Department v CS*, note 57 above. For a comment on both judgments, see P Neuvonen, ‘EU Citizenship and Its “Very Specific” Essence: *Rendón Marín* and *CS*’ (2017) 54(3) *Common Market Law Review* 1201.

<sup>102</sup> *Rendón Marín v Administración del Estado*, note 95 above, paras 82–86; *Secretary of State for the Home Department v CS*, note 57 above, para 36–48.

<sup>103</sup> *Rendón Marín v Administración del Estado*, note 95 above, para 79.

Fundamental Rights ('CFR'), the rights of the child to family life read in conjunction with the best interests of the child.<sup>104</sup>

While the loosening of this test is important for the purposes of family reunification rights, there is a second dimension of this line of jurisprudence: the long-awaited elucidation of what precisely is meant by the term 'the substance of the rights of Union citizenship'.<sup>105</sup> Here two aspects of the judgments are key. Firstly, the reference to the rights of free movement and residence and secondly reference to the 'territory of the European Union'.

In *Iida*<sup>106</sup> and *Ymeraga*,<sup>107</sup> reference is made to the right of free movement in particular and may at the time have been considered a limiting move in light of more expansive hopes for the concept substance of the rights of Union citizenship. This however is taken and developed in the judgments of *Rendón Marín*<sup>108</sup> and *Chavez-Vilchez*, to give a clearer understanding of the links between the Article 20 TFEU test and the rights contained in Article 21 TFEU.<sup>109</sup> In *Iida* and *Ymeraga*, the Court finds that Article 20 TFEU situations have 'an intrinsic connection with the freedom of movement of a Union citizen'.<sup>110</sup> In *Rendón Marín*, this is expanded out to 'an intrinsic connection with the freedom of movement and residence of a Union citizen'.<sup>111</sup> Finally, in *Chavez-Vilchez*, the Court speaks of a restriction on the 'rights conferred on [the] children by their status as Union citizens, in particular the right of residence',<sup>112</sup> and, in a formula also found in *Rendón Marín*, states that 'the purpose and justification of those derived rights [of Article 20 TFEU] are based on the fact that a refusal to allow them would be such as to interfere, in particular, with a Union citizen's freedom of movement'.<sup>113</sup> It would seem that the rights referred to by the Court of Justice in *Zambrano* are no less than the classic, core transnational rights of Union citizenship, namely

<sup>104</sup> *Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others*, note 97 above, para 70.

<sup>105</sup> Called for immediately after *Zambrano* itself by Níc Shuibhne, note 26 above, p 162, and Kochenov, note 26 above.

<sup>106</sup> *Iida v Stadt Ulm*, note 27 above, paras 67–68.

<sup>107</sup> *Ymeraga v Minstre du Travail, de l'Emploi et de l'Immigration*, note 29 above, para 37.

<sup>108</sup> *Rendón Marín v Administración del Estado*, note 95 above.

<sup>109</sup> *Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others*, note 97 above.

<sup>110</sup> *Iida v Stadt Ulm*, note 27 above, para 72; *Ymeraga v Minstre du Travail, de l'Emploi et de l'Immigration*, note 29 above, para 37.

<sup>111</sup> *Rendón Marín v Administración del Estado*, note 95 above, para 75. See also the comment in paragraph 77 that 'as Union citizens, Mr Rendon Marin's children have the right to move and reside freely within the territory of the European Union, and any limitation of that right falls within the scope of Union law'.

<sup>112</sup> *Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others*, note 97 above, para 65.

<sup>113</sup> *Ibid*, para 62. See also *Rendón Marín v Administración del Estado*, note 95 above, para 73.

free movement and residence.<sup>114</sup> This is confirmed and expanded upon by the Court in *Tjebbes*, in which the Court elaborated upon the consequences for an individual of the loss of Union citizenship under Article 20 TFEU that needed to be taken into account in any denaturalisation decision. Those rights were the right to form a family life and conduct a professional life throughout the Union and the need to access the territory of the Union in order to build and sustain them.<sup>115</sup> We are back in the classic realm of the transnational rights of free movement and residence and what they bring to a citizen, in the sense of constructing one's life with reference to the bundle of opportunities offered by the various Member States.<sup>116</sup>

However, in order to understand more fully the conceptual implications of this, we should note the other element of the judgments, which indeed has been a recurring feature of the jurisprudence since *Zambrano*, namely the reference to 'the territory of the Union',<sup>117</sup> modified slightly to 'the territory of the European Union' in later cases.<sup>118</sup> By its invocation of the 'territory of the Union', the Court of Justice is not making a claim to territorial self-determination on behalf of the Union in a thick meaning of the concept under international law.<sup>119</sup> Territorial integrity is a characteristic of states and *Zambrano* is not making the claim that the Union has somehow become a sovereign state. Rather, as pointed out by Azoulai at the time of *Zambrano* itself,<sup>120</sup> the reference to territory of the Union has both spatial and normative implications, or more accurately spatio-normative implications. The reference to territory cannot but have spatial implications; it is referring to a particular space or place—called the territory of the Union—and it has normative implications in designating this as 'the *right* place' for Union citizens.<sup>121</sup> It is embedding the concept of Union citizenship within a particular spatial reference point. However, this is

<sup>114</sup> This is an argument to be made based on a close reading of *Chavez-Vilchez* that the Court has detached movement from residence, creating a stand-alone right of residence as advocated by AG Sharpston in Opinion of AG Sharpston in *Zambrano v ONEm*, EU:C:2010:560.

<sup>115</sup> *Tjebbes v Minister van Buitenlandse Zaken*, note 99 above, para 46.

<sup>116</sup> Preuß, note 14 above, p 280.

<sup>117</sup> *Zambrano v ONEm*, note 19 above, para 44. Also explored in detail in N Níc Shuibhne, 'The "Territory of the Union" in "EU Citizenship Law: Charting a Route from Parallel to Integrated Narratives" *Yearbook of European Law* (forthcoming, 2019).

<sup>118</sup> *Rendón Marín v Administración del Estado*, note 95 above, para 77; *Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others*, note 97 above, para 33. The notion has been addressed somewhat in the literature on this case law. See L Azoulai, "'Euro-Bonds": The *Ruiz Zambrano* Judgment or the Real Invention of EU Citizenship' (2011) 3(2) *Perspectives on Federalism* 31; C Raucea, 'European Citizenship and the Right to Reside: "No One on the Outside Has a Right to Be Inside?"' (2016) 22(40) *European Law Journal* 470; Neuvonen, note 101 above, p 1212.

<sup>119</sup> I am grateful to Imelda Maher for pointing out the legal connotations of the concept of territory.

<sup>120</sup> Azoulai, note 118 above.

<sup>121</sup> See H Lindahl, 'Finding a Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity' (2004) 29(4) *European Law Review* 461, for a discussion of territory and in particular the Area of Freedom, Security and Justice precisely in these terms.

not the territory of the Member States, which is after all the preferred (and formally legally correct) term of the Treaties (including Article 21 TFEU, dealing with free movement and residence ‘within the territory of the Member States’)<sup>122</sup> but the territory of the Union. The language and logic of territory also surface in *Tjebbes*.<sup>123</sup>

What we are witnessing is the creation of a right to the territory of the Union attached to Union citizenship. This is not insignificant.<sup>124</sup> It is certainly true that at the level of practice, the rights added by Article 20 TFEU jurisprudence are limited and add little to the *acquis* of Union citizenship rights.<sup>125</sup> Neuvonen has correctly pointed out the essentially negative nature of the Article 20 TFEU rights; amounting to a prohibition on actions that lead to a forced removal of a Union citizen from the territory of the Union<sup>126</sup> and it is unclear what other practical rights might flow from Article 20 TFEU, such as right to access welfare. However, we should not ignore the conceptual importance for the development of citizenship in the Union and its future potential.<sup>127</sup> A right to the territory of the political community remains at the heart of the concept of citizenship as a status of membership in that community. So long as political communities are (largely) represented by territorially defined states and that rights and other social goods are produced in the context of those states, access to the fruits of membership of those communities is premised on access to the territory of those states. The right to territory is, in a sense, a ‘gateway right’, which brings with it the possibility of the enjoyment of other rights and collective goods associated with membership—or in the classic formula of Hannah Arendt ‘the right to have rights’.<sup>128</sup>

In a more abstract but not unimportant sense, territory is a key reference point for the cohesion of the collective and in fact is the space across which relations and the values that underpin that community form.<sup>129</sup> ‘The notion of space is not merely a geographical term. It relates not so much, and not primarily, to a piece of land as to the space between individuals in a group whose members are bound to, and at the same time separated and protected from each other by all kinds of relationships based on a common language, religion, a common history, customs and laws’.<sup>130</sup> This is not a neutral move, merely adding to a set of citizenship rights a classic right of citizenship; by referring to this territory and linking it to Union citizenship

<sup>122</sup> Art 21 TFEU.

<sup>123</sup> *Tjebbes v Minister van Buitenlandse Zaken*, note 99 above.

<sup>124</sup> As perhaps implied in Kochenov, note 26 above, p 513.

<sup>125</sup> With the important exception of limited family reunification rights for non-mobile Union citizens.

<sup>126</sup> Neuvonen, note 101 above, pp 1213–14.

<sup>127</sup> For the constructive and dynamic nature of Union citizenship, see D Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’ (2005) 68(2) *Modern Law Review* 233.

<sup>128</sup> H Arendt, *The Origins of Totalitarianism* (Schocken Books, 2004), p 293. See also M Moore, *A Political Theory of Territory* (Oxford University Press, 2015), pp 38 ff.

<sup>129</sup> See also Níc Shuibhne, note 117 above.

<sup>130</sup> M Everson, ‘A Very Cosmopolitan Citizenship: But Who Pays the Price?’ in M Dougan, N Níc Shuibhne, and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing, 2012), p 149, quoting Lindahl, note 121 above, in turn quoting Hannah Arendt.



the Court is positing nothing less than the existence of a political community of citizens at a supranational level.<sup>131</sup>

However, we cannot ignore the fact that this supranational right to territory is composed of, and constructed from, the transnational rights of free movement and residence, which should be understood in a broader sense, as the rights to access the territories and political communities of the *Member States*. The supranational territory is posited as a unity—the territory of the Union—but is developed out of rights to the parts. Taking these two points together we see a right to the territory of the Union, but one that emerges from the transnational rights of free movement and residence, which themselves represent access to the territories of the Member States and all the social goods and opportunities associated with them. It ‘both entrenches *and* re-forms the purpose of free movement in the foundational narrative of territory in EU citizenship law’.<sup>132</sup> A right to access the political community of the Union is, in effect, a right to access the various political communities of the Member States, but now understood in their abstract totality. While a supranational reference point is created and a supranational community alluded to, it is built upon national communities.

It is, therefore, a supranational citizenship of the Union that guarantees a certain relationship with the Member States of the Union taken in their totality. But note the form this relationship takes, especially in light of recent developments analysed in the previous section. It is a relationship of membership—or more accurately the opportunity to develop a status of membership—with (other) Member States. It is a latent right, triggered and developed by the Union citizen engaging in activities which further his or her relationships with other Member States.

And so, while mimicking the classic citizenship right to the territory of the political community, which for some is constitutive of the status of citizenship,<sup>133</sup> it in fact differs from this traditional right in important ways. Firstly, the territory it offers is *fragmented* amongst the different territories of the Member States and the ability of an individual to access these territories will vary depending on the nature of his or her relationship with these Member States, the cultivation of which he or she is at least partially responsible. Those deemed not to have demonstrated appropriate behaviour and actions are thereby denied right to (certain) parts of the territory of the Union and are excluded from those national communities. As pointed out by

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<sup>131</sup> Echoes of this can sentiment be found in the Opinion of AG Poiares Maduro in *Rottmann v Bayern*, EU:C:2009:588, para 23. There is also an important normative implication in the representation of the territory of the Union whereby certain values are attributed to the Union, informing the protection of Union citizens. See L Azoulay, ‘Transfiguring European Citizenship: From Member State Territory to Union Territory’ in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017), and Níc Shuibhne, note 117 above, on this point. In this sense the concept of the territory of the Union as a protective reference is closely connected to developments in the Area of Freedom, Security and Justice. See generally Coutts, note 2 above.

<sup>132</sup> Níc Shuibhne, note 117 above.

<sup>133</sup> See B Anderson, M J Gibney, and E Paoletti, ‘Boundaries of Belonging: Deportation and the Constitution and Contestation of Citizenship’ (2011) 15(5) *Citizenship Studies* 543.

Azoulai, troublesome citizens are not offered the territory of the Union as a whole but are restricted to the national territories.<sup>134</sup>

Secondly, this is not an *unconditional* right to the territory of the Union. Certainly, in *Chavez-Vilchez*, the economic conditions contained in the Citizenship Directive are set aside; these are market citizens no more, but simply citizens whose continuing presence on the territory of the Union cannot be made subject to economic conditions or productive capacity but appears based more on empathy.<sup>135</sup> At the same time, the rights at stake are bare rights of residence or presence. It is unclear if other rights, for example social assistance, which are important for a meaningful and full membership in the community can be derived from Article 20 TFEU. In *Rendón Marín* and *CS*, the supranational right to the territory of the Union is more explicitly conditioned by responsibilities owed by the Union citizen to the host Member State. In these cases, the Court imports the limitations based on public policy and public security contained in transnational Union citizenship (and, it must be said, the protections offered by that status in such situations) into the operation of Article 20 TFEU.<sup>136</sup> National interests and values are used to limit on what should be supranational rights properly speaking.<sup>137</sup>

## V. CONCLUSION

Union citizenship is an ever-evolving status and recent years have been no exception. We have witnessed Union citizenship evolve in various directions across both its transnational and supranational dimensions. Firstly, we have witnessed the reworking of the social integration paradigm in the context of transnational citizenship. This has been presented here not as an unambiguously restrictive trend—although it has had significant restrictive effects—but rather as a refashioning of the concept of social integration to emphasise the role of the individual and the responsibility he has for his integration in the society of the host Member State. Recent case law has underlined the requirement that the mobile Union citizen makes the appropriate effort or contribution in the area of access to social benefits and/or adopts the appropriate norm-respecting behaviour in the context of criminal behaviour and protection from expulsion. A second trend has been the subordination of what was termed the ‘autonomy’ dimension of Union citizenship to the social integration dimension. This has occurred through the use of the ‘genuine residence’ requirement as a precondition for passporting rights in one Member State throughout the Union, evident in *Coman*. Only now, the social integration dimension has been reworked to emphasise the responsibility of the individual. This subordination of autonomy and concentration on the quality of the individual-community relationship has resulted in a renewed emphasis on the

<sup>134</sup> Azoulai, note 131 above.

<sup>135</sup> In a similar and critical vein, see Everson, note 12 above.

<sup>136</sup> *Rendón Marín v Administración del Estado*, note 95 above, paras 81 ff; *Secretary of State for the Home Department v CS*, note 57 above, paras 36 ff.

<sup>137</sup> For a similar dynamic in the context of voting rights to the European Parliament see S Coutts, ‘*Delvigne*: A Multi-Levelled Political Citizenship’ (2017) 42(6) *European Law Review* 867.

progressive development of relations between individual Union citizens and the communities of other Member States, the conditions under which these relationships and the responsibility of the individual in these situations develop.

That right to develop relations amongst the multiple Member States is also at the heart of the parallel developments under Article 20 TFEU and the supranational rights first mooted in *Rottman* and *Zambrano*, since developed in *Rendón-Marín*, *Chavez-Vilchez*, and *Tjebbes*. This overarching and encompassing right contained in Article 20 TFEU is phrased in terms of the territory of the Union, a right which has been increasingly asserted and applied with practical legal impact in *Rendón-Marín* and *Chavez-Vilchez*. The concept of ‘territory of the Union’ can serve an important metaphorical purpose in representing a common community of values. However, we should not misunderstand the nature of this right to the territory of the Union. It is not an autonomous right to something distinct but rather is developed from, and ultimately protects the ability to form relations with other Member States and to take the Member States as a whole, and the communities they represent as the context within which to develop one’s life. That this is the import of Article 20 TFEU and the status of Union citizenship is clear from *Tjebbes*. The right to the territory of the Union provides an overarching framework for those rights, a better understanding of their broader significance and does locate them within a common European reference point but, ultimately, it is developed out of transnational rights and the national communities to which they relate.

Taken in this light, it is unsurprising that the concept of responsibility—which now operates as a key principle in the development of the relationship between Union citizens and other Member States—resurfaces in the context of Article 20 TFEU. At first, it may appear paradoxical that supranational rights are restricted for reasons to do with the individual’s relationship with the national community, as for example occurs in *Rottmann* and *CS*.<sup>138</sup> However, when considered in light of the underlying nature of Article 20 TFEU as a provision which protects the right to live one’s life amongst the various communities of the Member States and where that right is increasingly framed by the responsibility owed those communities, it appears less paradoxical and more a logical consequence of the nature of that status and the relationships it promotes.

There is a broader, political significance in this for the future of European integration. Union citizenship is a status intended to fulfil the promise of an ‘ever closer Union’ at the level of the individual and to facilitate the development of a community of citizens at a European or supranational level. The reference to the ‘territory of the Union’ in Article 20 TFEU cases might suggest that Union citizenship is on the cusp of a federal turn, with the development of an autonomous collective body of citizens at a supranational level, independent from the national communities. That may be the case and, in certain exceptional areas, we may have already witnessed this.<sup>139</sup> However, the developments analysed here suggest a different trajectory and a

<sup>138</sup> And also in the slightly different context of *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde*, C-650/13, EU:C:2015:648.

<sup>139</sup> As discussed in Coutts, note 137 above.

continued emphasis on the transnational relationship between the individual Union citizen and (other) national communities. While there is an increasingly pronounced supranational dimension in the Union citizenship, this is not disassociated from the transnational dimension. Recent developments in Union citizenship taken together point to a European community based on the territory of the Union certainly, but one that emerges from relationships based on mutual responsibility between individuals and the communities of the Member States, creating a space of transnational exchanges and opportunities.