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Charting a route from parallel to integrated narratives

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## The 'Territory of the Union' in EU Citizenship Law: Charting a Route from Parallel to Integrated Narratives

Niamh Nic Shuibhne\*

### Abstract

This paper examines the growing significance of the 'territory of the Union' in EU citizenship law and asks what it reveals about Union citizenship in the wider system of the EU legal order. In doing so, it builds on scholarship constructing the idea of 'personhood' in EU law by adding a complementary dimension of 'place-hood'. The analysis is premised on territory as a place within – but also beyond – which particular legal qualities are both produced by and reflect shared objectives or values. In that respect, the paper offers a comprehensive 'map' of Union territory as a legal construct, with the aim of uncovering what *kind* of legal place the territory of the Union constitutes as well as the extent to which it is dis-connectable from the territories of the Member States. It also considers how Union territory relates to what lies 'outside'. It will be shown that different 'narratives' of Union territory have materialised in the case law of the Court of Justice. However, it is argued that these segregated lines of reasoning should be integrated, both to reflect and to progress a composite understanding of Union territory as a place in which concerns for Union citizens, for Member States and for the system underpinning the EU legal order are more consistently acknowledged and more openly weighed.

### I. Introduction

This paper examines the growing significance of the 'territory of the Union' in EU citizenship law and asks what it reveals about Union citizenship in the wider system of the EU legal order. In doing so, it builds on scholarship constructing the idea of 'personhood' in EU law<sup>1</sup> by adding a complementary dimension of 'place-hood'. The analysis is premised on territory in the sense of what Lindahl describes as 'the closure of space into a *legal place*, into a bounded region'.<sup>2</sup> Additionally, 'the concreteness of territoriality involves a claim to commonality; a territory is held to be the place of a collective, a

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<sup>1</sup> E.g. L Azoulay, S Barbou des Places and E Pataut (eds.), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing, 2016); C O'Brien, 'I Trade, Therefore I am: Legal Personhood in the European Union' (2013) 50 CML Rev 1643.

<sup>2</sup> H Lindahl, 'Finding a Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity' (2004) 29 EL Rev 461, 461 (emphasis added); he notes that '[w]hereas "place", harking back to the Greek notion of *topos*, can be provisionally defined as a bounded region, "space", especially in its modern connotations, stands for a boundless extension' (462).

*common place*'.<sup>3</sup> These elements of legal place and common place are used here to anchor, explore and impart a deeper understanding of territory in EU citizenship law. In that respect, the paper offers a comprehensive 'map' of Union territory as a legal construct, with the aim of uncovering what *kind* of legal place the territory of the Union constitutes as well as the extent to which it is dis-connectable from the territories of the Member States.<sup>4</sup> It also considers how Union territory relates to what lies 'outside'. However, it will be shown that different 'narratives' of Union territory have materialised in the case law of the Court of Justice. In this sense, common values that shape Union territory as a legal place are used in different ways or to different degrees. Ultimately, it is argued that these segregated lines of reasoning should be integrated, both to reflect and to progress a composite understanding of Union territory as a place in which concerns for Union citizens, for Member States and for the system underpinning the EU legal order are more consistently acknowledged and more openly weighed.

The territory of the Union became meaningful as a legal place that both draws from and, in turn, transmits and reinforces common values within the process of constructing the EU legal order. In that respect, three different acts can be identified around the judicial contribution in particular: first, and most basically, simply stating what the features of the EU legal order actually are; second, clarifying why and/or how those decisions were reached; and, third, dealing with the implications or repercussions of the decisions that were taken. These three acts can be described as instances of *articulation, explanation and confrontation*. Sometimes, they happen in sequence i.e. across different cases over time, but they can also manifest within the same case. In systemic terms, for example, the judgments in *Van Gend en Loos* and *Costa v ENEL* both articulated the principles of the direct effect and primacy of EU law and explained them through the language of the 'new legal order...for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'.<sup>5</sup> While the Court did say in *Costa v ENEL* that the EEC Treaty 'created *its own* legal system',<sup>6</sup> the autonomy of the EU legal order and the consequences of its characterisation as such were explained and confronted in more detail as the case law evolved.<sup>7</sup> Judgments that established a system of State liability for breaches of EU law or

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<sup>3</sup> Ibid 468 (emphasis in original); drawing from H Arendt, *The Human Condition* (Chicago University Press, 1958) 52.

<sup>4</sup> Though emphasising that the Court of Justice is not, through EU citizenship law, 'making a claim to territorial self-determination on behalf of the Union in a thick meaning of the concept under international law' (S Coutts, 'The Shifting Geometry of Union Citizenship: Between Transnational and Supranational', forthcoming).

<sup>5</sup> Case 26/62 *Van Gend en Loos*, EU:C:1963:1.

<sup>6</sup> Case 6/64 *Costa v ENEL*, EU:C:1964:66 (emphasis added); see similarly, the reference to the 'law stemming from the Treaty' as 'an independent source of law' having a 'special and original nature'.

<sup>7</sup> See esp. Opinion 2/13 (*Accession to the ECHR*), EU:C:2014:2454 and Opinion 1/17 (*CETA*), EU:C:2019:341. See generally, N Nic Shuibhne, 'What is the Autonomy of EU Law, and Why Does That Matter?' (2019) 88 *Nordic Journal of International Law* 9.

confirmed its horizontal reach in certain circumstances provide further examples of confronting the implications of primacy and direct effect.

The same dynamics can be seen in EU citizenship law. Most famously, the requirement to treat EU citizens equally with host State nationals was first articulated in *Martínez Sala*;<sup>8</sup> it was then explained through the idea that Union citizenship is the ‘fundamental status’ of Member State nationals in *Grzelczyk*;<sup>9</sup> and its reach has been confronted in several threads of case law ever since. In his Opinion for *Morgan and Bucher*, Advocate General Ruiz-Jarabo Colomer suggested that ‘the constant evolution of the ideas which inspired the creation of the [Union] has slowed down’.<sup>10</sup> In that light, whether in EU law generally or EU citizenship law specifically, it is normally through the need for confrontation that the more difficult contests are now waged. Explanations for the choices made necessarily deepen as a result but they also become more complex. The objective of ensuring coherence intensifies in importance; but the risk of producing conflicting lines of reasoning grows too.

Especially since its articulation in *Ruiz Zambrano*,<sup>11</sup> the concept of the ‘territory of the Union’ has a distinctive legal significance in EU citizenship law. But how is ‘territory’ defined or understood in that context? What is its legal meaning, and what are the implications of attributing legal meaning to territory in the first place? In this paper, following a brief overview of the roots of territory as a concept of EU law in a general sense (Section II), three explanatory narratives of the territory of the Union are drawn from citizenship case law. The first narrative (Section III) takes the judgment in *Ruiz Zambrano* as its starting point and examines how the Court shaped a ‘right to stay within the territory of the European Union’ in the case law that followed.<sup>12</sup> In particular, the Court later explained that the right to stay has an ‘an intrinsic connection with the freedom of movement of a Union citizen’.<sup>13</sup> In other words, the right to stay just now in this particular legal place was rationalised on the basis of facilitating and protecting the Union citizen’s exercise of free movement and residence rights for the future. This case law constitutes the point of construction of the territory of the Union as a legally meaningful concept. On that understanding, the first narrative is presented as the *foundational narrative* of territory in EU citizenship law.

However, while an ‘intrinsic connection’ with freedom of movement was undoubtedly a necessary point of explanation for the purposes of first defence, it proves also to be insufficient – or at least, incomplete. In subsequent judgments that build directly on *Ruiz Zambrano*, a more

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<sup>8</sup> Case C-85/96 *Martínez Sala*, EU:C:1998:217, paras 62-63.

<sup>9</sup> Case C-184/99 *Grzelczyk*, EU:C:2001:458, para. 31.

<sup>10</sup> AG Ruiz-Jarabo Colomer in Joined Cases C-11/06 and C-12/06 *Morgan and Bucher*, EU:C:2007:174, para. 2 of the Opinion.

<sup>11</sup> Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124.

<sup>12</sup> Case C-133/15 *Chavez-Vilchez*, EU:C:2017:354, para. 42; see also, para. 44.

<sup>13</sup> Case C-40/11 *lida*, EU:C:2012:691, para. 72; confirmed in e.g. Case C-87/12 *Ymeraga and Others*, EU:C:2013:291, para. 37 and Case C-165/14 *Rendón Marín*, EU:C:2016:675, para. 75.

complicated picture of what Union territory as a legal place can offer has unfolded.<sup>14</sup> But even more importantly for present purposes, *different* stories emanate from case law where Union citizenship intersects with the Area of Freedom, Security and Justice (AFSJ).<sup>15</sup> In the second narrative mapped in this paper (Section IV.A), the key judgments – *Petruhhin*<sup>16</sup> and *Raugevicius*<sup>17</sup> – concern extradition requests by third States i.e. requests seeking the extradition of Union citizens outside Union territory. In response, the Court innovates in order to keep the business of the Union citizen within the territory of the Union. The AFSJ is the relevant territorial zone in this narrative, but the explanation for the legal solutions developed is framed around protection of the citizens affected, which in turn protects the status of Union citizenship more abstractly i.e. producing a *protective narrative*. The objective of preserving freedom of movement does coincide with the outcomes proposed by the Court but is not foregrounded on its own terms. The role of other EU values, and especially the Charter of Fundamental Rights, becomes much more evident in the protective narrative. Crucially, however, the Court’s methods for keeping Union citizens ‘inside’ depend in the end on how the Member States trust and therefore cooperate with each other within the framework of the AFSJ.

The conditions that yield the protective narrative therefore entrench the idea of Union territory as a legal place underpinned by common values; and as a place where the EU legal order is engaged to protect Union citizens. In other situations, however, animating wider EU objectives and values seems, for its own sake, to take precedence over the interests of the citizen. In this third, *systemic narrative* (Section IV.B), the protective dynamic transfers from concern for the citizen to concern for sustaining the EU legal order – even where this might result in the interests of the citizen being subdued or sacrificed. In such cases, concern can manifest for how the system operates within the territory of the Union (as in *Pisciotti*<sup>18</sup>) but it can also extend outwards, towards the external territories up against which the Union inevitably bumps (thinking of the pathway tentatively laid in *RO* for post-Brexit relations between the EU and the UK<sup>19</sup>). In *RO*, any overt connection to Union

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<sup>14</sup> See e.g. Case C-221/17 *Tjebbes*, EU:C:2019:189, para. 46: ‘following the loss, by operation of law, of Netherlands nationality and of citizenship of the Union the person concerned would be exposed to limitations when exercising his or her right to move and reside freely within the territory of the Member States, including, depending on the circumstances, particular difficulties in continuing to travel to the Netherlands or to another Member State in order to retain genuine and regular links with members of his or her family, to pursue his or her professional activity or to undertake the necessary steps to pursue that activity. Also relevant [is] ... the serious risk, to which the person concerned would be exposed, that his or her safety or freedom to come and go would substantially deteriorate because of the impossibility for that person to enjoy consular protection under Article 20(2)(c) TFEU in the territory of the third country in which that person resides’.

<sup>15</sup> For Lindahl, ‘place is essential to the very possibility and concrete actualisation of freedom, security and justice’ (n2 above, 462).

<sup>16</sup> Case C-182/15 *Petruhhin*, EU:C:2016:630.

<sup>17</sup> Case C-247/17 *Raugevicius*, EU:C:2018:898.

<sup>18</sup> Case C-191/16 *Pisciotti*, EU:C:2018:222.

<sup>19</sup> Case C-327/18 PPU *RO*, EU:C:2018:733.

citizenship is quietly dropped. It will be also seen that confronting systemic tensions can disrupt the internal logic of the case law and alter, as a result, how the territory of the Union is constructed. The Court's understanding of territory edges here into what Scott describes as the 'contested transition zone between the territorial and the extraterritorial'.<sup>20</sup> In that context, to some extent in the protective narrative but especially in the systemic narrative, the relationship between 'territory' and 'legal place' has become much more complex than what geographical borders alone could suggest.

It is important to acknowledge that there is significant overlap and evolution across the foundational, protective and systemic narratives of Union territory. The objective of protecting free movement rights provides the best example in both respects. In the foundational narrative, protecting freedom of movement, something that can only be exercised within Union borders, was arguably always more than a functional or instrumental goal: it represents respect for a value common to the Member States and therefore something that should infuse their decision-making at national level.<sup>21</sup> In the protective narrative, there is heightened reliance on – a wider range of – common values as well as deployment of the cooperative mechanisms of EU law that underpin them. That shift or evolution in perspective responds to a sharper inside/outside dichotomy from the perspective of consolidating Union territory and, in consequence, a deeper engagement with the protective prospects of Union territory as a particular kind of legal place. And *what* makes the Union the kind of legal place that it is comes back, in essence, to the system of the EU legal order.

Nevertheless, the foundational, protective and systemic narratives are shown ultimately to institute *parallel* narratives. In particular, this is because their application is more selectively outcome-oriented than chronological or sequential. In that light, the task here is to unearth the main driver – the dominant narrative – in each case, while acknowledging and allowing for overlap and evolution. Through the analytical lens of Union territory, difficult questions about the place of Union citizens (and Union citizenship) within the EU legal order therefore materialise. We often recall the idea from *Van Gend en Loos* that EU law 'not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage'.<sup>22</sup> But for present purposes, from the perspective of analysis framed around narratives, another statement from the same judgment can be emphasised: that 'the nationals of the states brought together in the [Union] are called upon to cooperate in the functioning of this [Union]' (emphasis added). This paper argues ultimately for a shift from parallel to integrated narratives, which entails confronting more openly and more consistently

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<sup>20</sup> J Scott 'The New EU "Extraterritoriality"' (2014) 51 CML Rev 1343, 1379.

<sup>21</sup> See esp. L Azoulay 'Transfiguring European Citizenship: From Member State Territory to Union Territory' in D Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP, 2017) 178; this point is examined in more detail in Section III below.

<sup>22</sup> Case 26/62 *Van Gend en Loos*, EU:C:1963:1.

the citizen-specific, State-specific and system-specific interests at stake in any given case. Though not (ostensibly) a judgment in the area of Union citizenship, the ruling in *Wightman* is used as a template for reasoning that exemplifies integrated narratives.<sup>23</sup> In this way, it is argued, the maturity of the EU legal order is both better reflected and more deeply consolidated. In particular, we are challenged to conceive of Union citizens, the Member States and the EU legal order itself as symbiotic essentials of the same ‘unique ecosystem’<sup>24</sup> rather than as opposing elements more usually pitched competitively against each other in this distinctive legal place.

## II. The concept of territory in EU (citizenship) law

The territory of the European Union consists, most basically, of the territories of its 28 Member States and Article 52(1) TEU provides that the Treaties ‘shall apply’ to all of these States, which it simply lists.<sup>25</sup> Article 52(2) indicates that the ‘territorial scope of the Treaties is specified in Article 355 [TFEU]’, which concerns the extent to which the Treaties do (and do not) apply to the overseas countries and territories of the Member States. Taking these provisions together, ‘EU territory corresponds to the geographical space referred to in Article 52 TEU and Article 355 TFEU which define the territorial scope of the Treaties’.<sup>26</sup> In the physical understanding of territory, the EU does not have control over determining its territory in the way that states do. However, through the critical gateway of membership, the Union does exercise control within processes that both extend (accession/Article 49 TEU) and contract (withdrawal/Article 50 TEU) it.

Importantly, though, the Union’s ‘physical’ and ‘legal’ territories do not always overlap. For example, while Article 26(2) TFEU establishes that ‘[t]he internal market shall comprise an area *without internal frontiers in which* the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’, Article 63(2) TFEU provides that ‘all restrictions on payments between Member States *and between Member States and third countries* shall be prohibited’. Similarly, and especially for the purposes of the analysis in this paper, Article 3(2) TEU establishes that ‘[t]he Union shall offer its citizens an area of freedom, security and justice without

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<sup>23</sup> Case C-621/18 *Wightman*, EU:C:2018:999.

<sup>24</sup> European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, Internal eu27 preparatory discussions on the framework for the future relationship: “Regulatory Issues”, 21 February 2018, <[ec.europa.eu/commission/sites/beta-political/files/slides\\_regulatory\\_issues.pdf](http://ec.europa.eu/commission/sites/beta-political/files/slides_regulatory_issues.pdf)>.

<sup>25</sup> In *Boukhalfa*, AG Léger noted that ‘Articles 198, paragraph 1, of the Euratom Treaty and Article 79 of the ECSC Treaty expressly limit the application of each of these treaties strictly to the “territory” of the Member States. In my opinion, the absence of any reference to this term in Article [52(1) TFEU] should not be regarded as a mere oversight on the part of the draftsmen, who after all took care to refer to it in the other treaties’ (AG Léger in Case C-214/94 *Boukhalfa*, EU:C:1995:381, para. 30 of the Opinion).

<sup>26</sup> Case C-17/16 *El Dakkak and Intercontinental*, EU:C:2017:341, para. 22.

internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'. The AFSJ is a proxy for Union territory at one level: in particular, its remit with respect to both internal and external borders<sup>27</sup> does suggest a more 'composite' understanding of Union territory i.e. something beyond 28 individual Member State territorial units.<sup>28</sup> However, the regulatory reach of the AFSJ can extend beyond the physical territory of the Union in some respects, on the one hand, yet, conversely, apply within fewer than the 28 Member States, on the other. The complex geography of the Schengen Area provides a good example of both of these points: Iceland, Liechtenstein, Norway and Switzerland are associate members; Ireland and the United Kingdom have opt-outs; and Bulgaria, Croatia, Cyprus and Romania have not yet joined.<sup>29</sup> It is also worth noting that the Member States retain a key role in shaping the AFSJ in the sense that 'strategic guidelines for legislative and operational planning' are defined by the European Council (Article 68 TFEU).<sup>30</sup>

These structural examples already show that the territory of the Union is a complicated 'legal place' that cannot be reduced to geography in isolation. Following a brief account of the role of territory in EU law (Section II.A), its role in EU citizenship law specifically is then introduced (Section II.B). That discussion bridges in turn to the movement-centric 'foundational narrative' instituted by *Ruiz Zambrano* (Section III).

### A. Territory and the reach of EU law

Approaching territory from a more consciously legal perspective, the central question concerns the 'reach' of EU law and it tends to be expressed and examined in the broader language of territoriality

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<sup>27</sup> See especially, Article 67(2) TFEU, which establishes that the Union 'shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals'. More thematic objectives – including respect for fundamental rights (Article 67(1)) and 'ensur[ing] a high level of security through measures to prevent and combat crime, racism and xenophobia' (Article 67(3)) – cut across the internal and external strands of the AFSJ.

<sup>28</sup> Economic and social cohesion policy provides another example; see e.g. AG Sharpston in Case C-436/15 *Alytaus regiono atliekų tvarkymo centras*, EU:C:2017:33, fn3 of the Opinion: '[i]n essence EU policy on economic and social cohesion aims in particular to reduce disparities between the levels of development across the territory of the European Union and to address "the backwardness of the least favoured regions"'. See, in that regard, Article 174 TFEU'.

<sup>29</sup> See further, Protocol No 19 on the integration of the Schengen Acquis. With respect to the AFSJ more generally, see Protocol No 21 on the position of the UK and Ireland and Protocol No 22 on the position of Denmark.

<sup>30</sup> Note also the lower threshold for review of draft legislative acts based on Article 76 TFEU with respect to subsidiarity opinions submitted by national parliaments (a quarter rather than a third); see Article 7(2) of Protocol No 2 on the application of the principles of subsidiarity and proportionality.



and extraterritoriality.<sup>31</sup> Territoriality relates to *which* law applies and *who* has the authority to make<sup>32</sup> as well as to enforce it. For example, to protect intellectual property rights, ‘the principle of territoriality, in trade mark law, entails that it is the law of the State – or of the union of States – where protection of a trade mark is sought which determines the conditions of that protection ... [T]he principle of territoriality also entails that the court of a State or of a union of States has jurisdiction (in whole or in part) in respect of acts of infringement committed or threatened within the territory of that State or that union of States, to the exclusion of third States’.<sup>33</sup> Determining the reach of EU law relates (1) to defining its scope of application,<sup>34</sup> for the purposes of which demarcation of the ‘customs territory’ of the Union offers a good example;<sup>35</sup> (2) to determining the effects of EU measures in third countries, which has generated an extensive line of case law on the legitimacy of EU measures effecting the freezing of funds, for example,<sup>36</sup> and (3) to establishing the territorial jurisdiction of EU actors, such as that of the Commission to enforce EU competition rules.<sup>37</sup>

Three points have particular resonance for the consideration of Union territory as legal place and as common place explored in this paper. First, where EU legislation has been adopted, the Court emphasises the need for uniform interpretation of ‘autonomous concepts’ of EU law so that a uniform

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<sup>31</sup> Though more basic impressions of ‘territory’ can also be found in EU law: for example, Article 50 of the Charter of Fundamental Rights, which provides that ‘[n]o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted *within the Union* in accordance with the law’. See e.g. Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon*, EU:T:2004:118, para. 137; and AG Saugmandsgaard Øe in Case C-234/17 *XC and Others*, EU:C:2018:391, para. 38 of the Opinion.

<sup>32</sup> In Opinion 2/15, for example, AG Sharpston characterised the TFEU provisions that determine the division of competences as addressing: ‘who is competent to act within the territory of the European Union: the European Union or the Member States?’ (EU:C:2016:992, para. 57 of the Opinion).

<sup>33</sup> Case T-61/16 *Coca-Cola v EUIPO - Mitico (Master)*, EU:T:2017:877, para. 81.

<sup>34</sup> For example, to delimit the scope of application of directly applicable EU regulations (e.g. recital (s) of Council Regulation 267/2012 concerning restrictive measures against Iran (2012 OJ L88/1) defines Union territory as ‘the territories of the Member States to which the Treaty is applicable, under the conditions laid down in the Treaty, including their airspace’, while Article 49 determines that the Regulation applies ‘(a) within the territory of the Union, including its airspace; (b) on board any aircraft or any vessel under the jurisdiction of a Member State; (c) to any person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union’).

<sup>35</sup> See e.g. Case C-409/14 *Schenker*, EU:C:2016:643 (entry into the customs territory of the Union); Case C-267/16 *Buhagiar*, EU:C:2018:26 (exclusion of Gibraltar from the customs territory of the Union); and Case C-643/17 *Suez II*, EU:C:2019:179 (determination of ‘Union status’ for goods under the Customs Code).

<sup>36</sup> See e.g. Case T-362/04 *Minin*, EU:T: 2007:25, esp. paras 106-108 (financial sanctions based on conduct that produces effects exclusively outside the Union). See further, Case T-256/07 *People’s Mojahedin Organization of Iran v Council*, EU:T:2008:461, para. 148; Case T-383/11 *Makhlouf*, EU:T:2013:431, paras 99-100; and Joined Cases T-156/13 and T-373/14 *Petro Suisse Intertrade*, EU:T:2015:646, para. 128.

<sup>37</sup> See e.g. Case T-91/11 *InnoLux Corp*, EU:T:2014:92, paras 56-75; Case C-413/14 P *Intel v Commission*, EU:C:2017:632, esp. paras 40-50.

level of protection is ensured throughout the territory of the Union.<sup>38</sup> Second, for activity undertaken *outside* the territory of the Union, EU law can still be relevant where a ‘sufficiently close’ connection or link to the Union can be established. For the free movement of persons, *Boukhalfa* is the archetypal example, demonstrating that EU law does not have ‘a purely geographical scope’.<sup>39</sup> Confirming the approach taken in previous case law,<sup>40</sup> the Court ruled that ‘provisions of [Union] law may apply to professional activities pursued outside [Union] territory as long as the employment relationship retains a sufficiently close link with the [Union]’.<sup>41</sup> At a more general level, the Court considered that while what is now Article 52(1) does define ‘the geographical application of the Treaty’, it does not ‘preclude [Union] rules *from having effects* outside the territory of the [Union]’.<sup>42</sup> As a result, ‘the geographical dimension of the [Union] legal system is *more than* the sum of the territories of the Member States, which it undoubtedly includes’.<sup>43</sup>

Third, the relevance of EU law for actions that have effects outside the territory of the Union – for situations where there are ‘elements of extra-territoriality’<sup>44</sup> – is deeply connected to the objectives and values that the Union pursues. For example, in *Air Transport Association of America*, having first stated that ‘the European Union legislature may in principle choose to permit a commercial activity, in this instance air transport, to be carried out in the territory of the European Union *only on condition* that operators comply with the criteria that have been established by the European Union and are designed to fulfil the environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the European Union is a signatory’, the Court then stated that ‘the fact that, in the context of applying European Union environmental legislation, certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question, in the light of the principles of customary international law capable of being relied upon in the main proceedings, the full applicability of European Union law in that

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<sup>38</sup> See e.g. Case C-34/10 *Brüstle*, EU:C:2011:669, para. 26 (definition of human embryo); Case C-226/15 P *Apple and Pear Australia and Star Fruits Diffusion v EUIPO*, EU:C:2016:582, para. 49 (uniform protection of EU trademarks); Case C-149/15 *Wathelet*, EU:C:2016:840, para. 29 (definition of seller for consumer goods).

<sup>39</sup> AG Léger in Case C-214/94 *Boukhalfa*, EU:C:1995:381, para. 27 of the Opinion.

<sup>40</sup> E.g. Case C-60/93 *Aldewereld*, EU:C:1994:271, para. 14.

<sup>41</sup> Case C-214/94 *Boukhalfa*, EU:C:1996:174, para. 15; satisfied in this case through the existence of ‘a sufficiently close link between the employment relationship, on the one hand, and the law of a Member State and thus the relevant rules of [Union] law, on the other’ (ibid) and not called into question by the fact that the plaintiff resided and performed her contract of employment in a third country (paras 20-21). Confirmed in e.g. Case C-544/11 *Petersen*, EU:C:2013:124, para. 41.

<sup>42</sup> Case C-214/94 *Boukhalfa*, EU:C:1996:174, para. 14 (emphasis added).

<sup>43</sup> AG Léger in Case C-214/94 *Boukhalfa*, EU:C:1995:381, para. 32 of the Opinion (emphasis added). The EEA is strong example of Union rules ‘having effects outside the territory of the Union’, its institutional as well as substantive dimensions being shaped by the requirements of EU law.

<sup>44</sup> AG Ruiz-Jarabo Colomer in Joined Cases C-187/01 and C-385/01 *Gözütok and Brügger*, EU:C:2002:516, para. 55 of the Opinion.

territory'.<sup>45</sup> Similarly, in *El Dakkak and Intercontinental*, the Court recalled a range of underpinning objectives and values to detach presence in the Union territory from the act of crossing an external border in order to rationalise a broad reading of Regulation 1889/2005. On that basis, it held that obligations flowing from EU law reached into the international transit areas of airports located in the territory of the Union.<sup>46</sup> Importantly, the responsibility of the Member States as the enforcers of EU legal obligations on their own territories was also highlighted, returned to in Section IV.A below.<sup>47</sup>

Finally, in the context of the territory of the Union as a *common* place, how do the objectives and values of the Union relate to the objectives and values of its Member States? Where, in other words, is the commonality in this respect? In *Arcelor*, Advocate General Poiares Maduro rooted the values of the Union in 'the constitutional principles common to the Member States, as reiterated in [Article 6(3) TEU]', a link that generates 'analogous European constitutional values'.<sup>48</sup> Similarly, for Advocate General Ruiz-Jarabo Colomer, '[t]he construction of a Europe without borders, with its corollary of the approximation of the various national legal systems, including the criminal systems, presupposes that the States involved will be guided by the same values'.<sup>49</sup> However, engaging with the territory of the Union in its more autonomous and composite senses must also suggest that there are distinctly 'Union' values too, which can then be linked more autonomously to Union citizenship – or at least values with a distinctly Union meaning or content. Thinking again about the AFSJ, for example, consider the emphases used by Advocate General Kokott in her statement that '[i]t is the *Union* that provides *its citizens* with such an area and it is the *Union* that *constitutes* that area (Article 67(1) TFEU), with the emphasis on an area *without internal frontiers* (Article 3(2) TEU and 67(2) TFEU)'.<sup>50</sup> At the same time, she acknowledged that '[t]here may certainly be cases where cooperation with a third State is also capable of helping to achieve the objectives of the area of freedom, security and justice within the Union (see the second variant of Article 216(1) TFEU) and thus of giving that area a genuine "external dimension"'.<sup>51</sup>

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<sup>45</sup> Case C-366/10 *Air Transport Association of America*, EU:C:2011:864, para. 128 (emphasis added). For extensive analysis of the 'global reach' of EU legislation, see Scott, n20 above. Conversely, on external norms coming 'into' EU measures, see E Fahey, 'Joining the Dots: External Norms, AFSJ Directives and the EU's Role in the Global Legal Order' (2016) 41 EL Rev 105.

<sup>46</sup> Case C-17/16 *El Dakkak and Intercontinental*, EU:C:2017:341, paras 28-38; Regulation 1889/2005 on controls of cash entering or leaving the Community, 2005 OJ L309/9.

<sup>47</sup> Case C-17/16 *El Dakkak and Intercontinental*, EU:C:2017:341, para. 42.

<sup>48</sup> AG Poiares Maduro in Case C-127/07 *Arcelor*, EU:C:2008:292, para. 15 of the Opinion.

<sup>49</sup> AG Ruiz-Jarabo Colomer in Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge*, EU:C:2002:516, para. 55 of the Opinion.

<sup>50</sup> AG Kokott in Case C-263/14 *Parliament v Council*, EU:C:2015:729, para. 63 of the Opinion (emphasis in original).

<sup>51</sup> *Ibid* para. 65 of the Opinion; continuing that '[e]xamples are the inclusion of Norway, Iceland, Liechtenstein and Switzerland in the Schengen area or the Lugano Convention, which includes some of those States in certain aspects of judicial cooperation in civil matters. However, external action has no evident repercussions on the area within the Union in the case of cooperation like that with Tanzania, for which the contested

Alongside the constitutional traditions of the Member States, Article 6(3) TEU also refers to the ECHR in connection with the fundamental rights that constitute general principles of EU law. For the values of the Union more generally, Article 2 TEU establishes that '[t]he *Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*', while acknowledging too that '[t]hese values are *common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*'. There is therefore an interrelationship between national, Union and international values as well as the potential for distinctive understandings<sup>52</sup> of a particular value at any given level. The testing of national rule of law standards against the Union standard of the 'same' value in various threads of litigation involving Poland at the present time exemplifies the point;<sup>53</sup> that case law is returned to in Section IV.B below.

## B. Territory and Union citizenship

Although *Boukhalfa* concerned the free movement of workers, Advocate General Léger did reflect on the then recently created status of Union citizenship. In particular, he considered that through the obligation 'to treat the nationals of all the Member States in the same way as those of the State concerned', the Treaty's free movement provisions 'meet the more general aim of promoting *a feeling of belonging to a common entity* enshrined in the frequently used phrase "people's Europe", and in the "citizenship of the Union"; asking then what 'the effects of such a feeling of belonging or such citizenship [would be] if they disappeared once the geographical borders of the Union were crossed'.<sup>54</sup> That reflection evokes the impulse both to keep Union business within the territory of the Union and to insinuate EU law where certain effects materialise beyond its borders. Union citizenship adds a further dimension to the resulting 'feeling of belonging' to a common place. However, in EU citizenship

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decision and the disputed agreement lay the legal foundations'. For another example of the particular Union interest in 'events which take place in a country bordering the European Union', which 'are capable of justifying measures designed to protect essential European Union security interests and to maintain peace and international security', see Case C-72/15 *Rosneft*, EU:C:2017:236, para. 112 (concerning the EU-Russia Partnership Agreement in the context of Ukraine).

<sup>52</sup> There is also some potential for distinctive *application* but, for an EU Member State, that potential is limited by the requirements of primacy when a situation falls within the scope of EU law; see esp. Case C-399/11 *Melloni*, EU:C:2013:107.

<sup>53</sup> Case C-619/18 *Commission v Poland (Indépendance de la Cour suprême)*, EU:C:2019:531; Case C-216/18 PPU (*Minister for Justice and Equality (Deficiencies in the system of justice) (LM)*), EU:C:2018:586.

<sup>54</sup> AG Léger in Case C-214/94 *Boukhalfa*, EU:C:1995:381, para. 31 of the Opinion (emphasis added).

law, nationality is the dominant coordinate. It is not surprising then that, before the judgment in *Ruiz Zambrano*, there were only limited and scattered references to the concept of territory.<sup>55</sup>

In the Treaty provisions that establish Union citizenship and associated rights, the main explicit references to ‘territory’ are to the territory *of the Member States* regarding the scope of application of the right to move and reside freely (Articles 20(2) and 21(1) TFEU). Similarly, Directive 2004/38, which regulates the exercise of the right to move and reside, refers only to the territory ‘of the Member States’ or ‘of the host Member State’.<sup>56</sup> However, there is also an explicitly *extraterritorial* dimension in the guarantee that ‘[e]very citizen of the Union shall, *in the territory of a third country* in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State’ (Article 23 TFEU).<sup>57</sup> Additionally, legislation that establishes ‘the procedures and conditions required for a citizens’ initiative within the meaning of Article 11 [TEU]’<sup>58</sup> (Article 24 TFEU) reflects a *transnational* understanding of Union territory through the validity thresholds that it puts in place.<sup>59</sup> Territory rarely featured in EU citizenship case law. However, in *McCarthy II*, the Court continued a process of distancing itself from its previous, State territory-oriented ruling in *Akrich* to find that ‘pursuant to Article 5 of Directive 2004/38, a person who is a family member of a Union citizen...is not subject to the requirement to obtain a visa or an equivalent requirement in order to be able to enter the territory of that Union citizen’s Member State of origin’.<sup>60</sup> Instead, ‘the Member States are, in

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<sup>55</sup> On the salience of territory for citizenship of a state, of the Union and for emerging forms of citizenship decoupled from politics, see N Walker ‘The Place of Territory in Citizenship’ in A Shachar, R Bauböck, I Bloemraad and M Vink (eds.), *The Oxford Handbook of Citizenship* (OUP, 2017) 553.

<sup>56</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.

<sup>57</sup> See Directive 2015/637/EU on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries, 2015 OJ L106/1. See further, M Moraru, ‘An Analysis of the Consular Protection Directive: Are EU Citizens Now Better Protected in the World?’ (2019) 56 CML Rev 417; P Vigni, ‘The Right of EU Citizens to Diplomatic and Consular Protection: A Step Towards Recognition of EU Citizenship in Third Countries?’ in Kochenov (ed.), n21 above, 584.

<sup>58</sup> Article 11(4) TEU provides: ‘[n]ot less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. The procedures and conditions required for such a citizens’ initiative shall be determined in accordance with the first paragraph of Article 24 [TFEU]’.

<sup>59</sup> Regulation 211/2011/EU on the citizens’ initiative, 2011 OJ L65/1; see especially, Article 7 on the minimum number of signatories per Member State, explained in recital 5 on the premise of ‘ensur[ing] that a citizens’ initiative is representative of a Union interest’.

OJ L 65, 11.3.2011, p. 1

<sup>60</sup> Case C-202/13 *McCarthy II*, EU:C:2014:2450, paras 41-42. In *Akrich*, the Court ruled that ‘the national of a non-Member State, who is the spouse of a citizen of the Union, must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated’ (Case C-109/01 *Akrich*, EU:C:2003:491, para. 50). It ‘reconsidered’ that approach in Case C-127/08 *Metock and Others*, EU:C:2008:449, on the basis that no such requirement was added to Directive 2004/38, which had been adopted in the period between *Akrich* and *Metock*.

principle, required to recognise a residence card issued under Article 10 of Directive 2004/38, for the purposes of entry into their territory without a visa'.<sup>61</sup> That decision transforms entry to the territory of a Member State into entry to the territory of the Union – to the territory of Union citizenship.<sup>62</sup>

However, territorial splintering is still evident in other aspects of Union citizenship's legal framework. For example, Azoulai observes that a 'somewhat unfortunate consequence' of the 'territorial differentiation' realised through Article 355 TFEU is that 'the citizens of these special territories, who have the status of Union citizens by virtue of their nationality, may be deprived of the enjoyment of EU citizenship rights, whereas Union citizens from the Member States' "common" territory may be deprived of the enjoyment of free movement rights in these special territories'.<sup>63</sup> It is also clear that most disputes in EU citizenship law concern the territory of one i.e. 'host' State, reflecting in essence a bilateral relationship between that State and the national of another State, albeit one that is mediated by supranational law where relevant. Azoulai has criticised what he calls the resulting 'transnational paradigm of EU citizenship based on Member State *territoriality*' and argued that '[a] proper citizenship regime would constitute not only a right to free movement, but also a right to enjoy *the community of values anywhere within the European Union, regardless of territory*. It would allow people to live, at least partially, in material, social and moral conditions which reflect a wide-reaching European society'.<sup>64</sup> In one sense, the judgment in *Coman* realised that vision. There, the Court attributed Union-wide meaning to the concept of 'spouse' for the purposes of Directive 2004/38 and determined that 'Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the

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<sup>61</sup> Case C-202/13 *McCarthy II*, EU:C:2014:2450, para. 62.

<sup>62</sup> Underlined by the Court's comment in *Akrich* that Regulation 1612/68 was actually 'silent as to the rights of a national of a non-Member State, who is the spouse of a citizen of the Union, in regard to access to the territory of the [Union]' (Case C-109/01 *Akrich*, EU:C:2003:491, para. 49; Regulation 1612/68/EEC on freedom of movement for workers within the Community, 1968 OJ L257/13).

<sup>63</sup> Azoulai, n21 above, 179 (emphasis added); also pointing out that in *Eman and Sevinger* [Case C-300/04, EU:C:2006:545, paras 55-58], 'the Court made clear that EU citizens residing in the non-European territory of Aruba may be deprived of the right to participate in the European Parliament elections as long as this complies with the general principle of non-discrimination enshrined in EU law. Conversely, on the possibility for overseas countries and territories to introduce restrictions on free movement, reference is made to Council Decision 2013/755/EU on the association of overseas countries and territories with the European Union, OJ 2013 L344/1'.

<sup>64</sup> Azoulai, n21 above, 180 (emphasis added). In particular, he argues that 'EU law seems incapable of resisting the re-territorialisation of free movement policies advocated, sometimes successfully, by the governments of certain Member States in the context of a significant decrease in mutual trust and harmony in the Union, particularly in times of economic and political crisis. As a result, the legal regime which governs EU citizenship seems to be doomed to produce individual emancipation and empowerment whilst at the same time producing alienation and frustration' (ibid 180-181). See similarly, C Rauceu, 'European Citizenship and the Right to Reside: "No One on the Outside has a Right to be Inside?"' (2016) 22 ELJ 470, esp. 482. On the transnational and supranational dimensions of Union citizenship, see further, Coutts, n4 above.

ground that the law of that Member State does not recognise marriage between persons of the same sex'.<sup>65</sup> The facts in *Coman* concern a right to reside in one Member State territory; but the construct of the Union as a legal place on its own terms had to be engaged to make that happen. Similarly, certain values that are clearly not 'common' to all of the Member States at a local regulatory level nevertheless had to be recognised at that level because they are *Union* values: the commonality of the State's membership of that legal place therefore transcending local differences.

In these cases, Azoulai suggests that '[w]hat EU law does is to *facilitate the possibility of movement* from one Member State territory to another' and that '[s]uch mobility requires the construction of a space which ties together all Member States territories. This inter-space is the point of view from which the situation of individuals can be assessed. It is no more than a fictional space which allows individuals to maintain their legal status while passing from one state territory to the other'.<sup>66</sup> However, he argues that the judgment in *Ruiz Zambrano* 'represent[s] a real and discernible paradigm shift in the shape of the concept of the "territory of the Union"'.<sup>67</sup> His research questions connect to examining the tensions between the introduction of that concept in *Ruiz Zambrano* and the evolution of EU citizenship law more generally along a transnational, movement-oriented trajectory. He asks: 'how are we going to reconcile the traditional jurisprudence which takes a transnational view of EU citizenship with the emergence of the "transcendental" conception of citizenship as presented in *Ruiz Zambrano*? How and under which circumstances does EU law reach the point of complete "metaphorization" of the concept of Union territory? Is this process sustainable, and can we build upon it to shift the discourse on Union citizenship?'<sup>68</sup>

Here, the three narratives presented, which also proceed from *Ruiz Zambrano* as the starting point of significant legal change, pursue a more territory-focused than citizen-focused analysis, at least in the first instance. The objective is to unpick how the privileging of different interests can produce strikingly different outcomes, leading then to consideration of how the parallel narratives that have developed in the case law to date – foundational, protective and systemic – might be integrated; to narrate more effectively the 'complete' story of Union territory as a legal construct.

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<sup>65</sup> Case C-673/16 *Coman*, EU:C:2018:385, para. 51.

<sup>66</sup> Azoulai, n21 above, 184 (emphasis added).

<sup>67</sup> *Ibid* 181.

<sup>68</sup> *Ibid* 182.

### III. The foundational narrative: Union citizenship and the ‘intrinsic connection’ to freedom of movement and residence

Achieving the condition of residence security is a powerful theme in EU citizenship law, but it almost always concerns security of residence for a Member State national (and/or their family members) in the territory of another Member State.<sup>69</sup> In contrast, the ruling in *Ruiz Zambrano* opened up a novel, and more controversial, conception of residence security with reference to the territory of the Union per se. It is not so much, then, that the Court ‘reversed’ its longstanding case law on purely internal situations. It is more that, by attributing legal significance to the construct of Union territory, the Court transcended that case law altogether. The reasoning proceeded in four steps. First, the Court invoked the idea of Union citizenship as ‘the fundamental status of nationals of the Member States’.<sup>70</sup> Second, it held that ‘[i]n those circumstances, Article 20 TFEU precludes national measures which 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’.<sup>71</sup> Engaging Article 20, not 21, TFEU seemed initially to suggest that the right to move and reside was not relevant in this case: the Union citizens in question were minor children of Belgian nationality who had always lived in Belgium i.e. no free movement rights had been exercised. The use of ‘substance of rights’ language suggested a doctrine drawn more from Union citizenship as a *status* than from rights already expressly conferred by the Treaty or provided for in secondary law. Furthermore, the Court referred to its judgment in *Rottmann*, which had determined that decisions taken at national level about the withdrawal of Member State nationality must be taken in compliance with the principle of proportionality when they lead in consequence to the loss of Union citizenship.<sup>72</sup>

Third, the Court held that ‘[a] refusal to grant a right of residence to a third country national with *dependent* minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect’.<sup>73</sup> This is because, fourth, ‘[i]t must be assumed that such a refusal would lead to a situation where those children, citizens of

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<sup>69</sup> See further, L Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (Hart Publishing, 2019) 222.

<sup>70</sup> Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124, para. 41.

<sup>71</sup> *Ibid* para. 42.

<sup>72</sup> Case C-135/08 *Rottmann*, EU:C:2010:104. In *Ruiz Zambrano*, the Court referred to para. 42 of *Rottmann*, where it had established that ‘the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article [20 TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law’ (emphasis added).

<sup>73</sup> Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124, para. 43 (emphasis added).



the Union, *would have to leave the territory of the Union* in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, *having to leave the territory of the Union*. In those circumstances, *those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union*.<sup>74</sup> In subsequent judgments, the Court explained and confronted the implications of *Ruiz Zambrano* i.e. that it had constructed a ‘right to stay within the territory of the European Union’.<sup>75</sup> Three (related) points from that case law are highlighted here:<sup>76</sup> first, the exceptional nature of rights based on Article 20 TFEU and the explanatory ‘intrinsic connection’ to freedom of movement drawn in that respect; second, the requirement and meaning of a relationship of dependency; and, third, the limits that can be placed on Article 20 TFEU residence rights.

First, residence rights based on Article 20 TFEU arise only in ‘*very specific situations* in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence *exceptionally* cannot, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen *would be obliged in practice to leave the territory of the European Union altogether*’.<sup>77</sup> While the paring back of the genuine enjoyment test that results can be criticised for consequential paring back of the scope of Union citizenship rights,<sup>78</sup> it is, at the same time,

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<sup>74</sup> *Ibid* para. 44 (emphasis added).

<sup>75</sup> Case C-133/15 *Chavez-Vilchez*, EU:C:2017:354, para. 42; see also, para. 44. Davies recalls the residence expectations of citizenship in a general sense in this context, suggesting that ‘it is hardly a strange view of citizenship to say that citizens should enjoy the right to live in the territory of which they are citizens. Member States may not all have realised that Union citizenship is to be understood as a form of citizenship, and not merely a relabeling of the migratory status quo, but the name should perhaps have given them a hint, and the Court has certainly been warning them for long enough’ (G Davies, ‘The Right to Stay at Home: A Basis for Expanding European Family Rights’ in Kochenov (ed.), n21 above, 468, 473).

<sup>76</sup> For general discussion of *Ruiz Zambrano* and subsequent case law, see e.g. H Kroeze, ‘The Substance of Rights: New Pieces of the *Ruiz Zambrano* Puzzle’ (2019) 44 EL Rev 238; PJ Neuvonen, ‘EU Citizenship and Its “Very Specific” Essence: *Rendón Marín* and *CS*’ (2017) 54 CML Rev 1201; N Nic Shuibhne, ‘(Some of) The Kids Are All Right’ (2012) 49 CML Rev 349.

<sup>77</sup> Case C-40/11 *lida*, EU:C:2012:691, para. 71 (emphasis added); confirmed in e.g. Case C-87/12 *Ymeraga*, EU:C:2013:291, para. 36 and Case C-165/14 *Rendón Marín*, EU:C:2016:575, para. 74. A Union citizen can of course *choose* to leave the territory of the Union but should not be forced to do so by a decision implementing national law, subject to the limits discussed further below. In other words, Union citizenship ‘cannot amount to putting [Member State nationals] “under house arrest” in the territory of the European Union’ (AG Bot in Joined Cases C-356/11 and C-357/11 *O and S*, EU:C:2012:595, para. 41 of the Opinion).

<sup>78</sup> See e.g. S Reynolds, ‘Exploring the “Intrinsic Connection” between Free Movement and the Genuine Enjoyment Test: Reflections on EU Citizenship after *lida*’ (2013) 38 EL Rev 376, 388-391.

reflective of a legal order premised on conferred competences.<sup>79</sup> More generally, the value of reframing this kind of either/or dilemma is returned to in Section IV.C below.

The Court has also explained that the ‘common element’ in *Ruiz Zambrano* situations is that ‘although they are governed by legislation which falls *a priori* within the competence of the Member States, namely legislation on the right of entry and stay of third-country nationals outside the scope of Directives 2003/109 and 2004/38,<sup>80</sup> they none the less have *an intrinsic connection with the freedom of movement of a Union citizen* which prevents the right of entry and residence from being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom’.<sup>81</sup> The thread of ‘intrinsic connection’ reasoning was, at most, implicit in the *Ruiz Zambrano* judgment; though it was referenced directly by Advocate General Sharpston.<sup>82</sup> Advocate General Sharpston also acknowledged another dimension that the Court overlooked: that ‘[i]t is of course *theoretically possible* that another Member State might be prepared to take the family’.<sup>83</sup> The option (or obligation?) to move to another State – which necessarily means that there is then no forced departure from the territory of the Union – featured more prominently in later case law.<sup>84</sup> However, it exemplifies the limited ‘transnational paradigm of EU citizenship based on Member State

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<sup>79</sup> See e.g. S Adam and P van Elsuwege, ‘Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*’ (2012) 37 EL Rev 176, esp. 182; K Lenaerts and JA Gutiérrez-Fons, ‘Epilogue on EU Citizenship: Hopes and Fears’ in Kochenov (ed.), n21 above, 751, 771-773.

<sup>80</sup> In *NA*, Court referred to the fact that ‘the person concerned does not qualify for a right of residence in that Member State under European Union secondary law’ as ‘[t]he first condition on which the possibility of claiming a right of residence in the host Member State under Article 20 TFEU depends’ (Case C-115/15 *NA*, EU:C:2016:487, para. 74; Directive 2003/109 concerning the status of third-country nationals who are long-term residents (2003 OJ L16/44). Similarly, Reynolds observes ‘a “last resort” approach, requiring EU citizens to access EU law through other means’ (n78 above, 386).

<sup>81</sup> Case C-40/11 *Iida*, EU:C:2012:691, para. 72 (emphasis added); confirmed in e.g. Case C-304/14 *CS*, EU:C:2016:674, para. 3 and Case C-133/15 *Chavez-Vilchez*, EU:C:2017:354, para. 64.

<sup>82</sup> AG Sharpston in Case C-34/09 *Ruiz Zambrano*, EU:C:2010:560, esp. para. 99 of the Opinion: ‘[g]iven their age ... his children will have to leave with him. *They will be unable to exercise their right to move and reside within the territory of the European Union.* The parallels with *Rottmann* are obvious. Dr Rottmann’s rights as a citizen of the Union were under serious threat because revocation of his naturalisation in Germany would leave him unable to exercise those rights *ratione personae*. Here, Mr Ruiz Zambrano’s children face a not dissimilar threat to their rights *ratione loci*. They need to be able to *remain physically present within the territory of the European Union in order to move between Member States or reside in any Member State*’ (emphasis added). See further, paras 100-103 of the Opinion.

<sup>83</sup> *Ibid* fn76 of the Opinion (emphasis added).

<sup>84</sup> See esp. Case C-86/12 *Alokpa and Moudoulou*, EU:C:2013:645, paras 32-35. Thus, ‘while European citizenship status can shield individuals from being deported from the territory of the Union, it cannot completely shield individuals from the risk of “internal” deportations’ (Rauceau, n64 above, 481). That position has been much criticised; see e.g. D Kochenov, ‘EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text’ (2012) 37 EL Rev 369, 393 (‘[s]ince the Treaties do not connect the enjoyment of the substance of EU citizenship rights with movement or limit EU citizenship rights to the right not to leave the territory of the Union, the rights paradigm should not be artificially connected to movement, which the Court seems to be suggesting in *McCarthy* or *Dereci*. It is quite sensible to expect that rights be sufficiently protected without taking a bus’).

territoriality’ criticised above by Azoulai.<sup>85</sup> In a welcome development, the Court now engages more deeply with the *practical* and not just *theoretical* circumstances of affected Union citizens:<sup>86</sup> ‘[i]n other words, the option available to a third country national and his/her Union citizen children of moving to the Member State of which those children are nationals cannot exist only in the abstract’.<sup>87</sup>

For example, in *Rendón Marín*, the Court confirmed that ‘it is for the referring court to check whether, in the light of all the circumstances of the main proceedings, Mr Rendón Marín, as the parent who is the sole carer of his children, may in fact enjoy the derived right to go with them to Poland and reside with them there, so that a refusal of the Spanish authorities to grant him a right of residence would not result in his children being obliged to leave the territory of the European Union as a whole’.<sup>88</sup> However, noting the claimant’s submissions at the hearing that ‘he maintains no ties with the family of his daughter’s mother, who, according to him, does not reside in Poland, and that neither he nor his children know the Polish language’, the Court did suggest that ‘it seems to be clear from the information before the Court that the situation at issue in the main proceedings is capable of resulting, for Mr Rendón Marín’s children, in their being deprived of the genuine enjoyment of the substance of the rights which the status of Union citizen confers upon them’.<sup>89</sup> In other words, the factual circumstances in a given case ‘may defeat the theoretical possibility of not having to leave the territory of the European Union altogether’.<sup>90</sup> The same logic, framed by Articles 7 and 24 of the Charter, applies to evaluating the *reality* of a minor Union citizen’s relationship with both of his or her parents: ‘the fact that the other parent, a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national’.<sup>91</sup> In *Chavez-*

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<sup>85</sup> See further, AG Mengozzi in Case C-256/11 *Dereci*, EU:C:2011:626, paras 43-44 of the View, acknowledging the ‘paradox’ that ‘in order to be able actually to enjoy a family life within the territory of the Union, the Union citizens concerned *have* to exercise one of the freedoms of movement laid down in the TFEU’ (emphasis in original). The case law further encourages this ‘paradox’ in the sense that deliberately exercising free movement and residence rights for the purpose of creating rights in a home State following the Union citizen’s return there is not an abuse of free movement (see e.g. Case C-109/01 *Akrich*, EU:C:2003:491, paras 55-57).

<sup>86</sup> Already evident in the questions raised by AG Mengozzi in Case C-256/11 *Dereci*, EU:C:2011:626, paras 47-48 of the View.

<sup>87</sup> AG Wathelet in Case C-115/15 *NA*, EU:C:2016:259, para. 114 of the Opinion.

<sup>88</sup> Case C-165/14 *Rendón Marín*, EU:C:2016:575, para. 79.

<sup>89</sup> *Ibid* para. 80.

<sup>90</sup> AG Wathelet in Case C-115/15 *NA*, EU:C:2016:259, para. 109 of the Opinion.

<sup>91</sup> Case C-133/15 *Chavez-Vilchez*, EU:C:2017:354, para. 71; the Court continued by advising that “[i]n reaching such a conclusion, account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child’s physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child’s equilibrium’ (*ibid*). On the burden of proof in such cases,

*Vilchez*, the Court restated the ‘intrinsic connection’ explanation but, as noted, emphasised more strongly the right to stay within the territory of the Union.<sup>92</sup> The right to stay conjures a link between Union citizenship and finding a home – cushioned by the security that this term implies – within Union territory. The sense that *Ruiz Zambrano* was always concerned with something more than preservation of free movement per se is returned to below; but the nature of Union territory as a specific *legal* place and specific *common* place is already discernible.

Second, to engender a right to stay within the territory of the Union, the relationship between the Union citizen and their third country national family member(s) must be defined by dependency.<sup>93</sup> Dependency is an expression of proportionality. It provides a framework through which it can be determined whether restricting the rights of Union citizens is ‘acceptable or not in the specific circumstances of the situations at issue’.<sup>94</sup> Dependency is not determined by whether a Union citizen lives with the person for whom a right to reside is sought or by a blood relationship,<sup>95</sup> though arrangements concerning the custody or primary care of minor children may be relevant.<sup>96</sup> What is essential is that legal, financial or emotional dependency must be demonstrated;<sup>97</sup> since that is what ‘would lead to the Union citizen being obliged, in fact, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole’.<sup>98</sup> For the Court, ‘unlike minors and *a fortiori* minors who are young children...an adult is, as a general rule, capable of living an independent existence apart from the members of his family’, so that ‘identification of a relationship between two adult members of the same family as a relationship of dependency, capable of giving rise to a derived right of residence under Article 20 TFEU, is conceivable only in exceptional cases, where, having regard to all the relevant circumstances, there could be no form of separation of the individual concerned from the member of his family on whom he is dependent’.<sup>99</sup> Thus while a

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see paras 74-78. For Davies, ‘in some sense there are always alternatives, so that to understand dependency in terms of a complete lack of alternatives is to empty it of meaning’ (n75 above, 477).

<sup>92</sup> Case C-133/15 *Chavez-Vilchez*, EU:C:2017:354, esp. paras 42, 44 and 65.

<sup>93</sup> See e.g. Joined Cases C-356/11 and C-357/11 *O and S*, EU:C:2012:776, para. 50. See further, AG Bot in the same case (EU:C:2012:595, para. 44 of the Opinion): ‘[t]he reasons linked to the departure of the citizen of the Union from its territory are therefore particularly limited in the case-law of the Court. They concern situations in which the Union citizen *has no other choice but to follow the person concerned*, whose right of residence has been refused, because he is in that person’s care and thus entirely dependent on that person to ensure his maintenance and provide for his own needs’ (emphasis added).

<sup>94</sup> AG Szpunar in Case C-133/15 *Chavez-Vilchez*, EU:C:2016:659, para. 93 of the Opinion.

<sup>95</sup> Joined Cases C-356/11 and C-357/11 *O and S*, EU:C:2012:776, paras 54-55.

<sup>96</sup> Case C-133/15 *Chavez-Vilchez*, EU:C:2017:354, para. 68; Case C-82/16 *KA*, EU:C:2018:308, para. 71.

<sup>97</sup> Joined Cases C-356/11 and C-357/11 *O and S*, EU:C:2012:776, paras 51 and 56; Case C-133/15 *Chavez-Vilchez*, EU:C:2017:354, para. 68.

<sup>98</sup> Joined Cases C-356/11 and C-357/11 *O and S*, EU:C:2012:776, paras 54-56; Case C-82/16 *KA*, EU:C:2018:308, para. 73.

<sup>99</sup> Case C-82/16 *KA*, EU:C:2018:308, para. 65; ruling out ‘dependency of any kind’ in that case for a ‘lawful cohabitant’ (para. 69).

theoretical prospect remains that dependency might be recognised in any relationship, the *Ruiz Zambrano* case law has particular impact and import for protecting the rights of children.<sup>100</sup>

The intersection of the dependency requirement and the circumstances of a Union citizen's network of relationships brings us back to the relevance of Article 7 of the Charter of Fundamental Rights, which ensures respect for private and family life. The Court's attempt to address this question in *Dereci* generated the regrettably dismissive statement that 'the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted'.<sup>101</sup> Substantively, this limitation connects back to the strict understanding of dependency applied in the case law, without which 'the *existence* of a family link, whether natural or legal, between the minor Union citizen and his third-country national parent cannot be sufficient ground to justify the grant, under Article 20 TFEU, of a derived right of residence to that parent in the territory of the Member State of which the minor child is a national'.<sup>102</sup> In other words, '[t]he mere possibility of losing the opportunity to quietly live with one's family does not trigger protection under EU law'.<sup>103</sup>

The Court acknowledged that '[t]hat finding is, admittedly, without prejudice to the question whether, on the basis of other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused' but stressed that 'that question must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case'.<sup>104</sup> In that respect, the Court was initially reluctant to engage the Charter to *determine* whether the circumstances of a case generated the kind of exceptional situation required by Article 20 TFEU.<sup>105</sup> But it has loosened that resistance more recently,<sup>106</sup> especially where Article 7 further connects to protecting the best interests of the child under Article 24 of the Charter.<sup>107</sup> Here, we see common values that underpin the Union territory as a legal place coming gradually to the fore of the Court's decision-making in connection with its shaping of the right of Union citizens to stay there.

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<sup>100</sup> For further discussion, see H van Eijken and P Phoa, 'The Scope of Article 20 TFEU Clarified in *Chavez-Vilchez*: Are the Fundamental Rights of Minor Citizens Coming of Age?' (2018) 43 EL Rev 949.

<sup>101</sup> Case C-256/11 *Dereci and Others*, EU:C:2011:734, para. 68.

<sup>102</sup> Case C-82/16 *KA*, EU:C:2018:308, para. 75 (emphasis added).

<sup>103</sup> Azoulai, n21 above, 196.

<sup>104</sup> Case C-256/11 *Dereci and Others*, EU:C:2011:734, para. 69.

<sup>105</sup> See e.g. Case C-87/12 *Ymeraga*, EU:C:2013:291, paras 42-43.

<sup>106</sup> See esp. Case C-133/15 *Chavez-Vilchez*, EU:C:2017:354, para. 70.

<sup>107</sup> The change in the Court's approach surely responds to powerful interventions from Advocates General Sharpston (Case C-456/12 *O*; Case C-457/12 *S and G*, EU:C:2013:837, paras 60-63 of the joint Opinion), Szpunar (Case C-165/14 *Rendón Marín*; Case C-304/14 *CS*, EU:C:2016:75, paras 119-120 of the joint Opinion) and Wathelet (Case C-115/15 *NA*, EU:C:2016:259, paras 120-126 of the Opinion).

However, third, the right to stay within the territory of the Union is not unlimited. The right to reside in another Member State can be restricted under EU law, but that framework presumes that a Union citizen can return to their home State i.e. can remain within the territory of the Union. Nevertheless, the Court has ruled that ‘Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security’.<sup>108</sup> In line with the approach taken to loss of Union citizenship in *Rottmann*, proportionality plays a critical role here once again. In that light, where forced departure of a Union citizen from the territory of the Union is being contemplated on public policy or public security grounds, national authorities ‘must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which...must be read in conjunction with the obligation to take into consideration the child’s best interests, recognised in Article 24(2) of the Charter’.<sup>109</sup> Additionally, ‘as a justification for derogating from the right of residence of Union citizens or members of their families, the concepts of “public policy” and “public security” must...be interpreted strictly, so that their scope cannot be determined unilaterally by the Member States without being subject to control by the EU institutions’.<sup>110</sup> Nevertheless, where the Union citizen in question is a minor child, as in the circumstances of *CS*,<sup>111</sup> their right to stay within the territory of the Union can be denied because of the behaviour of others i.e. through no criminal fault of their own.

For states, making a decision to withdraw citizenship is the only method, *in extremis*, through which they can deny a right to reside to their own citizens while still complying with the requirements of international law.<sup>112</sup> But the Union cannot confer or withdraw its own citizenship, and has essentially accepted that ‘its’ citizens may be forced to leave ‘its’ territory in certain circumstances. Even though the parameters of such decisions are framed by EU law, they lie ultimately in the hands of the Member States. In this sense, unlimited or absolute rights under Article 20 TFEU would have

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<sup>108</sup> Case C-165/14 *Rendón Marín*, EU:C:2016:575, para. 81.

<sup>109</sup> *Ibid*; see similarly, Case C-304/14 *CS*, EU:C:2016:674, para. 36; Case C-82/16 *KA*, EU:C:2018:308, para. 90.

<sup>110</sup> Case C-165/14 *Rendón Marín*, EU:C:2016:575, para. 82; see further, paras 83-86, where the Court’s guidance on the concepts of public policy and public security aligns with the principles set out in Articles 27 and 28 of Directive 2004/38 for situations of expulsion from a host Member State.

<sup>111</sup> Case C-304/14 *CS*, EU:C:2016:674.

<sup>112</sup> ‘[A] principle of international law, reaffirmed in Article 3 of Protocol No 4 to the [ECHR], that European Union law cannot be assumed to disregard in the context of relations between Member States, precludes a Member State from refusing its own nationals the right to enter its territory and remain there for any reason...; that principle also precludes that Member State from expelling its own nationals from its territory or refusing their right to reside in that territory or making such right conditional’ (Case C-434/09 *McCarthy*, EU:C:2011:277, para. 29). See further, S Iglesias Sanchez, ‘A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement’ in Kochenov (ed.), n21 above, 371, 374-375. These questions have been much discussed in the context of responses to acts of terrorism; see further, E Cloots, ‘The Legal Limits of Citizenship Deprivation as a Counterterrorism Strategy’ (2017) 23 *European Public Law* 5. See more generally, D Owen, ‘On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights’ (2018) 65 *Netherlands International Law Review* 299.

been difficult to rationalise: the Member State is not *directly* expelling its own national in these cases, and there is no State-free place within Union territory where Union citizens can go with their ‘unwanted’ family members. The power that Member States hold with respect to limiting a Union citizen’s right to stay within the territory of the Union does then reflect the persistence of territorial splintering. Even so, however, the broader trend in case law after *Ruiz Zambrano* suggests something more autonomously territorially-rooted at the heart of Article 20 TFEU rights; even the foundational narrative does not, in other words, seem as concerned with ensuring free movement between Member States at some indeterminate time in the future as the explanation in cases like *lida* might suggest.<sup>113</sup> The protection extended by the Court is undoubtedly ‘anchored to cross-border movement’<sup>114</sup> but it is not necessarily constituted by it. Raucea suggests that free movement rights function as *indicators* of the genuine enjoyment rule’s applicability.<sup>115</sup> Going further, Lenaerts and Gutiérrez-Fons even argue that *Ruiz Zambrano* ‘served to *emancipate* EU citizenship from the constraints inherent in its free movement origins’.<sup>116</sup>

Articulation of a *right to stay within* the territory of the Union provides a first important clue in the search for more nuanced explanation. Second, we can point to the deeper engagement with Charter rights seen in recent case law. Third, the Court has rendered more realistic its expectation that Union citizens might always somehow manage to move to another Member State in order to stay in Union territory. For Azoulai, when looking more closely for what Scott describes as the ‘trigger’<sup>117</sup> for invoking EU law in *Ruiz Zambrano*, the Court’s antenna for ‘integrability’ in EU citizenship law is exposed: ‘[w]hat may have had an impact on the Court’s decision is the manner in which Mr Ruiz Zambrano was represented, namely as an individual well integrated into many aspects of local society. For example, Mr Ruiz Zambrano enjoyed stable family relationships, he and his wife were care-givers of their children and he had shown a willingness to create “real” social links by finding employment and paying taxes. Whilst being an illegal resident in Belgium, he and his family were registered in the municipality they lived in. More important perhaps, he manifested a desire for legality and social integration as evidenced by his application to have his situation regularised and his “efforts to integrate into Belgian society, his learning of French and his child’s attendance at pre-school”’.<sup>118</sup>

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<sup>113</sup> See further, Davies, n75 above, 471-473.

<sup>114</sup> Reynolds, n78 above, 384 (emphasis added).

<sup>115</sup> Raucea, n64 above, 487 (emphasis added).

<sup>116</sup> Lenaerts and Gutiérrez-Fons, n78 above, 761 (emphasis added).

<sup>117</sup> Scott, n20 above, 1344; similarly, for Raucea, ‘free movement rights function as *indicators* of the genuine enjoyment rule’s applicability’ (n64 above, 487 (emphasis added)).

<sup>118</sup> Azoulai, n20 above, 193 and 195; referring to Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124, para. 16.

Extrapolating from his previous work on ‘good’ and ‘bad’ Union citizens,<sup>119</sup> Azoulai suggests that ‘the Court was concerned with the family’s situation, some of whose members were Union citizens who had made a place within Union territory the centre of their personal and social life’.<sup>120</sup> Crucially, he argues that ‘this construction implies that the Court is *taking legal possession of the territories of the Member States*’ and thereby creating ‘a special legal habitat for “European individuals” deserving of protection. It refers to it as the “territory of the Union”, a proxy for the idea of a far-reaching European society’.<sup>121</sup> In fact, according a relatively generous expanse of discretion to the Member States regarding the expulsion of ‘bad’ family members – and with them, where necessary, dependent Union citizens – fits beautifully with this explanation of things too: it is the very ‘resilience of deportability’ that ‘disaggregate[s] the *common space* as a geographical *and legal* area with respect to which citizens can rely on it *as their territory of reference*, within which *they can feel secure* through an unconditional right to remain’.<sup>122</sup>

Retuning the *Ruiz Zambrano* case law in this way both entrenches *and* re-forms the purpose of free movement in the foundational narrative of territory in EU citizenship law. At one level, freedom of movement is itself placeable in the sphere of Union values. Iglesias Sánchez makes this point both from the perspective of Union citizens – observing that ‘in conditions of free movement individuals have the choice to relocate and enjoy a greater level of individual freedom which translates into real and effective possibilities to pursue their happiness and economic progress in a wider geographical space’<sup>123</sup> – and through the more systemic fact that ‘in the *structure of* the European Union, mobility is a means to an end, namely, greater equality and social cohesion’.<sup>124</sup> In the latter sense, protecting freedom of movement is also a surrogate for protecting *other* values. As indicated in Section I above, the Court moved towards precisely this richer understanding of Union territory in *Tjebbes*.<sup>125</sup> For Rauceca, it is about the Union citizen’s ‘right to have a place where she is entitled to take part, to some extent, in the schema of distribution of rights which characterises the European polity’.<sup>126</sup> Importantly,

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<sup>119</sup> L Azoulai, ‘The (Mis)construction of the European Individual – Two essays on Union Citizenship Law’, EUI working papers, LAW 2014/14, at <https://cadmus.eui.eu/handle/1814/33293>; L Azoulai and S Coutts, ‘Restricting Union Citizen’s Residence Rights on Grounds of Public Security – Where Union Citizenship and the AFSJ Meet: *P.I.*’ (2013) 50 CML Rev 553.

<sup>120</sup> Azoulai, n21 above, 196.

<sup>121</sup> *Ibid* 197-198 (emphasis added).

<sup>122</sup> Iglesias Sanchez, n112 above, 384 (emphasis added).

<sup>123</sup> *Ibid* 380.

<sup>124</sup> *Ibid* 392 (emphasis added).

<sup>125</sup> See again, Case C-221/17 *Tjebbes*, EU:C:2019:189, para. 46. I am grateful to Stephen Coutts for highlighting this point.

<sup>126</sup> Rauceca, n64 above, 485; see similarly, her idea of ‘the European community Union’ (486).



though, this ‘does not mean that the free movement rules have lost their constitutional relevance; rather, it implies that the time has come to construct European citizenship on firmer ground’.<sup>127</sup>

Retuning the *Ruiz Zambrano* case law also constructs a bridge from the foundational narrative to the protective and systemic narratives outlined in Section IV below by elucidating the critical importance of *common values* that are underpinned by (the system of) EU law. In the protective and systemic narratives, we see the status of Union citizenship intersecting with the framework and objectives of the AFSJ. Lindahl’s conception of territory as a common place involves ‘two correlative dimensions’: ‘[t]he first is *normative*, and, in the case of the [AFSJ], concerns a claim about the common interest of the EU. To be common, an interest must be bounded, and this means that a legal order necessarily selects certain values to grant them legal protection and discards other values as legally irrelevant. This is tantamount to identifying the values on which the EU confers legal protection as its *own* values. The second dimension is *physical*, in so far as the legal order’s claim to common values is determined by means of boundaries that establish where individuals ought or ought not to be’.<sup>128</sup> In that understanding, ‘values are a constitutive feature of territoriality *as such*; indeed, space becomes the area – the EU’s *own* place – when normatively mediated in terms of values deemed to be legally relevant’.<sup>129</sup> In the narratives that have developed *alongside* the foundational narrative, this interplay between the normative and physical dimensions of Union territory becomes acutely salient.

#### IV. Parallel narratives of territory in EU citizenship law

The discussion in Section III disclosed that an ‘intrinsic connection’ to freedom of movement is a valid but also incomplete explanation of the foundational narrative of territory in EU citizenship law. In Section IV.A below, we see that a ‘protective’ narrative running in parallel in a different line of case law solidifies Azoulay’s idea of Union territory as a ‘special legal habitat for “European individuals” deserving of protection’ in many respects. The protective narrative advances how the character and values of the Union are used to ensure that Union citizenship is ‘*emplaced* citizenship’.<sup>130</sup> Fundamentally, the Court progresses its understanding of Union territory as the place where Union citizens *ought to be* and exploits the distinctive mechanisms of the EU legal order to achieve it. In distinction from the foundational case law, the Court invokes Article 21 rather than Article 20 TFEU as the relevant source of citizenship rights. That should root the protective narrative even more firmly in

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<sup>127</sup> D Sarmiento and E Sharpston, ‘European Citizenship and Its New Union: Time to Move On?’ in Kochenov (ed.), n21 above, 226, 241.

<sup>128</sup> Lindahl, n2 above, 468 (emphasis in original).

<sup>129</sup> *Ibid* (emphasis in original).

<sup>130</sup> *Ibid* 473 (emphasis in original).

free movement than *Ruiz Zambrano* case law yet there is, at the same time, ambiguity around *how* the situations in the relevant judgments connect to the fundamentals of the legal framework and, more particularly, to the limits and conditions normally attached to free movement rights based on Article 21 TFEU.

If the foundational narrative is about securing a home within the territory of the Union, the protective narrative rouses the defensive qualities of home against the ‘outside’. However, the essentials of the protective narrative are profoundly challenged by the parallel ‘systemic’ narrative unspooled in Section IV.B. In the cases considered there, concern for Union citizens(hip) subsides. Sustaining the system of the Union appears to be privileged over Union citizenship in situations both confined internally within and extending outwards beyond the external edges of Union territory. The Court navigates political ground more graphically in its decision-making. As a result, the relationship between territory and legal place must be interrogated more deeply. In Section IV.C, the judgment in *Wightman* is used to show how parallel narratives can be integrated; better reflecting the interdependency of the interests at stake and better contributing to a Union system that confronts rather than suppresses its complexity.

#### **A. The protective narrative: animating Union citizenship in the AFSJ**

The protective narrative of the territory of the Union is drawn from the intersection of EU citizenship law and the AFSJ, more specifically in the context of requests by third States for the extradition of Union citizens beyond the borders of the Union. As indicated in Section II above, these interests formally intersect through Article 3(2) TEU, which states that ‘[t]he Union shall offer *its citizens* an area of freedom, security and justice *without internal frontiers*, in which the *free movement of persons is ensured* in conjunction with appropriate measures with respect to *external border controls*, asylum, immigration *and the prevention and combating of crime*’. The fundamental differences attributed to surrender based on extradition and surrender based on a European Arrest Warrant reflect the differences between systems that are external and internal to the Union. In *LM*, the Court confirmed that ‘[t]he purpose of Framework Decision 2002/584...is to *replace* the multilateral system of extradition based on the European Convention on Extradition of 13 December 1957 with a system of surrender between judicial authorities of convicted or suspected persons for the purpose of enforcing judgments or of conducting prosecutions, the system of surrender being based on the principle of mutual recognition’.<sup>131</sup> That system ‘has as its basis the high level of trust which must exist between

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<sup>131</sup> Case C-216/18 PPU (*Minister for Justice and Equality (Deficiencies in the system of justice) (LM)*), EU:C:2018:586, para. 39 (emphasis added); Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, 2002 OJ L190/1.

the Member States'.<sup>132</sup> The existence of mutual trust is both *implied* and *justified* by the foundations of EU law itself, which is 'based on the fundamental premiss that *each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded*, as stated in Article 2 TEU'.<sup>133</sup> Crucially for present purposes, 'the very possibility and concrete realisation of these values, whether separately or jointly, depends on boundaries that determine the territorial unity of a legal community'.<sup>134</sup>

In the case law considered here, Union citizenship is engaged by the Court to explain a novel override of expectations set by extradition requests issued by third States, in order to contain the situations of Union citizens within the territory of the Union where possible. Such an outcome does ensure that the Union citizens in question can exercise free movement and residence rights should they choose to do so, and, in that respect, the protective narrative aligns with the 'intrinsic connection' logic of the foundational narrative. However, the alignment is superficial at most for, in the case law considered here, the Court overlooks the basic regulatory framework of free movement law. Freedom of movement is therefore even more obviously about the means than the end.<sup>135</sup> It provides Scott's 'trigger' for invoking EU law; but awkwardly. *Petruhhin* institutes the protective narrative in the way that *Ruiz Zambrano* institutes the foundational narrative. The case concerned an extradition request from Russia received by Latvian authorities shortly after Mr Petruhhin – an Estonian national – was arrested in Latvia. The request indicated that Mr Petruhhin was accused of attempted large-scale organised drug-trafficking. His extradition to Russia was authorised by the Latvian Public Prosecutor's Office but he appealed, arguing that he should be entitled to the same protection against extradition to Russia that Latvian nationals enjoy under national law as well as under a bilateral agreement with the Russian Federation. However, on the basis that, under national law, only Latvian nationals who committed a criminal offence in a third country could be prosecuted for that offence in Latvia,

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<sup>132</sup> Case C-216/18 PPU (*Minister for Justice and Equality (Deficiencies in the system of justice) (LM)*), EU:C:2018:586, para. 40. In a different context, AG Kokott outlines similarly the mutual recognition of Member State integration requirements for third country nationals who had already resided in another Member State under Directive 2003/109 for third-country nationals who are long-term residents (n80 above) compared to the 'different quality' of '[t]he first entry of family members into the European Union' under Directive 2003/86/EC on the right to family reunification, 2003 OJ L251/12; AG Kokott in Case C-153/14 *K and A*, EU:C:2015:186, paras 29-30 of the Opinion.

<sup>133</sup> Case C-216/18 PPU (*Minister for Justice and Equality (Deficiencies in the system of justice) (LM)*), EU:C:2018:586, para. 35 (emphasis added); referring to Case C-284/16 *Achmea*, EU:C:2018:158, para. 34. On the meaning and requirements of mutual trust, as determined by the Court, see e.g. M Schwarz, 'Let's Talk About Trust, Baby! Theorising Trust and Mutual Recognition in the EU's Area of Freedom, Security and Justice' (2018) 24 ELJ 124; L Mancano, 'Judicial Harmonisation through Autonomous Concepts of European Union Law: The Example of the European Arrest Warrant Framework Decision' (2018) 43 EL Rev 69; K Lenaerts, 'La Vie apres l'Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust' (2017) 54 CML Rev 805.

<sup>134</sup> Lindahl, n2 above, 474.

<sup>135</sup> Iglesias Sanchez, n112 above, 392.

Advocate General Bot did not consider that the applicant was in a comparable situation with Latvian nationals for the purposes of EU equal treatment requirements under Article 18 TFEU.<sup>136</sup>

In its judgment, the Court took a radically different approach. It first acknowledged that ‘in the absence of an international agreement between the European Union and the third country concerned, the rules on extradition fall within the competence of the Member States’.<sup>137</sup> But it then invoked the established requirement that ‘in situations covered by EU law, the national rules concerned must have due regard to the latter’.<sup>138</sup> Next, the Court recalled that ‘Mr Petruhhin, an Estonian national, *made use*, in his capacity as a Union citizen, of his right to move freely within the European Union by moving to Latvia, so that the situation at issue in the main proceedings falls within the scope of application of the Treaties, within the meaning of Article 18 TFEU, which sets out the principle of non-discrimination on grounds of nationality’.<sup>139</sup> However, instead of then engaging in the comparability analysis required by the substantive application of equal treatment law, the Court observed that ‘the unequal treatment which allows the extradition of a Union citizen who is a national of another Member State, such as Mr Petruhhin, gives rise to a restriction of freedom of movement, within the meaning of Article 21 TFEU’.<sup>140</sup> A restriction of freedom of movement may be justified only where it is justifiable on public interest grounds and also proportionate. In that light, the Court accepted that ‘[t]he objective of preventing the risk of impunity for persons who have committed an offence...must be considered a legitimate objective in EU law’.<sup>141</sup>

The Court did not invoke Union citizenship as the ‘fundamental status of Member State nationals’ but it did deftly slide the whole basis of its analysis from equal treatment under Article 18 TFEU to restrictions on freedom of movement under Article 21 TFEU. In other words, the Court used the lighter-touch free movement method to realise an equal treatment outcome.<sup>142</sup> It is interesting that the Court has never expressed the ‘intrinsic connection’ to movement in *Ruiz Zambrano* case law

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<sup>136</sup> AG Bot in Case C-182/15 *Petruhhin*, EU:C:2016:330, esp. paras 64-69. Nevertheless, he did consider that ‘[s]ince the situation of a national of a Member State who, like Mr Petruhhin, has exercised his freedom to move and reside in the territory of another Member State, falls...within the scope of EU law...Article 19(2) of the Charter may apply in such a situation’ (para. 75 of the Opinion). In that light, he suggested that the ‘methodology’ developed by the Court in *Aranyosi and Căldăraru* in the context of the EAW ‘can be transposed to a situation in which, following a request for the extradition of a citizen of the Union issued by a third country, the judicial authority of the requested Member State ascertains whether the guarantees laid down in Article 19(2) of the Charter are respected’ (para. 83 of the Opinion; referring to Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, EU:C:2016:198, para. 94).

<sup>137</sup> Case C-182/15 *Petruhhin*, EU:C:2016:630, para. 26.

<sup>138</sup> *Ibid* para. 27.

<sup>139</sup> *Ibid* para. 31 (emphasis added).

<sup>140</sup> *Ibid* para. 33.

<sup>141</sup> *Ibid* paras 34 and 37.

<sup>142</sup> As Costa stresses, ‘neither the AG nor the ECJ at any moment implied that Member States should apply a nationality exception in their extradition traffic with third States; merely that, if they do, they shall dispense comparable treatment to other EU citizens’ (MJ Costa, ‘The Emerging EU Extradition Law: *Petruhhin* and Beyond’ (2017) 8 *New Journal of European Criminal Law* 192, 196).

with reference to potential interferences with freedom of movement under Article 21 TFEU; and that, conversely, it did not engage Article 20 TFEU as a basis for rights in *Petruhhin*. After all, the non-extradition of Mr Petruhhin would coincide with protecting his prospective free movement rights in line with the explained objective of *Ruiz Zambrano* case law while his extradition to Russia would clearly bring about forced departure from the territory of the Union.<sup>143</sup> This point about legal basis separates the foundational and protective narratives in a formal sense. But it is important to remember that a decision taken by a third State – and one that is perfectly valid within the framework of international law – does not have to be taken with ‘due regard’ or indeed any regard to EU law, therefore limiting the prospects of what the Court can actually do about it. In essence, the proportionality framework that Member State national authorities must abide by under the *Ruiz Zambrano* case law is of no consequence for decisions taken by national authorities in Russia.

Turning from form to substance, Mr Petruhhin *had* moved to another Member State and the Court used that actual fact in the moulding of its novel intra-EU solution, the detail of which is returned to below. Meanwhile, it is argued that, even substantively, *Petruhhin* does not fit properly into the movement-*centric* foundational narrative either. It should be emphasised that the Court drew from Article 21 TFEU in *two* different ways in *Petruhhin* – first, because Mr Petruhhin ‘*made use*’ of freedom of movement thereby triggering ‘the scope of application of the Treaties, within the meaning of Article 18 TFEU’;<sup>144</sup> and, second, because his extradition would generate ‘unequal treatment’ that ‘gives rise to a restriction of freedom of movement within the meaning of Article 21 TFEU’,<sup>145</sup> on the other. In other words, the Court used both past/present *and* prospective free movement in its reasoning. However, it did not interrogate the legal dimensions of Mr Petruhhin’s presence in Latvia at either of these two stages of analysis. In particular, we do not know if his presence there was *lawful* with reference to the requirements laid down in Directive 2004/38. That Directive establishes ‘a gradual system as regards the right of residence in the host Member State, which reproduces, in essence, the stages and conditions set out in the various instruments of European Union law and case-law preceding that directive and culminates in the right of permanent residence’.<sup>146</sup> A Union citizen may reside in another State for up to three months without any conditions (Article 6). For periods of

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<sup>143</sup> For example, ‘one possible reading of *Petruhhin* did highlight the protective quality of the Union’s legal order for its citizens and their right to the territory of that Union, manifested in the rights of free movement and residence’ (S Coutts, ‘From Union citizens to national subjects: *Pisciotti*’ (2019) 56 CML Rev 521 at 537). See similarly, 538: ‘[t]he individual’s rights to free movement and residence are diminished less by his remaining in the Union, be it in the requested Member State or the Member State of nationality. It is through the rights of free movement and residence that a broader right to the territory of the Union as a whole is developed’.

<sup>144</sup> Case C-182/15 *Petruhhin*, EU:C:2016:630, para. 31.

<sup>145</sup> *Ibid* para. 33.

<sup>146</sup> Joined Cases C-316/16 and C-424/16 *B and Vomero*, EU:C:2018:256, para. 51.

residence in a host State that exceed three months, the right to reside is subject to the conditions in Article 7(1) and, according to Article 14(2), ‘that right is retained only if the Union citizen and his family members satisfy those conditions’.<sup>147</sup> When the conditions are fulfilled, residence in the host State is lawful. Importantly, Article 24(1) then applies: it guarantees that ‘Union citizens *residing on the basis of this Directive* in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State *within the scope of the Treaty*’.

In *Petruhhin*, the Court never confirms or even refers to the duration of the applicant’s presence in Latvia. It stated that he ‘made use’ of his free movement rights. On that basis alone, his situation fell within the scope of application of the Treaties and therefore triggered the relevance of Article 18 TFEU. The Court then asserted that extraditing him amounted to unequal treatment – without explaining why, notwithstanding the contrary analysis of Advocate General Bot. No reference was made to the conditions established by Directive 2004/38, which means that the legal framework regulating freedom of movement was basically ignored. In *Dano*, concerning equal treatment and eligibility for social assistance, the Court ruled that ‘the principle of non-discrimination, laid down generally in Article 18 TFEU, is given more specific expression in Article 24 of Directive 2004/38 in relation to Union citizens who, like the applicants in the main proceedings, *exercise their right to move and reside within the territory of the Member States*’.<sup>148</sup> Ms Dano was not found not to be residing in the host State ‘on the basis’ of Directive 2004/38 since it was assumed that she did not fulfil the conditions for lawful residence in Article 7. It is true that ‘in contrast to...exclusion from social assistance schemes, extradition to third States is not regulated by EU legislation expressly providing for a different treatment of the host Member State’s nationals and other EU citizens’.<sup>149</sup> However, Directive 2004/38 does not address entitlement to social assistance in the period between three months and five years of residence in the host State i.e. the period at issue in *Dano*. Moreover, both Article 24(1) of the Directive and the relevant part of the judgment in *Dano* are expressed in very general language. If we apply *Petruhhin* analysis to *Dano*, she also ‘made use’ of her right to move and reside and the unequal treatment of her exclusion from social assistance in the host State may well restrict her capacity to (continue to) exercise that right. If, conversely, we apply *Dano* to *Petruhhin*, the basis and especially the duration of his presence in Latvia have to become significant.

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<sup>147</sup> Ibid para. 53. These conditions involve working or being self-employed in the host State under Article 7(1)(a); possessing sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during the period of residence as well as comprehensive sickness insurance under Article 7(1)(b); studying at an accredited host State institution under similar financial conditions under Article 7(1)(c); or being a family member accompanying or joining a Union citizen who satisfies one of the preceding sets of conditions under Article 7(1)(d).

<sup>148</sup> Case C-333/13 *Dano*, EU:C:2014:2358, para. 61 (emphasis added).

<sup>149</sup> M Böse, ‘Mutual Recognition, Extradition to Third Countries and Union Citizenship: *Petruhhin*’ (2017) 54 CML Rev 1781, 1794.

In *Petruhhin*, the Court avoids the problem because ‘a non-discrimination analysis is ultimately displaced by a free movement analysis... [I]mportantly for the solution ultimately adopted by the Court, it is not Article 18 TFEU that is violated by this difference in treatment. Instead, the difference in treatment is characterized as a restriction on movement within the meaning of Article 21 TFEU’.<sup>150</sup> Avoiding a problem does not make it go away. However, if we shift the premise of the analysis yet again, from free movement to the territory of the Union, a more compelling explanation of the Court’s very different approaches comes into focus. In *Dano*, the rootedness of the applicant’s *home* in the host State is never deeply probed. She is denied social assistance, but the host State is not forced to expel her. Should it decide to do so, she can still find a home in the territory of the Union, either in her own State or in any other Member State. In *Petruhhin*, the host State will not remain burdened by the applicant’s presence: he must either be extradited outside the territory of the Union or, as returned to below, removed instead to his home State. On that analysis, it is not that he is more ‘deserving’ of the protection of EU law than Ms Dano but actually that, from the perspective of keeping Union citizens within Union territory, both applicants ‘win’.

In *Petruhhin*, the Court did not refer expressly to the ‘territory of the Union’ but to the AFSJ as conceived in Article 3(2) TEU.<sup>151</sup> Nevertheless, in assessing the proportionality of the restriction relative to the legitimate objective of preventing the risk of impunity, the Court truly animated the AFSJ as the ‘special legal habitat for “European individuals”’ envisioned by Azoulay – not even concerning itself with whether Mr Petruhhin was particularly ‘deserving of protection’ in light of his particular circumstances or not. Interestingly, the Court refers explicitly to ‘territory’ in *Petruhhin* in connection with the territory of a Member State, observing that while ‘the non-extradition of its own nationals is generally counterbalanced by the possibility for the requested Member State to prosecute such nationals for serious offences committed outside its territory, that Member State as a general rule has no jurisdiction to try cases concerning such acts when neither the perpetrator nor the victim of the alleged offence is a national of that Member State’; in that light, ‘[e]xtradition thus allows offences committed in the territory of a State by persons who have fled that territory not to remain unpunished’.<sup>152</sup> National rules allowing extradition to a third State are therefore appropriate, in principle, relative to the public interest of preventing impunity. But in its analysis of ‘whether there is an alternative measure less prejudicial to the exercise of the rights conferred by Article 21 TFEU which would be equally effective in achieving the objective of preventing [that risk]’,<sup>153</sup> the Court reasoned

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<sup>150</sup> Coutts n143 above, 528-529. See similarly, Böse, n149 above, 1785.

<sup>151</sup> Case C-182/15 *Petruhhin*, EU:C:2016:630, para. 36.

<sup>152</sup> *Ibid* para. 39.

<sup>153</sup> *Ibid* para. 41; analysis called into question by Böse on the basis that ‘priority of a less restrictive measure is subject to the condition that it is equally effective to attain the objective pursued. In this regard, the obligation to inform the other Member State in order to trigger the requested person’s surrender to that State might give

on the basis of Union territory as the relevant territorial unit. This legal place is underpinned by the requirement of sincere cooperation outlined in Article 4(3) TEU; by the EAW ('which the European Council has referred to as the "cornerstone" of judicial cooperation'<sup>154</sup>) and other 'numerous instruments of mutual assistance intended to facilitate such cooperation',<sup>155</sup> and by the responsibility of the Union 'in its relations with the wider world, ...to uphold and promote its values and interests and contribute to the protection of its citizens, in accordance with Article 3(5) TEU'.<sup>156</sup> In the intensified register of the AFSJ, the territory of the Union as legal place and common place is therefore articulated in a more complex and multidimensional way than in *Ruiz Zambrano* case law, providing the platform from which the real novelty of the *Petruhhin* case then unfolded: the Court ruled that 'it is necessary, in order to safeguard EU nationals from measures liable to deprive them of the rights of free movement and residence provided for in Article 21 TFEU, while combatting impunity in respect of criminal offences, to apply all the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law'.<sup>157</sup>

In practical terms, this requires that 'the exchange of information with the Member State of which the person concerned is a national must be given priority in order to afford the authorities of that Member State, in so far as they have jurisdiction, pursuant to their national law, to prosecute that person for offences committed outside national territory, the opportunity to issue a European arrest warrant for the purposes of prosecution'.<sup>158</sup> By 'cooperating accordingly with the Member State of which the person concerned is a national *and giving priority to that potential arrest warrant over the extradition request*, the host Member State acts in a manner which is less prejudicial to the exercise of the right to freedom of movement while avoiding, *as far as possible*, the risk that the offence prosecuted will remain unpunished'.<sup>159</sup> For Coutts, this 'neat solution...ensured insofar as possible that the individual remained on the territory of the Union, thereby protecting his or her rights to free movement and residence, whilst at the same time ensuring that he or she faced justice.

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rise to time-consuming procedures and result in impunity if the requested person must be released when the maximum period for detention has expired ... Furthermore, there is no established mechanism for the new procedure and its implementation in court practice. What is the time-limit to issue a European arrest warrant? Which Member State shall be informed if the country of origin and the country of permanent residence differ? Thus, extradition to the third State may prove a more effective means to avoid impunity than the mechanism proposed by the Court and, thus, necessary as required by the proportionality test' (Böse, n149 above, 1791).

<sup>154</sup> Case C-182/15 *Petruhhin*, EU:C:2016:630, para. 43; referring to Case C-388/08 PPU *Leymann and Pustovarov*, EU:C:2008:669, para. 49.

<sup>155</sup> Case C-182/15 *Petruhhin*, EU:C:2016:630, para. 43; referring to Case C-129/14 *Spasic*, EU:C:2014:586.

<sup>156</sup> Case C-182/15 *Petruhhin*, EU:C:2016:630, para. 44.

<sup>157</sup> *Ibid* para. 47.

<sup>158</sup> *Ibid* para. 48.

<sup>159</sup> *Ibid* para. 49 (emphasis added).



Conceptually, the judgment was rooted in a regard for the rights of the individual that was linked to the status of Union citizen and *a certain protective role* of the Union legal order over “its citizens”.<sup>160</sup>

The Court does not formally undermine the extradition framework governed by international law, but it does invent a Union-specific ‘workaround’ to sidestep the implications of it. As in *Ruiz Zambrano* case law, the objective of not depriving a Union citizen of free movement and residence rights is the overt explanation provided (though here using Article 21 and not 20 TFEU). But the creative lengths to which the Court was prepared to go confirm that the AFSJ is a particular *kind* of legal place. In dealing with the criminal behaviour of its citizens, the Court makes ‘a statement concerning *the “right place” for such individuals*. Citizenship can be viewed as an institution that emplaces individuals within particular territories and legal orders, which designates the right place for an individual *in a normative and geographic sense*’.<sup>161</sup> Costa speaks of the ‘meaningful...line that has been drawn between the EU as a criminal justice area (formed primordially by the jurisdictions of the Member States, but now amounting to clearly *more than the mere sum of those parts*) and all other jurisdictions, whereby the first seizes primacy in the prosecution of crimes committed in the territory of the latter, often against local victims’.<sup>162</sup>

There is the irony that ‘the internal extradition system of the EU (the EAW) is far less protective than classic extradition, including in respect of the nationality of the offender’.<sup>163</sup> Nevertheless, Costa highlights the fact that ‘EU citizens are finally drawing advantages from a criminal justice area that, internally, has had them exposed to such onerous and swift mechanisms as the EAW’, attributing to *Petruhhin* a shift from *repressive* to *protective* function for the EAW.<sup>164</sup> In that sense, Iglesias Sánchez’s description of the EAW as ‘as a compensatory measure that somehow outweighs the possibilities offered by free movement’ is almost reversed: the EAW itself provides the *possibilities* in the protective case law narrative.<sup>165</sup> Costa does identify a testing point for the territorial argument in observing that ‘the *Petruhhin* principle does not seem to apply if the Member State of which the person is a national would itself extradite him/her, since in that event one element is missing which is indispensable to elicit the EU citizenship exception: an impairment of free movement’.<sup>166</sup> If a Union citizen has already ‘made use’ of free movement rights, then *Petruhhin* analysis applies. However, if the situation that Costa alludes to concerns what happens *after* the home State issues an EAW, an analogy could be drawn to the discretion retained by Member States with respect to public policy or

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<sup>160</sup> Coutts, n143 above, 522-523 (emphasis added).

<sup>161</sup> Ibid 539 (emphasis added).

<sup>162</sup> Costa, n142 above, 211 (emphasis added).

<sup>163</sup> Ibid 211.

<sup>164</sup> Ibid 214.

<sup>165</sup> Iglesias Sanchez, n112 above, 383.

<sup>166</sup> Costa, n142 above, 211.

public security limits on Article 20 TFEU residence rights: at a certain point, the Court has done what it can within the framework of EU law; and only the Member States can take the final decision.

Crucially, then, the Court cannot guarantee that the citizen's business can be contained within the territory of the Union. In galvanising the Member States as enforcers of EU law, what it imposes amounts to an obligation to *aim* for that outcome: translating hope into legal responsibility in as much as that is possible. The territory of the Union is thus safeguarded by legally induced cooperative mechanisms, demonstrating precisely what sincere cooperation is all about; that 'the European Union and the Member States are, in full mutual respect, to assist *each other* in carrying out tasks which flow from the Treaties'.<sup>167</sup> The resulting interplay does of course, at one level, concern the inside and the outside. Recalling Scott's 'contested transition zone between the territorial and the extraterritorial',<sup>168</sup> EU law cannot reach directly into the decision-making processes of third States, but its effects may still end up being profoundly felt there. But there is also the interplay between the inside *and the other inside* i.e. between the Union and its Member States. In *Petruhhin*, the Court 'in no way implies that EU citizens should not as a matter of principle be extradited to third States; merely that sometimes that is necessary to avoid discrimination and impairment of free movement. Therefore, Member States are not required to adopt this, or any other measure aimed at optimising the applicability of the EU citizenship exception'.<sup>169</sup> However, '*Petruhhin* seems destined to trigger reactions from Member States in that respect'.<sup>170</sup> In particular, Court is '*mandating* legal authorities to *posit and enforce* the distinction between inside and outside as the distinction between an own territory and foreign territories'.<sup>171</sup> The other evolution from *Ruiz Zambrano* seen in this respect is that the obligation created by EU law entails not just a responsibility for one Member State – the Union citizen's home State in that line of case law – but for both home and host States through the cooperative processes of the AFSJ.

What results exemplifies the *additional* character of Union citizenship prescribed by Article 20 TFEU and the additional *protection* offered by the territory of the Union over and above the territories of the Member States per se. In the territory of the Union, 'law can modulate and counterbalance the power that Member States have to shape and to affect, through their nationality and migration laws, the enjoyment of rights by European citizens'.<sup>172</sup> The borders of the Union then become more entrenched through the ambition of protecting its territory and thereby protecting its citizens. However, it should be recalled that the legal place and common place reasoning in *Petruhhin*

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<sup>167</sup> Case C-182/15 *Petruhhin*, EU:C:2016:630, para. 42 (emphasis added).

<sup>168</sup> Scott, n20 above, 1379.

<sup>169</sup> Costa, n142 above, 208.

<sup>170</sup> *Ibid* (emphasis added).

<sup>171</sup> Lindahl, n2 above, 480.

<sup>172</sup> Rauceau, n64 above, 489.

generates borders that are normative as well as geographical.<sup>173</sup> Lenaerts and Gutiérrez-Fons explain this point through the observation that ‘EU citizenship is intended to promote the feeling of *belonging to a community of values that stands up for all its citizens* when they cross the external borders of the EU’.<sup>174</sup> The argument is further supported by the fact that the ‘decision of a Member State to extradite a Union citizen, in a situation such as that of the main proceedings, comes within the scope of Article 18 TFEU and Article 21 TFEU and, therefore, of EU law for the purposes of Article 51(1) of the Charter’.<sup>175</sup> Article 19(2) of the Charter provides that ‘[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’. In *Petruhhin*, the referring court had asked whether it was sufficient that the requesting State is a party to the ECHR. The Court first used the ECtHR’s own finding that ‘[t]he existence of declarations and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the [ECHR]’.<sup>176</sup> Second, following Advocate General Bot, the Court transposed its reasoning from *Aranyosi and Căldăraru* to rule that where ‘the competent authority of the requested Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals in the requesting third State, it is bound to assess the existence of that risk when it is called upon to decide on the extradition of a person to that State’.<sup>177</sup>

The relationship between the Charter and the ECHR is returned to in Section IV.B below. It will also be seen there that the main findings in *Petruhhin* were confirmed in *Pisciotti* even for situations where the EU does have an extradition agreement with the relevant third State.<sup>178</sup> In *Raugevicius*, *Petruhhin* was also applied to requests for surrender to a third State for the purpose not of prosecuting the individual concerned but enforcing a custodial sentence already imposed. Mr Raugevicius, a Lithuanian national, resided in Finland. He was convicted of a drugs offence in Russia in 2011 and given a suspended prison sentence. Later in 2011, a Russian court revoked that suspension because of a

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<sup>173</sup> Lindahl, n2 above, 469.

<sup>174</sup> Lenaerts and Gutiérrez-Fons, n78 above, 763 (emphasis added).

<sup>175</sup> Case C-182/15 *Petruhhin*, EU:C:2016:630, para. 52; see similarly, Case C-473/15 *Schotthöfer and Steiner*, EU:C:2017:633.

<sup>176</sup> Case C-182/15 *Petruhhin*, EU:C:2016:630, para. 57; referring to ECtHR judgment of 28 February 2008 in *Saadi v. Italy*, CE:ECHR:2008:0228JUD003720106, § 147.

<sup>177</sup> Case C-182/15 *Petruhhin*, EU:C:2016:630, para. 58; the Court addressed evidentiary requirements in para. 59, advising that ‘the competent authority of the requested Member State must rely on information that is objective, reliable, specific and properly updated. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the requesting third State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations’.

<sup>178</sup> Case C-191/16 *Pisciotti*, EU:C:2018:222.

breach of supervision obligations. In December 2016, Russia sent a request to the Finnish authorities seeking the arrest and extradition to Russia of Mr Raugevicius for the purpose of enforcing his custodial sentence. In challenging his extradition, Mr Raugevicius stressed ‘that he had lived in Finland for a considerable length of time and that he was the father of two children residing in that Member State who are of Finnish nationality’.<sup>179</sup>

The referring court observed that the European Convention on Extradition, which makes it possible for the requested State to prosecute its own citizens when it does not extradite them, does not require that State to enforce a sentence pronounced by a court of another State party. However, sustaining the theme of cooperation that was central in *Petruhhin*, the Court indicated that ‘there are mechanisms under national law and/or international law which make it possible for those persons to serve their sentences, in particular, in the State of which they are nationals and, in doing so, increase their chances of social reintegration after they have completed their sentences’.<sup>180</sup> The Court pointed in particular to the 1983 Convention on the Transfer of Sentenced Persons, to which all EU Member States and Russia are parties and Article 2 of which allows a person to be transferred to their country of origin to serve a custodial sentence with the objective of furthering their social rehabilitation.<sup>181</sup> The Court also observed that Finnish law makes it possible for its own nationals and foreign nationals permanently residing there to serve a sentence pronounced elsewhere in Finland.<sup>182</sup>

Extrapolating a framework designed for State territories to the composite territory of the Union, the Court concluded that ‘it cannot be ruled out that Mr Raugevicius may be regarded as a foreign national permanently residing in Finland’ for the purposes of relevant Finnish law.<sup>183</sup> On that basis, he could serve his sentence in Finland ‘provided that both Russia and Mr Raugevicius consent to this’.<sup>184</sup> The Court expressly referred to the ‘fundamental’ nature of Union citizenship,<sup>185</sup> and reaffirms that the situation of a Union citizen who has already exercised the right to move and reside falls within the scope of Articles 18 and 21 TFEU. In the context of preventing the risk of impunity, it equated the situation of Finnish nationals and ‘nationals of other Member States who reside permanently in Finland and demonstrate a certain degree of integration into that State’s society’.<sup>186</sup> However, if the national court were to find that Mr Raugevicius is not ‘residing permanently’ in Finland on that basis, his extradition should be resolved on the basis of national or international law, subject

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<sup>179</sup> Case C-247/17 *Raugevicius*, EU:C:2018:898, para. 19.

<sup>180</sup> *Ibid* para. 36.

<sup>181</sup> *Ibid* para. 37.

<sup>182</sup> *Ibid* para. 38.

<sup>183</sup> *Ibid* para. 41. Predicting the application of *Petruhhin* in the context of a ‘rehabilitation exception’, see Costa, n142 above, 202-203.

<sup>184</sup> Case C-247/17 *Raugevicius*, EU:C:2018:898, para. 42.

<sup>185</sup> *Ibid* para. 43.

<sup>186</sup> *Ibid* para. 46; referring to Case C-123/08 *Wolzenburg*, EU:C:2009:616, para. 67.

to the proviso that ‘the extradition will not infringe the rights guaranteed by the Charter of Fundamental Rights of the European Union, in particular Article 19’.<sup>187</sup>

In his Opinion, Advocate General Bot had directly linked the underlying aim of social rehabilitation and the concept of human dignity in Article 1 of the Charter.<sup>188</sup> He further emphasised that ‘the social rehabilitation of the Union citizen in the Member State in which he has become genuinely integrated is not only in his interest, but *also in that of the European Union in general*’,<sup>189</sup> reflecting the element of commonality. Similarly, for Coutts, in the line of case law instituted by *Petruhhin*, ‘we are not dealing with an offence within the Union or one that has affected either the interests of the Union or of its Member States. Rather, we are concerned with a more abstract principle that justice be done more generally’ – in that light, he draws attention to how the Court uses the AFSJ as ‘*a broader normative source* to ground its decisions’.<sup>190</sup> In an interesting way, Mr Raugevicius’ integration into the society of the host State – into a *particular* territorial unit – is what triggered an intention to protect him in the *composite* territory of the Union i.e. ‘against’ the extradition request from outside. Just as in *Petruhhin*, that does not mean that the Union eschews international mechanisms: on the contrary, in *Raugevicius*, it proactively engages them to protect both its citizens and its territorial values. Scott observed the same dynamic in a different context, noting that ‘EU [legislative] measures that incorporate “extraterritorial” triggers also frequently incorporate jurisdictional “safety valves” that are intended to prevent jurisdictional over-reach and to facilitate cooperation and to reduce conflict between States’.<sup>191</sup> Two further findings from her work on the global reach of EU legislation have strong resonance for the judicial methods developed in *Petruhhin* and *Raugevicius*. First, ‘[t]hese mechanisms...create opportunities for continuing dialogue between the EU and third country regulators and entities, setting in train a discursive process rather than an emphatic, one-sided and uncompromising “extraterritorial” application of EU rules’.<sup>192</sup> Second, ‘[i]t is often the case that when the EU relies on novel “extraterritorial” triggers, these triggers take the form of contextual standards rather than rules. Contextual standards render the application of EU law conditional on a case-by-case, contextual, assessment of whether the criteria established

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<sup>187</sup> Case C-247/17 *Raugevicius*, EU:C:2018:898, para. 49; referring to Case C-182/15 *Petruhhin*, EU:C:2016:630, para. 60.

<sup>188</sup> AG Bot in Case C-247/17 *Raugevicius*, EU:C:2018:616, para. 61 of the Opinion.

<sup>189</sup> *Ibid* para. 67 of the Opinion (emphasis added); referring to Joined Cases C-316/16 and C-424/16 *B and Vomero*, EU:C:2018:256, para. 75.

<sup>190</sup> Coutts, n143 above, 529 (emphasis added); he argues that ‘[a]n analogy can be drawn here with [Joined Cases C-331 and C-366/16 *K and HF*, EU:C:2018:296], in which the ECJ found that war crimes *committed outside the Union itself still constitute a violation of the values of the Union* and hence justify expulsion from the territory of a host Member State’ (emphasis added).

<sup>191</sup> Scott, n20 above, 1365; aligning with a basic concern seen across EU citizenship law, she characterises these ‘safety values’ as ‘an expression of the proportionality principle in legal instruments that create over-the-border obligations’ (*ibid*).

<sup>192</sup> *Ibid* 1365.

by an open-ended standard have been met in a specific set of circumstances, rather than on the application of a more clearly delimited but more rigid rule'.<sup>193</sup>

Just as in *Petruhhin*, however, there are notable questions around the Court's foregrounding of freedom of movement while simultaneously bypassing the details of its regulatory framework in *Raugevicius*. In particular, the Court enabled the national authorities to consider a looser conception of 'permanent resident' than the more demanding Union concept created by Article 16 of Directive 2004/38 – which may be less about due recognition of national authority and more because the applicant may not have fulfilled the conditions for permanent residence under EU law. Article 16 provides that 'Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there'. The requirement to reside 'legally' connects to the conditions for lawful residence in Article 7.<sup>194</sup> However, residing legally depends 'not only on territorial and time factors but also on qualitative elements, relating to the level of integration in the host Member State'.<sup>195</sup> Bringing analogous complications for Mr Raugevicius, the Court has ruled in that respect that 'that 'the imposition of a prison sentence by a national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law, with the result that the taking into consideration of periods of imprisonment for the purposes of the acquisition...of the right of permanent residence for the purposes of Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive in establishing that right of residence'.<sup>196</sup> Assessing permanent residence as a concept of Finnish law only avoids the problem; delivering protection for the Union citizen. Similarly, the Court rather brazenly cited *Dano* for the proposition that '[e]very Union citizen may...rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in all situations falling within the scope *ratione materiae* of EU law, and those situations include, as in the dispute in the main proceedings, the exercise of the freedom conferred by Article 21 TFEU'.<sup>197</sup> Yet, as explained in Section IV.A above, the Court in fact significantly reduced the scope of EU equal treatment law in that case.

Other loose ends include the fact that a successful outcome in *Raugevicius*, from the perspective of the Union citizen, depended ultimately on the consent of Russia: this was conceded in one paragraph, as seen above, but the Court then moved directly to its restatement of the fundamental nature of Union citizenship. The judgment was also somewhat coy about the applicant's dual nationality in this case. Legally, it is absolutely right that '[t]he fact that a national of a Member

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<sup>193</sup> Ibid 1367.

<sup>194</sup> See e.g. Joined Cases C-316/16 and C-424/16 *B and Vomero*, EU:C:2018:256, para. 59.

<sup>195</sup> Case C-325/09 *Dias*, EU:C:2011:498, para. 64.

<sup>196</sup> Case C-378/12 *Onuekwere*, EU:C:2014:13, para. 31.

<sup>197</sup> Case C-247/17 *Raugevicius*, EU:C:2018:898, para. 36; referring to Case C-333/13 *Dano*, EU:C:2014:2358, para. 59.

State other than the Member State to which the extradition request was made, such as Mr Raugevicius, also holds the nationality of the third country...cannot deprive the person concerned of the freedoms he derives from EU law as a national of a Member State'.<sup>198</sup> But his 'third State' nationality is Russian i.e. he also holds the nationality of the requesting State.<sup>199</sup> Symbolically, then, by using more neutral 'third State' language, the Court amplifies the inside/outside significance of being a Union citizen. Under the protective narrative, the territory of the Union is the 'right place' for Mr Raugevicius; it is where he 'ought to be' – his true home, requesting State nationality aside. The host State may not be able to keep him there; but it is, once again, under a legal responsibility to try.

A final point to emphasise: by understanding the territory of the Union as a special legal place and a special common place, there are necessarily and inherently systemic elements running through the protective narrative – in particular, with respect to the AFSJ, the idea that 'as an EU citizen, the alleged offender has a legitimate interest in being tried in a criminal justice system committed to a common standard of fundamental rights and procedural safeguards in criminal proceedings'.<sup>200</sup> But the systemic elements do not dominate; crucially, they facilitate rather than work against the protection of the citizen. When that balance is upset, we move to a different narrative.

#### **B. The systemic narrative: subduing EU citizenship in the service of the AFSJ**

More persuasively than the veneration of free movement rights per se, the foundational and protective narratives of the territory of the Union in EU citizenship law share a deeper perspective: that 'leaving European territory means not only leaving Europe in the geographical sense, it also means leaving a community of ideals and values, it means being deprived of a certain mode of existence corresponding to the standards of European society'.<sup>201</sup> It means, in other words, leaving a special legal place and special common place. But does it *always* mean this? In certain judgments concerning the intersection of Union citizenship and the AFSJ, a different narrative prevails. Here, the citizen is either mentioned but not ultimately protected; or not even mentioned at all. Instead, in response to particular instances of confrontation, the primary concern is systemic i.e. for the functioning and continued health of the EU legal order more abstractly. In the systemic narrative, priorities *internal* to the territory of the Union take precedence over the protection of the citizen. Additionally, movement *outside* the territory of the Union – even more specifically, the mandated

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<sup>198</sup> Case C-247/17 *Raugevicius*, EU:C:2018:898, para. 29; referring to Case C-369/90 *Micheletti*, EU:C:1992:295, para. 15.

<sup>199</sup> AG Bot in Case C-247/17 *Raugevicius*, EU:C:2018:616, para. 2 of the Opinion.

<sup>200</sup> Böse, n149 above, 1795.

<sup>201</sup> Azoulaj, n21 above, 181.

transfer of Union citizens to criminal justice regimes in third States – is countenanced in the interests of preserving a greater systemic good. The idea that the borders of the Union are normative as well as physical explains the latter example to some extent. However, the normative *content* of what is sustained within those borders is distorted and ultimately degraded as part of that process.

The judgment in *Pisciotti* provides the first – *internal* – example, bridging well from the protective to the systemic narrative. As noted in Section IV.A, the Court initially followed the method it had developed in *Petruhhin* and, moreover, stretched its application even to situations where the EU has an extradition agreement with the requesting third State – in this case, the USA. Mr Pisciotti, an Italian national, was arrested on a stopover at Frankfurt Airport (as he travelled to Italy from Nigeria) pursuant to a US extradition request in connection with anticompetitive practices. His extradition had already taken place, as a result of which he was convicted and served a prison sentence in the US. Following his release, however, he initiated legal proceedings against Germany, seeking to establish liability for a breach of EU law in connection with allowing his extradition in the first place. Further supporting the idea of freedom of movement as more the means than the end in AFSJ case law, the Court stated that ‘[t]he fact that, when [Mr Pisciotti] was arrested, he was only in transit in Germany is not capable of casting doubt’ on the fact that his situation falls within the scope of the Treaties.<sup>202</sup> It then found that while, ‘[i]n principle, Article 17 of the EU-USA Agreement...allows a Member State, on the basis either of the provisions of a bilateral treaty or rules of its constitutional law, to provide for a particular outcome for its own nationals by prohibiting their extradition...that discretion must still be exercised in accordance with primary law and, in particular, with the rules of the TFEU on equal treatment and the freedom of movement of Union citizens’.<sup>203</sup>

Again evading substantive analysis of the comparability of German nationals and other Member State nationals for the purposes of EU equal treatment law, the Court asserted that ‘*the only question* is whether the Federal Republic of Germany could adopt a course of action with regard to Mr Pisciotti which would be less prejudicial to the exercise of his right to free movement by considering surrendering him to the Italian Republic rather than extraditing him to the United States of America’.<sup>204</sup> It then cited *Petruhhin* and reiterated that ‘the exchange of information with the Member State of which the person concerned is a national must be given priority in order, where relevant, to afford the authorities of that Member State the opportunity to issue a European arrest warrant for the purposes of prosecution’; acknowledging that while ‘that solution was adopted...in a context characterised by the absence of an international agreement on extradition between the European Union and the third State in question, it may be applied in a situation such as that at issue

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<sup>202</sup> Case C-191/16 *Pisciotti*, EU:C:2018:222, para. 34.

<sup>203</sup> *Ibid* paras 41-42.

<sup>204</sup> *Ibid* para. 50 (emphasis added).



in the main proceedings, in which the EU-USA Agreement gives the requested Member State the option of not extraditing its own nationals'.<sup>205</sup> Responding to concerns from some Member States that prioritising a request for surrender on the basis of an EAW could undermine the effectiveness of the EU-USA Agreement, the Court assured that 'a European arrest warrant issued by a Member State other than the requested Member State must, at least, relate to the same offences and...the issuing Member State must have jurisdiction, pursuant to national law, to prosecute that person for such offences, even if committed outside its territory'.<sup>206</sup>

We are firmly in *Petruhhin* territory up to this point. However, in the very final paragraphs of the later judgment, the Court noted, almost in passing, that the 'the consular authorities of the Italian Republic were kept informed of Mr Piscioti's situation before the request for extradition...was granted and that the Italian judicial authorities did not issue a European arrest warrant in respect of Mr Piscioti'.<sup>207</sup> It then framed its answer to the referring court around that act: 'Articles 18 and 21 TFEU must be interpreted as *not precluding* the requested Member State from drawing a distinction, on the basis of a rule of constitutional law, between its nationals and the nationals of other Member States and from granting that extradition whilst not permitting extradition of its own nationals, *provided that the requested Member State has already put the competent authorities of the Member State of which the citizen is a national in a position to seek the surrender of that citizen pursuant to a European arrest warrant and the latter Member State has not taken any action in that regard*'.<sup>208</sup> As a result of that qualification, 'the precise obligation imposed on the Member State of nationality to investigate the possibility of prosecution appears minimal' and, as a result, '[w]e are left not so much with a right of the Union citizen to remain on the territory of the Union, but a right of the Member State of nationality to assert its jurisdiction'.<sup>209</sup>

Coutts reinforces that impression in the suggestion that 'the Court seems to conclude that the next least restrictive measure that would ensure the avoidance of impunity is extradition to the US'; more specifically, he argues that '[t]he Court skips over the possibility that Germany may be in a position to prosecute, simply declaring it to be irrelevant and finds with no further discussion that the "only question" to be answered is whether prosecution is possible by the Member State of nationality. However, there is clearly another possibility and hence another question to be asked. If Germany was in a position to prosecute Mr Piscioti, he would remain on the territory of the Union, an outcome that is demonstrably less restrictive of his rights to free movement and residence in the territory of the

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<sup>205</sup> Ibid paras 51-52.

<sup>206</sup> Ibid para. 54; referring to Case C-182/15 *Petruhhin*, EU:C:2016:630, para. 50.

<sup>207</sup> Case C-191/16 *Pisciotti*, EU:C:2018:222, para. 55.

<sup>208</sup> Ibid para. 56 (emphasis added).

<sup>209</sup> Coutts, n143 above, 523.

Member States of the Union'.<sup>210</sup> Costa raises another problem: whether, especially in cases where issuing an EAW would be 'the sole manner of avoiding extradition', a Member State 'by refraining to act...will be co-producing an effect (a differentiation based on nationality) that, in the light of EU law, is undesirable and unnecessary'.<sup>211</sup>

Clues towards understanding what may have caused the backtracking at the end of the Court's judgment in *Pisciotti* become more apparent in the Opinion of Advocate General Bot i.e. 'several Member States which have submitted observations in these proceedings have emphasised the legal and practical difficulties associated with the approach adopted by the Court in [*Petruhhin*]'.<sup>212</sup> Particular concern was raised about the fact that, 'in most cases, the Member State of which the Union citizen forming the subject of an extradition request is a national is unlikely to be in possession of the information that would enable it to issue a European arrest warrant with a view to prosecution and then to prosecute the person surrendered. In that event, the objective of preventing the risk of impunity would be jeopardised'.<sup>213</sup> The Court ultimately preserves the *Petruhhin* obligation of cooperation on the surface of *Pisciotti*, but significantly dilutes its operation in practice.<sup>214</sup> The citizen is significantly less protected:<sup>215</sup> in this case, Mr Pisciotti's removal from the territory of the Union is absolved in retrospect. But the concerns of certain Member States, who had highlighted the problems of applying *Petruhhin* in practice, are taken seriously.<sup>216</sup> The citizen may lose out, but the functioning of the AFSJ system is protected: after all, sustaining the cooperative processes on which the AFSJ depends relies in turn on the trust that Member States place not only in each other but in the system *itself*. The importance of preventing impunity as a common value of that system is also respected.

Prioritising systemic concerns is fiercely evident in the judgment in *RO*, in which Union citizenship is not mentioned at all: in fact, *RO*'s nationality is never mentioned either. This case – providing the *external* example for the systemic narrative – concerned a preliminary reference from the Irish High Court, asking whether the fact that the UK had notified its intention to withdraw from the Union in accordance with Article 50 TEU should affect the execution of European arrest warrants issued by the UK with respect to allegations of serious crimes. *RO* was in custody in Ireland at the

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<sup>210</sup> Ibid 532.

<sup>211</sup> Costa, n142 above, 204.

<sup>212</sup> AG Bot in Case C-191/16 *Pisciotti*, EU:C:2017:878, para. 51 of the Opinion

<sup>213</sup> Ibid.

<sup>214</sup> E.g. for Coutts, 'the practical importance of *Petruhhin* is diminished and its conceptualization of the individual as a Union citizen is undermined' (n143 above, 523).

<sup>215</sup> Coutts comments in this context on 'the absence in *Pisciotti* of an additional rights-orientated aspect of *Petruhhin* and *Raugevicius*, namely any consideration of the broader principles of Union law and in particular the Charter of Fundamental Rights (CFR), that may operate to protect Mr Pisciotti from removal to the US' (n143 above, 534).

<sup>216</sup> For Coutts, '[w]hat we see in *Pisciotti* is not an obligation placed on the Member State of nationality to protect the rights of individuals. It is Italy's right to be informed that is at stake; it is the right of Member States to assert jurisdiction over their nationals' (n143 above, 536; see similarly, 537-538).

material time, which led to the reference being dealt with under the urgent preliminary ruling procedure. The Court first reinforced the defining qualities of *EU law* in its judgment. Following the template articulated in Opinion 2/13 and since planted consistently across the span of EU systemic coverage, the Court recalled that EU law is based on ‘the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded’.<sup>217</sup> The mutual trust between Member States that results ‘requires, particularly as regards the area of freedom, security and justice, each of those States, *save in exceptional circumstances*, to consider all the other *Member States* to be complying with EU law and particularly with the fundamental rights *recognised by EU law*’.<sup>218</sup> More specifically, the ‘high level of trust which must exist between the Member States’ is the basis of the EAW system, meaning that surrender should be denied only in ‘exceptional circumstances’.<sup>219</sup> In particular, the Framework Decision ‘is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Articles 2 and 6 TEU’.<sup>220</sup> For Advocate General Szpunar, ‘mutual recognition is probably *the EU’s most distinct contribution* to judicial cooperation *between EU Member States’ authorities* and...the flagship instrument in this domain is the Framework Decision’.<sup>221</sup>

Confronting the implications of an Article 50 TEU withdrawal notification for the system of the EAW, the Court ruled that ‘such a notification does not have the effect of suspending the application of EU law in the Member State that has given notice of its intention to withdraw from the European Union and, consequently, EU law, which encompasses the provisions of the Framework Decision and the principles of mutual trust and mutual recognition inherent in that decision, continues in full force and effect in that State *until the time of its actual withdrawal from the European Union*’.<sup>222</sup> More specifically, ‘mere notification’ is not an ‘exceptional circumstance...capable of justifying a refusal to execute a European arrest warrant issued by that Member State’.<sup>223</sup> After all, ‘[w]ithdrawing from the EU, though perhaps not too palatable an option for anyone concerned, is a possibility specifically recognised in Article 50 TEU’.<sup>224</sup> However, the executing judicial authority must ‘examine, after carrying out a specific and precise assessment of the particular case, whether there are substantial

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<sup>217</sup> Case C-327/18 PPU *RO*, EU:C:2018:733, para. 34. For comment, see C Sáenz Pérez, ‘Minister for Justice and Equality v *RO*: Brexit means nothing has changed... yet’ (2019) 44 *EL Rev* 548. Anticipating some of the relevant questions, see A Payter, R Davison and B Lloyd, ‘Extradition Law – Recent Developments and the Potential Impact of Brexit’ (2016) 10 *Criminal Law Reivew* 743. But see also, V Mitsilegas, ‘The Uneasy Relationship between the UK and European Criminal Law: From Opt-Outs to Brexit?’ (2016) 8 *Criminal Law Reivew* 519.

<sup>218</sup> Case C-327/18 PPU *RO*, EU:C:2018:733, para. 34 (emphasis added).

<sup>219</sup> *Ibid*, paras 36 and 39.

<sup>220</sup> *Ibid* para. 41; the Court also referred to the ‘absolute nature of the fundamental right guaranteed by Article 4 of the Charter’, which prohibits torture and inhuman or degrading treatment or punishment.

<sup>221</sup> AG Szpunar in Case C-327/18 PPU *RO*, EU:C:2018:644, para. 42 of the Opinion.

<sup>222</sup> Case C-327/18 PPU *RO*, EU:C:2018:733, para. 45 (emphasis added).

<sup>223</sup> *Ibid* para. 48.

<sup>224</sup> AG Szpunar in Case C-327/18 PPU *RO*, EU:C:2018:644, para. 52 of the Opinion.

grounds for believing that, *after withdrawal from the European Union of the issuing Member State*, the person who is the subject of that arrest warrant is at risk of being deprived of his fundamental rights and the rights derived, in essence, from Articles 26 to 28 of the Framework Decision'.<sup>225</sup>

Up to this point in the judgment, the Court has drawn a clear line between *being* and *not being* an EU Member State: between being inside and being outside of that territory. But things then become much blurrier. The Court recalled that Article 4 of the Charter 'correspond[s]' to Article 3 ECHR.<sup>226</sup> It then stressed that 'in this case, the issuing Member State, namely the United Kingdom, is party to the ECHR and...it has incorporated the provisions of Article 3 of the ECHR into its national law. *Since its continuing participation in that convention is in no way linked to its being a member of the European Union*, the decision of that Member State to withdraw from the Union has no effect on its obligation to have due regard to Article 3 of the ECHR, to which Article 4 of the Charter corresponds, and, consequently, cannot justify the refusal to execute a European arrest warrant on the ground that the person surrendered would run the risk of suffering inhuman or degrading treatment within the meaning of those provisions'.<sup>227</sup> However, that finding sits uneasily with *Petruhhin*, where being party to the ECHR (as Russia is) was necessary but not sufficient.

More remarkably, the Court in *RO* next emphasised that 'Articles 27 and 28 of the Framework Decision respectively reflect Articles 14 and 15 of the European Convention on Extradition of 13 December 1957. As was stated at the hearing before the Court, *the United Kingdom has ratified that convention and has transposed the latter articles into its national law*. It follows that *the rights relied on by RO in those areas are, in essence, covered by the national legislation of the issuing Member State*, irrespective of the withdrawal of that Member State from the European Union'.<sup>228</sup> And even more remarkably still:

As regards the deduction by the issuing Member State of any period of custody served in the executing Member State, in accordance with Article 26 of the Framework Decision, *the United Kingdom has stated that it has also incorporated that obligation into its national law and that it applies that obligation, irrespective of EU law, to any person who is extradited into the United Kingdom*. Since the rights resulting from Articles 26 to 28 of the Framework Decision and the fundamental rights laid down in Article 4 of the Charter *are protected by provisions of national law in cases not only of surrender, but also of extradition*, those rights are not

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<sup>225</sup> Case C-327/18 PPU *RO*, EU:C:2018:733, para. 49 (emphasis added).

<sup>226</sup> *Ibid* para. 50; referring to Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198, para. 86.

<sup>227</sup> Case C-327/18 PPU *RO*, EU:C:2018:733, para. 52 (emphasis added).

<sup>228</sup> *Ibid* para. 57 (emphasis added).

dependent on the application of the Framework Decision in the issuing Member State. It therefore appears, though subject to verification by the referring court, that there is no concrete evidence to suggest that RO will be deprived of the opportunity *to assert those rights before the courts and tribunals of that Member State after its withdrawal* from the European Union.<sup>229</sup>

Advocate General Szpunar could not resist injecting a note of irony on this point: while he agreed that ‘the UK has decided to withdraw from the EU, not to abandon the rule of law or the protection of fundamental rights’ and that there was therefore ‘no basis to question the UK’s continued commitment to fundamental rights’, he asked nevertheless to ‘be forgiven for adding that...as recently as 2016, the then UK Home Secretary [i.e. by the time of RO, the then UK Prime Minister Theresa May] pleaded for the UK to leave the ECHR’.<sup>230</sup> More generally, the line taken by the Court here collapses together the system of EAW and the system of extradition – at least with respect to the UK – despite stressing that the former *replaces* the latter for EU Member States. The element of trust conveyed by the passage extracted above is therefore extended to a *third State’s* national arrangements.

Yet perhaps most surprisingly of all, the Court next watered down the significance of access to the preliminary ruling system for the protection of EU rights. It pointed out that ‘recourse to the mechanism of a preliminary ruling procedure before the Court has not always been available to the courts and tribunals responsible for the application of the European arrest warrant. In particular...only on 1 December 2014, that is, five years after the entry into force of the Treaty of Lisbon, did the Court obtain full jurisdiction to interpret the Framework Decision’<sup>231</sup> – rather conveniently ignoring the fact that the Charter, routinely also placed at the heart of the AFSJ system, was not legally binding until the Lisbon Treaty took effect either. The RO downplaying of the Article 267 TFEU procedure also stands in stark contrast with its characterisation as the ‘keystone’ of the Union’s judicial system in *Commission v Poland*, a system ‘intended to ensure consistency and uniformity in the interpretation of EU law’ and ‘thereby serving to ensure its full effect and its autonomy as well as, ultimately, *the particular nature of the law established by the Treaties*’.<sup>232</sup> Moreover, ‘Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States *and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice*’.<sup>233</sup>

<sup>229</sup> Ibid paras 58-59 (emphasis added).

<sup>230</sup> AG Szpunar in Case C-327/18 PPU RO, EU:C:2018:644, para. 65 and fn54 of the Opinion.

<sup>231</sup> Case C-327/18 PPU RO, EU:C:2018:733, para. 60.

<sup>232</sup> Case C-619/18 *Commission v Poland*, EU:C:2019:531, paras 44-45 (emphasis added).

<sup>233</sup> Ibid para. 47 (emphasis added); referring to Case C-64/16 *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, para. 32 and Case C-216/18 PPU (*Minister for Justice and Equality (Deficiencies in the system of*

For Konstadinides, ‘by elevating effective judicial protection of individuals’ rights under EU law, referred to in Article 19(1) TEU and Article 47 of the Charter, the ECJ is taking ownership of the Charter. Not only does it solidify its reputation as a fundamental rights court, but it also empowers individuals *to defend common values* which are gradually becoming uncommon in some Member States’.<sup>234</sup> And yet, the Court was satisfied in *RO* that ‘the executing judicial authority *is able to presume* that, with respect to the person who is to be surrendered, the issuing Member State will apply the substantive content of the rights derived from the Framework Decision that are applicable in the period subsequent to the surrender, *after the withdrawal of that Member State* from the European Union. Such a presumption can be made *if the national law of the issuing Member State incorporates the substantive content of those rights, particularly because of the continuing participation of that Member State in international conventions* such as the European Convention on Extradition of 13 December 1957 and the ECHR, even after the withdrawal of that Member State from the European Union’.<sup>235</sup> From the perspective of territory as legal place and common place. with strongly protective implications for Union citizens in consequence, the Court’s stifling in *RO* of the particularities of the AFSJ – of the differences between being inside and outside – is simply stunning. There is no reference to the *Petruhhin* line of case law. The ‘citizen’ is not mentioned, never mind protected, anywhere in the judgment. The *European* persona of the post-withdrawal UK almost seamlessly replaces its European *Union* membership.

However, to achieve that outcome, the EU system is itself patently distorted: producing not just about parallel narratives across EU citizenship law but parallel narrative *within* the systemic narrative itself. Is there *some* way to join the framing of the judgment around the common values that underpin *EU law* and the comparably weak guarantees accepted as insurance that standards of protection offered in the territory of the UK both pending *and after* withdrawal from the Union will somehow be interchangeable? The answer lies, somewhat ironically, in the fact that membership of the Union *really* matters. Thus, in territorial terms, there is, for the Court, a far-reaching difference

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*justice* (*LM*), EU:C:2018:586, para. 50. In para. 49 of *Commission v Poland*, the Court underlines the right to effective judicial protection, protected by Articles 6 and 13 ECHR and ‘now reaffirmed by Article 47 of the Charter’.

<sup>234</sup> T Konstadinides, ‘Judicial Independence and the Rule of Law in the Context of Non-Execution of a European Arrest Warrant: *LM*’ (2019) 56 CML Rev 743 at 768 (emphasis added).

<sup>235</sup> Case C-327/18 PPU *RO*, EU:C:2018:733, para. 61 (emphasis added); reiterating that ‘[o]nly if there is concrete evidence to the contrary can the judicial authorities of a Member State refuse to execute the European arrest warrant’ (ibid). AG Szpunar’s expression of the same point was at least framed by *Union law*: ‘[t]here are no tangible indications that the political circumstances preceding, giving rise to, or succeeding the withdrawal notification are such as not to respect the substantive content of the Framework Decision and the fundamental rights enshrined in the Charter’ (Case C-327/18 PPU *RO*, EU:C:2018:644, para. 65 of the Opinion). On the protection of fundamental rights in the UK after Brexit more generally, see T Lock, ‘Human Rights in the UK After Brexit’ (2017) Nov Supp (Brexit Special Extra Issue) *Public Law* 117.

between a State that is/was once inside, and a State that never was.<sup>236</sup> For example, in her analysis of case studies that reflect ‘seeking’ (through acceding) and ‘shunning’ (through withdrawing) membership of the Union, and access to its citizenship in consequence, Shaw establishes that the Union ‘operates with a messy multi-layered constitutional structure and more complex sets of relationships than is often appreciated by those whose classic starting point is...*a binary notion* that a given state is either inside, or outside, the EU’.<sup>237</sup>

The UK’s membership of the Union – and its consequential commitment to and sharing of the common values on which the Union is founded – generates ‘legacy’: a legacy that will continue to mean something in a legal as much as any other sense.<sup>238</sup> In *RO*, the watering down of the legal premises that protect the territory of the Union – already crucial for constructing the foundational narrative and even more so for the protective narrative – suggests that even though the post-Brexit UK will no longer be part of Union territory in a physical sense, it can still be conceived as a part of Union territory within the meaning of Lindahl’s *legal place* and *common place*. In that sense, *RO* brings substance to Lindahl’s hypothesis that ‘if a territory is the concrete unity of normative and physical dimensions, then the relation between territoriality and legal power is far more intimate than meets the eye in this definition’.<sup>239</sup> There are trace elements here of the ‘close connection’ and effects’ doctrines outlined in Section II of this paper, where we already saw that the Union’s physical territory and legal territory are do not correspond in all instances. But in the systemic narrative, the intersection of these ideas with the AFSJ – and with the aim of its future-proofing for post-Brexit scenarios in particular – takes that idea considerably further since membership and nationality connections with the UK would be formally severed. The system and therefore the narrative itself have to work harder to deal with these changes. Even if the UK is not going to be, for example, an EEA member, it is being lined up to occupy a similar legal place; at least for the purposes of EAW-like cooperation in the future. All of this resonates too with Scott’s ‘contested transition zone between the territorial and the extraterritorial’, characterised here by the extension of trust to a non-EU Member State.<sup>240</sup>

The sustainability of that conception is, however, entirely contingent on what actually happens in the forum of the political negotiations. When the *RO* judgment was delivered, it was not

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<sup>236</sup> On the features and significance of ‘Union membership law’, see C Hillion, ‘Withdrawal under Article 50 TEU: An Integration-Friendly Process’ (2018) 55 CML Rev 29 esp. at 52.

<sup>237</sup> J Shaw, ‘“Shunning” and “Seeking” Membership: Rethinking Citizenship Regimes in the European Constitutional Space’ (2019) 8 *Global Constitutionalism*, forthcoming.

<sup>238</sup> ‘Editorial comments – Polar Exploration: Brexit and the Emerging Frontiers of EU Law’ (2018) 55 CML Rev 4 1, 15-16.

<sup>239</sup> Lindahl, n2 above, 478.

<sup>240</sup> Scott, n20 above, 1379.

yet clear whether the withdrawal of the UK from the Union would be ‘orderly’<sup>241</sup> or whether it would even happen at all. The political context was therefore acutely sensitive but also deeply chaotic. An assessment suggesting the actual or potential denigration of UK commitments and values would have been neither demonstrable nor helpful. And asking a national judicial authority somehow to predict what the standards of protection in a post-Brexit UK might be would clearly exceed any realistic expectation. *RO* reflects that context.<sup>242</sup> But neither the citizen nor the territory of the Union as a ‘special’ place finds any explicit reflection there.<sup>243</sup> Does this mean that when systemic concern is prioritised by the Court, the citizen must be left out?

### C. *Wightman*: a route to integrated narratives

When the Court is faced with – confronted by – particularly difficult choices, the examples presented in this paper show a gap in the function of explanation: *situations* are confronted; but critical implications of the Court’s own legal understanding of the EU ‘ecosystem’ tend to be suppressed; in the written judgments at least. This is how we end up with *parallel* narratives occupying the same legal space. The judgment in *Wightman* is, in contrast, perhaps one of the most ‘whole’ judgments that the Court has delivered, opening up the perspective of *integrated* narratives. The central legal question – whether a Member State who has notified its intention to withdraw from the Union may revoke that notification (it may) – is neither here nor there for present purposes; what stands out is the compelling and elegant completeness of the Court’s reasoning.<sup>244</sup> In that sense, different threads of priority are brought together in one place; there is a sense of consolidation. First, drawing an explanatory line straight back to *Van Gend en Loos* and *Costa*, the Court reconfirms that the Treaties established a ‘new legal order, possessing its own institutions, for the benefit of which the Member

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<sup>241</sup> European Council (Art. 50) guidelines following the United Kingdom’s notification under Article 50 TEU, 29 April 2017, para. 4. In AG Szpunar’s words, ‘[w]e know that we know next to nothing about the future legal relationship between the EU and the United Kingdom’ (AG Szpunar in Case C-327/18 PPU *RO*, EU:C:2018:644, para. 1 of the Opinion).

<sup>242</sup> It perhaps also, like *LM*, suggests that the Court will more comfortably take the burden of intervening in especially sensitive political disputes upon itself and other EU institutions) compared to what it will expect from national judicial actors: compare in particular Case C-216/18 PPU (*Minister for Justice and Equality (Deficiencies in the system of justice) (LM)*, EU:C:2018:586 and Case C-619/18 *Commission v Poland*, EU:C:2019:531 with respect to enforcing compliance with the values specified in Article 2 TEU. At the time of writing (July 2019), an appeal in *LM* is pending before the Irish Supreme Court.

<sup>243</sup> AG Szpunar did make one reference to *Petruhhin* to support the remark that ‘also in the case of extradition to a State outside the Union the Court applies the same principles as in *Aranyosi and Căldăraru* when interpreting the Treaty provisions on citizenship and non-discrimination and those of the Charter’ (AG Szpunar in Case C-327/18 PPU *RO*, EU:C:2018:644, para. 68 and fn63 of the Opinion).

<sup>244</sup> For present purposes at least; that is not to say that there are no open questions about the Article 50 process itself; see generally, A Cuyvers, ‘*Wightman*, Brexit, and the sovereign right to remain’ (2019) 56 CML Rev, forthcoming.



States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals'.<sup>245</sup> It then affirms the autonomy of EU law 'with respect both to the law of the Member States and to international law' and reiterates that such autonomy is 'justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the very nature of that law'.<sup>246</sup> The purpose of the Treaties – 'the creation of an ever closer Union among the peoples of Europe' – is acknowledged.<sup>247</sup> As to the kind of Union – the kind of *place* – thereby created, the Court 'underline[s] the importance of the values of liberty and democracy, referred to in the second and fourth recitals of the preamble to the TEU, which are among the common values referred to in Article 2 of that Treaty and in the preamble to the Charter of Fundamental Rights of the European Union, and which thus form part of the very foundations of the European Union legal order'.<sup>248</sup> All of this articulates and explains the legal place and common place characteristics of the Union.

Crucially for present purposes, the Court then gives equal billing to the two groups of beneficiaries articulated in *Van Gend en Loos* – the Member States and individuals. First, with particular resonance for *Wightman* itself, the Court affirmed that 'the European Union is composed of *States which have freely and voluntarily committed themselves to those values*', recalling once again that EU law 'is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values'.<sup>249</sup> Second, it is acknowledged that 'since citizenship of the Union is intended to be the fundamental status of nationals of the Member States...*any withdrawal of a Member State from the European Union is liable to have a considerable impact on the rights of all Union citizens, including, inter alia, their right to free movement, as regards both nationals of the Member State concerned and nationals of other Member States*'.<sup>250</sup> The Court therefore concludes that '[i]n those circumstances, given that a State cannot be forced to accede to the European Union against its will, neither can it be forced to withdraw from the European Union against its will'.<sup>251</sup>

In *Wightman*, the building blocks of the Union territory as a special legal place and a special common place picked out in different narratives across this paper are present now in one place: the narratives are integrated. In this instance, the State 'wins' but that is not inevitable. The Court refers once again to the free movement rights of Union citizens; but that does not guarantee that citizens

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<sup>245</sup> Case C-621/18 *Wightman*, EU:C:2018:999, para. 44.

<sup>246</sup> *Ibid* para. 45.

<sup>247</sup> *Ibid* para. 61.

<sup>248</sup> *Ibid* para. 62.

<sup>249</sup> *Ibid* para. 63 (emphasis added). The Court then repeatedly casts the decision of a Member State to leave the European Union in the language of sovereignty: see paras 50, 56-57, 59 and 72.

<sup>250</sup> *Ibid* para. 64 (emphasis added).

<sup>251</sup> *Ibid* para. 65.

will ‘win’ in that respect in all Brexit situations. For example, I think that it is highly unlikely that free movement will be conferred *judicially* on UK nationals who reside in other EU Member States following Brexit;<sup>252</sup> though the Court may well have protected Union citizens had European Parliament elections not been held in the UK in June 2019, which was a serious possibility at the time.<sup>253</sup> Raucea rightly characterises ‘the emergence of the territory of the Union as a collective good that belongs to EU citizens and that, then, needs to be distributed among European citizens *in fact*, and not only on paper’.<sup>254</sup> But it is necessary that the different actors and different interests involved in the production as well as the sharing of this ‘collective good’ are acknowledged and considered. There may be disagreement over outcome but there should not be (conscious) gaps in articulation or explanation.

The integrated narrative does provoke a challenge: not to see every outcome that strengthens the EU legal order as a ‘loss’ for the citizen. This point is not made to suggest that examples of poor explanation and/or confrontation in the case law should just be overlooked or excused. But where reasonable accommodation of competing (or even just multiple) interests are articulated and openly weighed, however, it is also in the interest of Union citizens that the Union legal system is robust – and that *it* is protected. The concept of Union territory can accommodate all of these objectives: it constitutes a physical place within which Union citizenship rights, including but not only freedom of movement and residence, are realised; and also a place shielded not just by physical borders but through respect for, and enforcement of, the commonality of rights and values committed to by both national and Union institutions. For Azoulai, a deeper Union citizenship status lay precisely in the hope that ‘that a sense of connection to the whole can be revealed through the judicial consideration of socially contested or morally troubling cases, and that this consideration is driven by the introduction of a metaphorical statement (the “territory of the Union”) in the legal discourse’.<sup>255</sup> He is right to caution that ‘[t]o go beyond the limited possibilities offered by a series of individual cases would require the support of the main European and national players. Only if this – extremely unlikely – event were to occur could this legal metaphor become anything more’.<sup>256</sup> Integrating the parallel

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<sup>252</sup> Article 79 TFEU provides that ‘1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas ... (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States’.

<sup>253</sup> See e.g. S Peers ‘Brexit and Extending EU Membership: The Legal Issues’, 21 March 2019, at <http://eulawanalysis.blogspot.com/2019/03/brexit-and-extending-eu-membership.html>; with links to different legal views on the requirement to hold the elections in the context of Brexit.

<sup>254</sup> Raucea, n64 above, 490 (emphasis in original).

<sup>255</sup> Azoulai, n21 above, 203.

<sup>256</sup> *Ibid.*

narratives on territory and Union citizenship identified in this paper provides a route through this dilemma. Moreover, the Court's judgment in *Wightman* shows that it is entirely possible.

## V. Conclusion

This paper has investigated the growing significance of the territory of the Union in EU citizenship law, disclosing different parallel narratives in that context. First, there is a 'foundational' narrative, ostensibly rooted in the facilitation and preservation of freedom of movement and residence but connected more substantively, in reality, to the idea of the Union as a distinctive place defined by distinctive rights and values. As the foundational narrative evolves, that wider as well as deeper dimension of its purpose has unfolded gradually in the relevant case law. Second, in the 'protective' narrative, the status of Union citizenship intersects with the purposes and qualities of the AFSJ. It was shown that the Court's primary concern in this line of case law is to keep the business of Union citizens within the territory of the Union as much as possible. The purpose here is to protect the Union citizen from the uncertain consequences of exposure to 'outside'. However, third, in the 'systemic' narrative, the Union citizen is either, in result or in reasoning, an absent figure. In other words, the Court explains things through a different dialect here; without express consideration of the implications for Union citizens and even in apparent contradiction to obligations spelled out under the other narratives.

The three narratives of territory and Union citizenship are parallel in a formal as well as substantive sense. For example, the foundational narrative is built on Article 20 TFEU; while the protective narrative is built instead on Article 21 TFEU. The significance of free movement rights for Union citizenship permeates both sets of judgments; but its placement and its purpose in the different narratives changes, shifting from central to instrumental to absent. Importantly, however, all three narratives share a sense of contributing to the kind of legal place and common place that the Union actually is: to defining its *specialness*, more specifically, along territorial lines. In that light, the territory of the Union, like Union citizenship, has added meaning and significance – it is not, in other words, just a shorthand descriptor of the 28 territorial units that comprise it. State territories have joined together and created the territory of the Union, which has become something greater than the sum of those parts precisely through the process of giving legal meaning(s) to it. Nevertheless, on the basis of sincere cooperation, it is also true that the Union depends ultimately on the Member States to sustain *its* territory.

The distinctive character of EU law and of the mechanisms and processes that it produces is ultimately central to the Court's construction and invocation of territory as a legal construct. As would be expected, the added value of Union territory in that respect comes into sharpest relief when Union

citizens are potentially pushed beyond its borders. Most basically, these situations force consideration of what is different between the inside and the outside; and of which inside values, ultimately, are worth fighting for. In the foundational and protective narratives, however, the physical and normative borders of Union territory essentially coincide. In the systemic narrative, things become more complicated as competing internal tensions are laid bare. Where State interests are privileged in *Pisciotti*, there is justifiable criticism of how the protection promised by case law in the protective narrative then contracts, without that being clearly explained. Where post-Brexit relations with the UK are shaped in *RO*, the judgment swings disconcertingly between reaffirming the specialness of the Union as legal place and common place, on the one hand, and suppressing precisely the features and legal mechanisms that make it so, on the other. Mapping the fundamentals of the narratives themselves, all three of the basic components of the AFSJ – *freedom* (movement), *security* (protection) and *justice* (as a value protected by the system) – must somehow be kept in balance.

It was argued that it is only by integrating the parallel narratives identified here that the full and remarkable complexity of the Union and of its legal order as well as its citizenship is both reflected and progressed. In this sense, it is ‘possible to transform the constitutional intentions expressed in the Treaty provisions on EU citizenship into a living truth without upsetting the constitutional balance set out in the Treaties’.<sup>257</sup> Failing more consistently to confront the implications of continuing down the path of parallel narratives embeds not just benign but ultimately corrosive ambiguity with respect to the judicial contribution. This argument is certainly not about defending or excusing weakening protection for Union citizens. On the contrary, the judgment in *Wightman* provides a blueprint for a most necessary ‘process...enabling the European citizen to become *increasingly* relevant as a protagonist of European integration’.<sup>258</sup> Importantly, though, while ‘[t]he Court will obviously play a part in shaping the scope of the status of this new, strong European citizenship’, it is also true that ‘[t]he main weight of the challenge...does not currently lie on the shoulders of the lawyers, but on those of the citizens themselves. It is up to the citizens to decide...if the Union we are currently constructing is worth the effort’.<sup>259</sup> If Union citizenship is the fundamental status of Member State nationals, then high demands for their protection are an inherent part of the Union system: and they must be appreciated as such. But an integrated narrative argument does perhaps challenge us to reconsider how we understand the idea of ‘losing’ a case in EU citizenship law; and to move beyond pitching ‘the citizen’ and/or ‘the State’ and/or ‘the EU’ against each other. The EU system is *for* the Member States and *for* Union citizens. There is really no point to it otherwise.

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<sup>257</sup> Lenaerts and Gutiérrez-Fons, n78 above, 752; these authors emphasise the importance of democracy in that respect.

<sup>258</sup> Sarmiento and Sharpston, n127 above, 241 (emphasis added).

<sup>259</sup> *Ibid* 242.