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ARTICLES
SPECIAL SECTION – SOCIAL INTEGRATION IN EU LAW:
CONTENT, LIMITS AND FUNCTIONS OF AN ELUSIVE NOTION

THE ABSENCE OF INTEGRATION AND THE RESPONSIBILISATION OF UNION CITIZENSHIP

STEPHEN COUTTS*

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ABSTRACT: Union citizenship has witnessed a reactive turn in recent years with citizens' rights being more easily restricted. Key to this development is a shift in the use of the concept of integration. This article traces this development through two key areas of law, namely access to social benefits and the effect of criminal behaviour on citizens' rights. It further argues that this shift in the use of integration entails a greater emphasis on the agency of the individual and the responsibilisation of the citizen. An image of the "good EU citizen" emerges as productive and law-abiding.

KEYWORDS: EU citizenship – social benefits – criminal law – agency – Directive 2004/38/EC – responsibilisation.

I. INTRODUCTION

Union citizenship has been experiencing a regressive phase.[1] Early advances in Union citizenship as the fundamental status of nationals of the Member States were secured

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[1] See in particular accounts by N. NIC SHUIBHNE, *Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, p. 889 *et seq.*; D. THYM, *The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens*, in *Common Market Law Review*, 2014, p. 17 *et seq.*; E. SPAVENTA, *Earned Citizenship: Understanding Union Citizenship Through Its Scope*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, p. 204 *et seq.*

through a robust interpretation of Treaty rights to free movement and especially non-discrimination, reinforced by legislative developments, notably Directive 2004/38/EC (Citizenship Directive).[2] Developments over the last decade across a number of fields, in particular in the field of social benefits and residence rights, have led to a reversal of this trend and a restriction of rights. A growing body of citizens find themselves excluded from the enjoyment of many of the rights of that fundamental status. This has taken place both at the level of national law and most notably in the jurisprudence of the Court of Justice.[3]

The causes of this shift in the case-law of the Court of Justice are many and varied and, as always with judicial developments, difficult to connect to specific social and legal developments.[4] The political environment and the growing popular and political unease with the consequences of Union citizenship in a context of migration concerns have no doubt contributed.[5] Related to this, there is a constitutional argument that this shift represents a not unproblematic rebalancing of the federal bargain in the context of Union citizenship.[6] Finally, there is a doctrinal argument that recent case-law operates as something of a corrective to questionable interpretations of the underlying legislative framework. This interpretation, it is argued, led to an overly individualised test, applied with difficulty by national administrators and resulted in a degree incoherence and even inequality in the operation of Union citizenship.

Regardless of the precise reasons for this shift in the direction of the jurisprudence, key to its operation is a particular legal concept developed by the Court of Justice and one that is now central to the operation and conceptual underpinnings of Union citizenship,

[2] See the critical account of K. HAILBRONNER, *Union Citizenship and Access to Social Benefits*, in *Common Market Law Review*, 2005, p. 1245 *et seq.* For a more positive account see D. KOSTAKOPOULOU, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, in *Modern Law Review*, 2005, p. 233 *et seq*.

[3] See for example restrictions on rights of family reunification of Union citizens in Ireland catalogued in P. BRAZIL, *The Citizens Directive in Irish Law: A Cautionary Tale*, in *Irish Journal of European Law*, 2016, p. 11 *et seq.* and the application of Union citizenship law in the UK in C. O'BRIEN, *Civis Capitalist Sum: Class as the New Guiding Princple of EU Free Movement Rights*, in *Common Market Law Review*, 2016, p. 937 *et seq*.

[4] Although some have faced this necessary task. See in particular contributions to D. THYM (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU*, Oxford: Hart, 2017.

[5] See for example the ease with which the United Kingdom government obtained concessions on citizens' rights in its attempted renegotiation of EU membership. See European Council Conclusions of 18-19 Feburary 2016. See S. REYNOLDS, *(De)Constructing the Road to Brexit: Paving the Way to Further Limitations on Free Movement and Equal Treatment*, in D. THYM (ed.), *Questioning EU Citizenship*, cit., p. 57 *et seq*. See also C. O'BRIEN, *The ECJ Sacrifices EU Citizenship in Vain:* Commission v United Kingdom, in *Common Market Law Review*, 2017, p. 209, noting that the "[t]he ECJ has played politics and lost".

[6] N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen when the Polity Bargain is Privileged?*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 147 *et seq*.

that of "social integration".[7] This concept, used initially to strengthen the rights of Union citizens, is now used as a justification to restrict and condition rights. It is now used to both include and exclude individual Union citizens, depending on the precise factual matrix involved. For it is the limits to, or absence of, integration that the Court has focused on in recent years, implicitly or explicitly. The purpose of this contribution is to outline this development across two fields in particular – economic activity and criminal activity – and their impact on the enjoyment of rights by Union citizens. The argument is that this regressive turn, and the shift in the use of integration as a concept in the field of Union citizenship law, has in fact altered the nature of Union citizenship and has responsibilised the Union citizen. The individual is rendered responsible for his integration into the society of the host Member State. This has led to a greater degree of imputed agency on the part of the Union citizen, an agency however that is used to justify exclusion.

A first section will outline the underlying dimension of Union citizenship in question, namely Union citizenship as a status of integration and how the concept of integration has traditionally interacted with rights. The second and third sections will outline the jurisprudence of the Court in the fields of social benefits and criminal law respectively, focusing on how these cases give rise to a presumption of a lack of integration on the part of Union citizens. This will be followed by a fourth section arguing that these cases represent an evolution of the concept of social integration, placing a greater emphasis on the role and responsibilities of the individual Union citizen for the integration process. It is *through* integration that responsibilities and certain normative elements to Union citizenship emerge.

II. Union citizenship as a status of integration: being and time and the passive citizen

Union citizenship is a multi-faceted institution that can be understood in various ways. It can be understood politically, as a status of identification with and participation in the collective governance of a particular political community, namely the European Union.[8] It can also be understood legally, as a constitutional status attributed to individual na-

[7] For an overview see the work of Azoulai and Barbou des Places, in particular L. Azoulai, *La citoyenneté européenne, un statut d'intégration sociale*, in G. Cohen-Jonathan, V. Constantinesco, V. Michel (eds), *Chemins d'Europe. Mélanges en l'honneur de Jean Paul Jacqué*, Paris: Dalloz, 2010, p. 1 *et seq*., and S. Barbou des Places, *The Integrated Person in EU Law*, in L. Azoulai, S. Barbou des Places, E. Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities*, Oxford: Hart, 2016, p. 186 *et seq*.

[8] For an early evaluation of Union citizenship as a vehicle for political participation in the Union in various ways see A. Wiener, *European Citizenship Practice: Building Institutions of a Non-State*, Boulder: Westview Press, 1998, and a more recent (and somewhat pessimistic) consideration in A. Wiener, *Going Home? "European" Citizenship Practice Today*, in D. Kochenov (ed.), *EU Citizenship and Federalism*, cit., p. 243 *et seq*. For a consideration of the political identity and community building possibilities of Union citizenship see I. Pawel Karolewski, *Citizenship and Collective Identity in Europe*, Abingdon-on-Thames: Routledge, 2010.

tionals of Member States, which carries with it a number of rights, principally amongst them the rights of free movement and non-discrimination. The legal status, which will be the subject of this article, is primarily[9] a horizontal one exercised not *vis-à-vis* the Union as such but *vis-à-vis* other Member States within the Union. It is therefore, as put by Magnette, a set of national rights guaranteed supranationally in the context of an "isopolity".[10] It essentially extends national rights to a certain category of privileged non-nationals, members of associated states. In terms of the broader implications for the political community in the Union, Union citizenship blurs the boundaries between the individual political communities represented by the Member States, rendering them more porous and open to the inclusion of nationals of other Member States.[11] For the individual therefore Union citizenship represents a latent right to move to and become part of other national communities within the Union, revealing, in Strumia's terms, an underlying logic of mutual recognition of belonging within the Union.[12]

Union citizenship can therefore be conceived of as a right to acquire membership in another Member State of the Union; indeed, this conception of Union citizenship has recently been given a strong endorsement by the Court of Justice in *Lounes*.[13] However, this right is not uniform or instantaneous, but variable and acquired overtime and under certain conditions. The concept of integration has come to play a central role in the operation of this dynamic process. Integration into the society of the host Member State is said to be the ultimate goal of Union citizenship.[14] The individual Union citizen is therefore rendered "integrable" in the eyes of Union law.[15] A potential member of the

[9] There is a vertical or supranational dimension to Union citizenship, exercisable against the Union or where the Union directly intervenes to protect certain rights *vis-à-vis* even the Member State of origin. While traditionally a less important dimension of Union citizenship, it has been developing somewhat in recent years. See in particular for example the citizens' initiative on the legislative side and the *Zambrano* (Court of Justice, judgment of 8 March 2011, case C-34/09, *Zambrano* [GC]) line of case-law, recently re-stated and developed in Court of Justice, judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez*. See also Court of Justice, judgment of 6 October 2015, case C-650/13, *Delvigne*, and a comment highlighting both the political but also supranational nature of the right identified in that case in S. COUTTS, Delvigne*: A Multi-Levelled Political Citizenship*, in *European Law Review*, 2017, p. 867 *et seq*.

[10] P. MAGNETTE, *La Citoyennéte européenne*, Bruxelles: Éditions de l'Université de Bruxelles, 1999.

[11] See in particular D. KOSTAKOPOULOU, *European Citizenship: Writing the Future*, in *European Law Journal*, 2007, p. 623 *et seq*.

[12] F. STRUMIA, *Supranational Citizenship and the Challenge of Diversity: Immigrants, Citizens and Member States in the EU*, Leiden: Martinus Nijhoff Publishers, 2013.

[13] Court of Justice, judgment of 14 November 2017, case C-165/16, *Lounes* [GC], with the Court effectively finding that naturalization is the natural continuum (and one must assume end-point) of the same process of social integration reflected in and encouraged by Union citizenship itself. See in particular paras 56-58.

[14] Perhaps culminating in naturalisation see *ibidem*.

[15] L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT, *Being a Person in the European Union*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, cit., p. 7.

host society, membership of which only needs to be activated and developed through a process of "integration".

This logic of integration has therefore informed the legal construction and operation of Union citizenship. It has, in short, become a status of integration.[16] This has been achieved primarily via its interaction with the concept of rights. Integration and rights have, in the context of Union citizenship, taken on a complementary and mutually reinforcing character. Rights are at the same time the means and the object of the integration of the individual. A set of rights in the host Member State are initially allocated to an individual to enable him or her to integrate into that society, including secure rights of residence and equal treatment, endowing the individual with security and equality regarding his or her place in the host society. At the same time after a period of residence (acting as a proxy for integration), those rights are strengthened and the conditions for them are relaxed. There is therefore generally a positive feedback loop between rights and integration with rights providing the foundations for integration, which in turn leads to the acquisition (or to be more accurate, the strengthening) of rights. Traditionally, there has been a progressive and unidirectional process of integration in which rights play a key role. As has been acknowledged by the Court,[17] the Citizenship Directive itself and the scheme of rights allocation it establishes reflect this rights-integration dynamic, with the Directive intended to be a "genuine vehicle for integration into the society of the host Member State".[18]

What is striking about the process of integration (for it is a process) of the individual Union citizen is its passive character. Barbou des Places notes the embedded character of the Union citizen, his or her existence as being *situated* rather than free floating and detached.[19] Azoulai similarly points out the insertion of the individual into specific social institutions of the host society.[20] A narrative is typically deployed of the deserving or undeserving citizen. However, it is a strangely objectified existence; the individual is assessed in the context of the social life he or she has constructed in the host society almost as a set of objective facts, divorced from the agency or intentions or normative or attitudinal orientations of the individual towards that host society. Despite the rich connotations of the concept of integration, focusing on the development of a very particular and consequential relationship or social bond between the heretofore "other" individual and the new social collective known as the "society of the home Member State", the actual process and the criteria by which that integration or process is measured are remarkably thin, at least formally. The only true criteria identified in the legislation are

[16] L. AZOULAI, *La citoyenneté européenne, un statut d'intégration sociale*, cit.

[17] For the paradigmatic expression of this conceptualisation of the Directive see again *Lounes* [GC], cit.

[18] Directive 2004/38, recital 18.

[19] S. BARBOU DES PLACES, *The Integrated Person in EU Law*, cit.

[20] L. AZOULAI, *The European Individual as Part of Collective Entities (Market, Family, Society)*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, cit., p. 203 *et seq.*

simply residence and duration of that residence; being and time in the words of Somek.[21] Mere presence, over a sufficient period of time, was deemed to somehow amount to the integration of the individual. Residence as a proxy for integration.[22] Union citizenship in this vision is overwhelmingly passive and strangely devoid of any agency on the part of the individual citizen.

III. The reactive turn: the indigent and the criminal and the absence of integration

The noticeable shift in the case-law is well-documented elsewhere and the below summary is brief, intended as it is to simply provide an overview of these doctrinal developments.[23] These developments will be presented in order to highlight the manner in which certain duties or responsibilities have emerged in more recent trends in Union citizenship through the exclusion of certain individuals, namely those lacking in economic self-sufficiency or activity and those convicted of criminal activity. The developments in both fields, it should be noted, have been judicially-led, although they presumably have not been unwelcome on the part of Member State governments.[24] It is also worth pointing out that in terms of the relationship between the legislature and the judiciary or – to put it another way, the techniques used by the Court of Justice in interpreting the underlying legislation and the consequential degree of departure or otherwise from the strict text of the legislative provisions – the Court has in fact taken opposing stances.[25] In the field of social benefits it has been accused of a too rigid approach

[21] A. Somek, *Solidarity Decomposed: Being and Time in European Citizenship*, in *European Law Review*, 2007, p. 787 *et seq*. Whereas Barbou des Places notes the socially embedded nature and demarketisation of Union citizenship effected by the operation of the concept of integration, Somek's piece (and indeed other work) focuses on the disembedded and individualist, even *bougeois*, nature of Union citizenship as it emerged from the legislative and judicial practice.

[22] See for example Court of Justice, judgment of 6 October 2009, case C-123/08, *Wolzenburg* [GC], in which the Court of Justice accepted residence of five years as a proxy for integration and a link with the host Member State comparable to nationality as applied by the Dutch government in the operation of the Council Framework Decision 2008/909/JHA of 29 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union.

[23] See in particular N. Nic Shuibhne, *Limits Rising, Duties Ascending*, cit., and E. Spaventa, *Earned Citizenship*, cit. See in general D. Thym (ed.), *Questioning EU Citizenship*, cit.

[24] See for example the willingness of the European Council to compromise on both welfare exports and security based restrictions on citizens' rights in the aborted deal to avoid Brexit. See European Council Conclusions of 18-19 Feburary 2016, cit. See the useful analysis in S. Reynolds, *(De)Constructing the Road to Brexit*, cit.

[25] I am grateful to Martijn van den Brink for pointing this out.

towards the text of the Directive,[26] whereas in the field of criminal law it has been accused of ignoring the text of the Directive. However, if the *means* have been different in the two strands of case-law, the *outcome* is broadly similar; a greater restriction of the rights of individual Union citizens in cases before the Court of Justice.

III.1. Economic activity and access to social benefits

In the field of social benefits the Court of Justice has recently conducted what amounts to a near *volte-face* in its jurisprudence on the rights of economically inactive migrant Union citizens to equal treatment and in particular the right to access welfare payments in host Member States on the same basis as nationals. Early case-law limited the effect of the conditions and limitations on the right to equal treatment ("counter-limits" so to speak) in this field by reading the secondary legislation (initially the Citizenship Directive and the residence Directives)[27] in light of primary law and in particular the directly effective right to equal treatment found in Art. 18 TFEU, requiring an individualised assessment and an application of the proportionality principle. This body of jurisprudence has recently been reversed, with the Court now establishing the primacy of the Citizenship Directive as the operationally relevant legal instrument, allowing Member States to apply its provisions in a strict and generalised manner.

The early case-law of the Court in this field is well-known for its progressive and holistic interpretation of the relevant law, leading to strengthened rights for individual Union citizens at the expense of Member State control over welfare policies with respect to non-economically active Union citizens. In *Grzelczyk* the Court, alongside introducing the by now ubiquitous and somewhat Delphic statement that Union citizenship was "destined to become the fundamental status of nationals of the Members States",[28] also found that Member States had, through the concept of Union citizenship, accepted a "certain degree of solidarity" with nationals of other Member States such that access to benefits on the same basis as nationals could only be refused if necessary to ensure a certain degree of integration or genuine connection with the society of the host Member State.[29] In *Bidar*, the Court of Justice found that while the principle of equal treatment in the field of social benefits could in theory be legitimately limited, in particular in

[26] The criticism could be reformulated in a perhaps stronger form as ignoring the constitutional context of the underlying legislation, namely the directly effective rights contained in Art. 20 TFEU, and the effect this has, or should have, on the interpretation of the legislation.

[27] Directive 90/364/EEC of the Council of 8 June 1990 on the right of residence, Directive 90/365/EEC of the Council of 24 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity and Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students.

[28] Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31.

[29] See *ibid.*, para. 44, where the Court speaks of a "certain degree of solidarity" that must be shown migrant Union citizens.

the interest of ensuring a sufficient link with the society of the host Member State, any such limitation would need to be compatible with the principle of proportionality. In particular, the degree of integration of the Union citizen concerned in the host society would have to be taken into account, thus ensuring that the longer a Union citizen's residence and the greater his or her integration the more rights he or she would enjoy.[30] In *Trojani*[31] the Court clarified (or perhaps failed to clarify) the relationship between applying for welfare assistance and the right of residence, which was under the then residence Directive[32] (and is similarly today under the Citizenship Directive) conditional on sufficient resources. In *Trojani* it found that that while applying for welfare benefits may call into question the residence rights of the Union citizen, under no circumstances could the withdrawal of residence rights be an *automatic* consequence of any such application.[33] Before any expulsion could take place it must be demonstrated that the Union citizen constituted an unreasonable burden on the host Member State, necessitating, it may be assumed, an individualised assessment taking into account all the relevant circumstances and applying the principle of proportionality.[34]

Indeed, this interpretation was maintained by the Court of Justice in the more recent case of *Brey*, in hindsight the precursor to the reactive turn in the Court's jurisprudence. In *Brey* the Court, while noting that the right of residence may be called into question by an application for welfare benefits, stressed that this could only take place following a case-by-case assessment, taking into account different circumstances of the case.[35] However, in *Brey* the Court also found that the rights of Union citizens can "be subordinated to the legitimate interests of the Member States [including] the protection of their public finances".[36]

It was this part of the judgment which was subsequently picked up and developed by the Court in *Dano*, which, in a striking phrase, found that "a Member State must [...] have the possibility [...] of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement *solely* in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence".[37] This was achieved by linking the right to equal

[30] Court of Justice, judgment of 15 March 2005, case C-209/03, *Bidar* [GC].

[31] Court of Justice, judgment of 7 September 2004, case C-456/02, *Trojani* [GC].

[32] Directive 90/364, cit.

[33] *Trojani* [GC], cit., para. 45.

[34] The result being a kind of self-reinforcing dynamic between EU rights and national rights and rights to non-discrimination and a right to residence as pointed out in N. Nic Shuibhne, *The Third Age of EU Citizenship*, in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge: Cambridge University Press, 2012, p. 331 *et seq*.

[35] Court of Justice, judgment of 19 September 2013, case C-140/12, *Brey*, para. 67.

[36] *Ibid*., para. 55.

[37] Court of Justice, judgment of 11 November 2014, case C-333/13, *Dano* [GC], para. 78, emphasis added. Of course nothing in the description of the case indicated that Elisabeta Dano and her son had moved to

treatment to residence on the basis of the directive. It was stressed that Art. 24, para. 1, of the Citizenship Directive grants a right of equal treatment to Union citizens resident in another Member State "*on the basis of the Directive*".[38] In effect, this amounted to the Court using the conditions contained in the provisions of the directive relative to lawful residence, and in particular conditions of economic activity or self-sufficiency contained in Art. 7 of the Directive, as conditions to the right of equal treatment contained in Art. 24, para. 1; residence being the bridge between conditions and the right to equal treatment.

The Directive, and the conditions it contains, now appears to constitute the sole reference point for the Court in determining the rights of Union citizens in host member states and hence the degree of their inclusion. Note the absence in *Dano* of any reference to residence on an alternative basis, in particular Art. 21 TFEU or equally an alternative right to non-discrimination such as Art. 18 TFEU, as occurred in earlier case-law.[39] What this means in practice is that it is the Directive alone and the conditions and limitations it contains, that determines the extent to which an individual is entitled to equal treatment and hence access to benefits on the same basis as nationals. From a doctrinal perspective, the Directive is no longer read in light of the primary law rights contained in Arts 21 and 18 and subject to appropriate limits, including a test of proportionality, on foot of those rights.[40]

This reading has been confirmed in the subsequent cases of *Alimanovic*[41] and *Commission v. UK*.[42] In *Alimanovic* what was at stake was not an assessment of the conditions of residence in the Directive but rather the limitations on equal treatment contained in its Art. 24, para. 2. Mrs. Alimanovic and her daughters were deemed jobseekers under Art. 14 of the Directive after having lost their jobs and remaining unemployed for a period of six months. They were therefore still legally resident in the host Member State (Germany) but unfortunately their residence was of the wrong kind and could legitimately be subjected to the limitation on the right to non-discrimination con-

Germany *solely* to claim social assistance. Indeed, what seems problematic about the statement is imputing a primary and exclusive motive to economically inactive migrant Union citizens to acquire social assistance whereas in reality individuals move for a variety of reasons with access to social assistance being merely an incidental and facilitating right rather than being the (sole) objective of the migrant.

[38] *Ibid.*, para. 68, emphasis added.

[39] Court of Justice, judgment of 12 May 1998, case C-85/96, *Martinez Sala*. Indeed, this is precisely the operation at play in *Martinez Sala*, in which the Court found that the then Art. 12 TEC (now Art. 18 TFEU) was a general principle of equal treatment and applied to any Union citizen lawfully resident in another Member State with no need for that lawful residence to be based on Union law.

[40] As for example occurred in Court of Justice, judgment of 17 September 2002, case C-413/99, *Baumbast*. See M. DOUGAN, *The Constitutional Dimension to the Case Law on Union Citizenship*, in *European Law Review*, 2006, p. 613 *et seq*.

[41] Court of Justice, judgment of 15 September 2015, case C-67/14, *Alimanovic* [GC].

[42] Court of Justice, judgment of 14 June 2016, case C-308/14, *Commission v. United Kingdom*.

tained in Art. 24, para. 2, of the Directive. Importantly, an individualised assessment was not in fact necessary as "Directive 2004/38, establishing a gradual system as regards the retention of the status of 'worker' which seeks to safeguard the rights of residence and access to social assistance, *itself takes into consideration various factors characterising the individual situation of each applicant for social assistance* and, in particular, the duration of the exercise of economic activity".[43] The general assessment contained in the legislation is substituted for the individualised assessment in any particular case.

The point that the Directive rewards economic activity with the granting of rights is underlined in the more recent case of *Gusa* in which the Court found that the status of self-employed could be retained if economic activity ceased under circumstances outside the control of the individual concerned. *Gusa* differs from previous welfare cases in that the outcome is positive for the claimant and the Court departs from its literal approach to the interpretation of the Directive. However, in doing so, it further underlines the importance attached to the performance of economic activity in the allocation of rights. The Court relies on a comparison of multiple language versions of the Directive to reach its conclusion. However, it also justifies the move, by pointing out that, while the Directive makes a distinction between the economically active and inactive in Art. 7, there is no such distinction drawn within the former category;[44] what matters is not what type of economic activity one is performing but the fact of doing so. This is further justified in light of the fact that to do otherwise would "lead to a person who has been self-employed for more than one year in the host Member State, and who has contributed to that Member State's social security and tax system by paying taxes, rates and other charges on his income, being treated in the same way as a first-time jobseeker in that Member State who has never carried on an economic activity in that State and has never contributed to that system."[45] Contribution to the Member State and the health of its finances is paramount in determining the degree of equal treatment an individual can expect.

While the concept of social integration is not mentioned explicitly in the above judgments it is arguable that it is implicit throughout and in particular when considered against the previous body of case-law developed by the Court in this field. Rights and in particular equal treatment have typically followed the social integration of the individual in the host Member State. This is what follows from *Grzelcyk*, *Trojani* and especially *Bidar* and is evident from the scheme and language of the Directive as endorsed by the Court on numerous occasions, most recently in *Lounes*.[46] What the Court has done in *Dano* and *Alimanovic*, is to read the Directive and in particular the conditions and limitations it contains – rather than any individualised assessment of the position of the in-

[43] *Alimanovic* [GC], cit., para. 60, emphasis added.
[44] Court of Justice, judgment of 20 December 2017, case C-442/16, *Gusa*, para. 36.
[45] *Ibid.*, para. 44.
[46] *Grzelczyk*, cit.; *Trojani* [GC], cit.; *Bidar* [GC], cit.; *Lounes* [GC], cit.

dividual – as determinative of the rights that an individual enjoys and hence by implication of the degree or absence of integration of the individual in the society of the host Member State. The Directive and its conditions and limitations and the extent to which the individual fulfils those conditions, now acts as a yardstick for the degree of integration of the Union citizen. In *Alimanovic*, it is the limitation contained in Art. 24, para. 2, which results in the denial of equal treatment to the applicants, itself based on the nature of their residence and in particular the nature of the economic situation. In *Dano* it is the conditions of residence contained primarily in Art. 7 of the Directive, relating to economic activity or self-sufficiency once again, which are deemed to determine whether the individual is entitled to equal treatment with nationals of the host Member State and by implication whether those individuals are sufficiently integrated or otherwise. Finally, in *Gusa* the inverse situation proves the same point; Mr. Gusa is successful in securing rights precisely because of his lengthy economic activity.[47]

While striking and deployed to devastating effect in the *Dano* line of case-law, this reliance on the (economic) conditions of the Directive as constituting appropriate criteria for assessing the rights available to Union citizens and by implication his or her degree of integration in the society of the host Member State, in fact has deeper roots in the case-law of the Court. In a number of cases the Court of Justice has in fact taken the five year period – included in the Directive to signify the point at which an individual acquires permanent residence and hence can be considered sufficiently integrated to be entitled to full equal treatment with nationals of the host Member State – as a legitimate period to ensure that an individual is sufficiently integrated and hence to justify discriminatory treatment of non-national Union citizens.[48] The Court has been happy to draw on the Directive to inform its construction of Union citizenship and in particular the extent to which individuals are sufficiently integrated and hence entitled to rights under Union citizenship.[49] Furthermore, in a number of cases dealing with the acquisition of residence rights under the Directive, the Court has focused on the economic conditions contained in the Directive to demonstrate that the individuals concerned resided in such a fashion so as to ensure their integration and hence their right to particular forms of residence under the Directive. *Lassal* found that periods completed prior to the implementation of the Directive could be taken into account in determining whether an individual was entitled to permanent residence, as what was at stake was the degree of integration of the individual concerned.[50] In *Dias*, the Court found that "the inte-

[47] And self-sufficiency it should be pointed out. For the first year of his residence in Ireland, Mr. Gusa relied on his children for resources. See *Gusa*, cit., para. 16.

[48] Court of Justice, judgment of 18 November 2008, case C-158/07, *Förster* [GC], for student fees and *Wolzenburg* [GC], cit., for equal treatment between nationals and non-national Union citizens in the context of the European Arrest Warrant.

[49] As pointed out in N. Nic Shuibhne, *The Third Age of EU Citizenship*, cit.

[50] Court of Justice, judgment of 7 October 2010, case C-162/09, *Lassal*.

gration objective which lies behind the acquisition of the right of permanent residence laid down in Art. 16, para. 1, of the Citizenship Directive is based not only on territorial and time factors but also on qualitative elements, relating to the level of integration in the host Member State."[51] Hence, only periods of residence completed in compliance with the Directive could be taken into account.[52] A similar point was made in *Ziolkowski*, referring to the conditions of economic activity contained in Art. 7, para. 1, of the Citizenship Directive.[53] In *O and B* and more recently *Coman* the Court found that family reunification rights on the basis of circular migration could only be acquired in the event that "genuine residence" had taken place in the second Member State.[54] Genuine residence is residence "in conformity with the conditions set out in Art. 7, para. 1, of [the Citizenship Directive and] is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State [...]".[55]

The use of in particular the condition of economic activity or self-sufficiency contained in Art. 7 of the Directive has been growing for some time now across Union citizenship law. In *Dias* these conditions are deemed to be "qualitative" elements in addition to mere time and space that demonstrate the degree of social integration and the relationship of the individual Union citizen to the host society. On the basis of fulfilling those "qualitative" conditions, an individual is deemed sufficiently integrated and hence entitled to equal treatment as nationals. In *Dano* the conditions contained in Art. 7 of the Directive are used to determine the extent to which an individual is entitled to equal treatment. In the context of a directive underpinned by a philosophy of social integration, and which uses this concept as the basis of allocating rights to individuals, the denial of rights for want of fulfilling conditions of economic activity leads to the conclusion that economic activity is deemed, under the scheme established by the Directive and interpreted by the Court, an essential element of social integration. It is through the conditions of residence contained in the Directive that the Court has introduced an economic dimension into its test of social integration.

III.2. Crime and integration

If the link between the restriction of rights and integration has been implicit in the case-law on access to social benefits and arises from a general consideration of the case-law in light of the Directive as a whole and its underlying philosophy, in the field of criminal law it has been explicit. The second area where the question of the absence of integration ap-

[51] Court of Justice, judgment of 21 July 2011, case C-325/09, *Dias*, para. 64.

[52] *Ibid.*, para. 55.

[53] Court of justice, judgment of 21 December 2011, joined cases C-424/10 and C-425/10, *Ziolkowski and Szeja*, para. 46.

[54] Court of Justice, judgment of 5 June 2018, case C-673/16, *Coman* [GC], paras 52 to 56.

[55] Court of Justice, judgment of 5 June 2018, case C-456/12, *O and B* [GC], para. 53.

pears is in the interaction of crime and the acquisition or maintenance of rights of residence under the Directive. The Court has, through an assessment of the extent to which an individual may or may not remain in a particular Member State, introduced a qualitative dimension into the integration test, seeking from the Union citizen some form of good behaviour or compliance with the norms and values of the host society as embodied in its criminal law. This has occurred in two areas in particular, firstly in the traditional field of expulsion measures and secondly in a more recent set of judgments considering the effect of imprisonment on the acquisition of residence rights under the Directive.[56]

Integration as a concept was properly introduced into the field of expulsion of Union citizens in the case of *Ofanopoulous and Oliveri*,[57] in which two individuals, long term resident in Germany,[58] were issued with deportation orders on the grounds of Directive 64/221/EC (since replaced by the Citizenship Directive) for repeated drug offences.[59] In its judgment the Court of Justice, echoing the jurisprudence of the European Court of Human Rights (ECtHR) on this point,[60] introduced a proportionality test that stressed the degree of integration of the individual concerned and the balance that needed to be struck between the individual rights of the individual subject to deportation to family and private life on the one hand and the broader societal interests in public security and public policy on the other.[61]

The importance of the integration was later reflected in the Citizenship Directive in two ways. Firstly, codifying the Court of Justice's jurisprudence on the matter, a general proportionality test was to be applied to all expulsion decisions to take into account their family and private life and the degree of their integration in the host society.[62] Secondly, the Directive introduced a structured and gradual system of protection whereby the protection an individual enjoys increases with their degree of integration. For the first five years, individuals may be expelled on grounds of public security and

[56] This section draws on work already completed and published in S. COUTTS, *Union Citizenship, Social Integration and Crime: Duties Through Crime*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, cit., p. 228 *et seq*. See also L. AZOULAI, S. COUTTS, *Restricting Union Citizens' Residence Rights on Grounds of Public Security*, in *Common Market Law Review*, 2013, p. 553 *et seq*., and S. COUTTS, *Union Citizenship as Probationary Citizenship:* Onuekwere, in *Common Market Law Review*, 2015, p. 531 *et seq*.

[57] Court of Justice, judgment of 29 April 2004, joined cases C-482/01 and C-493/01, *Orfanopoulos and Oliveri*, paras 97-99. There is a discussion of the concept in Opinion of AG La Pergola delivered on 17 February 1998, case C-348/96, *Calfa* shortly before *Orfanopoulos and Oliveri*, cit.

[58] The former from the age of 13, the latter from birth.

[59] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of speacial measurs concernign the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

[60] With the Court of Justice specifically citing the landmark case of European Court of Human Rights, judgment of 2 August 2001, no. 6009/10, *Boultif v. Switzerland*. See *Ofanopoulous and Oliveri*, cit., para. 99.

[61] The notion of proportionality was foreshadowed in this area in Opinion of AG La Pergola, *Calfa*, cit.

[62] Citizenship Directive, Art. 28, para. 1.

public policy, subject to the general principles governing such decisions including that they are based on the personal conduct of the individual concerned, are in accordance with the principle of proportionality and take into account the degree of integration of the individual. After acquiring the status of permanent residence, a Union citizen is entitled to enhanced protection and may only be expelled if he or she constitutes a "serious threat to public security or public policy".[63] After ten years of residence or in the case of minors subject to the principle of the best interests of the child,[64] a Union citizen may only be expelled on "imperative grounds of public policy or public security".[65] Thus the degree of protection increases in line with the period of residence of an individual and, in accordance with the scheme established by the Directive, in line with his or her degree of integration in the society of the host Member State.

Note that for the final category of individuals (those resident for ten years and minors) there is not only a difference in degree in terms of the seriousness of the offence that justifies expulsion but also a difference in kind; it is only for imperative grounds of public policy that an individual may be expelled. The legislator therefore made a distinction between the broader category of "public policy and public security" and simply "public security". One would be forgiven for assuming that public policy therefore refers to a narrower and alternatively defined category of actions posing a threat to society. While the distinction is certainly not water-tight and there exists an overlap between the two concepts, ordinarily public security would connote some form of attack against the institutions or essential infrastructure of the state or constitute a major security threat because of the magnitude of the risk, such as that posed by a major terrorist attack. Public policy on the other hand would refer to the key values of *ordre public*, including maintenance of peaceful coexistence and enjoyment of personal rights typically protected by ordinary criminal law. Thus while public policy might, in certain circumstances, refer to the public morality of a Member State,[66] it would appear that public security would not.

That distinction was ignored by the Court of Justice when interpreting Art. 28, para. 3, in *Tsakouridis* and in *P.I.*[67] While accepting that the new regime required a higher degree of threat in terms of seriousness in order to expel such individuals, the Court made no meaningful qualitative distinction between the concepts of public policy and public security, instead finding that a threat to public security existed wherever there was a threat to "a fundamental interest of society or of the host Member State, which might pose a direct threat to the calm and physical security of the population".[68] The

[63] *Ibid.*, Art. 28, para. 2.

[64] *Ibid.*, Art. 28, para. 3, let. b).

[65] *Ibid.*, Art. 28, para. 3.

[66] See for example Court of Justice, judgment of 4 December 1974, case 41/74, *van Duyn*.

[67] Court of Justice: judgment of 23 November 2010, case C-145/09, *Tsakouridis* [GC]; judgment of 22 May 2012, case C-348/09, *P.I.* [GC].

[68] *Ibidem*.

definition therefore allowed Member States to include within that concept acts that would be normally considered ordinary criminal offences (albeit of a particularly serious nature) such as drug trafficking and the sexual assault of minors.[69]

Not only was definition of public security absorbed into the general definition of public policy and public security but in terms of the assessment of the seriousness of the threat, the Court appeared to adopt a curiously moralistic approach, defining the particular acts as "serious" not by reference to the threat posed by the individuals concerned or the possible harm caused by their acts but rather by the extent to which they offended against the moral sentiments of the host society. Rather peculiarly for a concept such as "public security", which implies a harm based rather than normative assessment of the act, what was at stake for the Member States was their values.[70] The concept was to include threats not simply to the physical security of the host society but also to the "calm and physical security" of the population, implying some perturbation caused by a particular act.[71]

This logic has been taken one step further in the joined cases of *K and HF*, which concerned the exclusion of individuals convicted of war crimes from the Netherlands and Belgium respectively. Three points in the judgment stand out. Firstly, public policy now encompasses a "direct threat to the *peace of mind* of the population",[72] mere presence of an offensive character, it would appear is sufficient to justify exclusion; it is not future harm which is the issue here but offense.[73] Secondly, this is justified by reference to the fundamental values of the a Member State and "social cohesion" as well, interestingly to the fundamental values of the Union as expressed in Arts 2 and 3 TEU.[74] Finally, in a significant move, past conduct alone is sufficient to justify an expulsion measure, if that past conduct demonstrates a continuing "disposition hostile to the fundamental values" of the Union.[75] The analysis is backward looking, at the past conduct of the individual and the offence he has caused (and continues to cause by his mere presence) rather than the future threat of harm.[76]

[69] Respectively, *Tsakouridis* [GC], cit., and *P.I.* [GC], cit.

[70] *P.I.* [GC], cit., paras 21 and 29, referring to the "particular values of the legal order of the Member State".

[71] *Ibid.*, paras 28-29.

[72] Court of Justice, judgment of 2 May 2018, joined cases C-331/16 and C-366/16, *K and HF* [GC], para. 42, emphasis added.

[73] It is worth pointing out that mere offence is normally not considered sufficient grounds for criminalisation under classic liberal theories of the criminal law based on the harm principle. See J. FEINBERG, *The Moral Limits of the Criminal Law: Offense to Others*, Oxford: Oxford University Press, 1985.

[74] *K and HF* [GC], cit., para. 44.

[75] *Ibid.*, para 60.

[76] Intriguingly, that offence was caused not by any act directed against the political community of the Member State concerned but rather by a war crime, i.e. a crime against humanity as a whole.

What emerges from these cases is therefore not a security threat per se, or at least not primarily a security threat, but rather the commission of an act that offends against the values of the host Member State and its society. And it is this offence which justifies the exclusion of the individual from that society.

This reading of crime and its relationship with integration was explicitly endorsed by the Court of Justice in a second set of cases dealing with the impact of periods of imprisonment on the acquisition of residence rights, including the acquisition of enhanced protection under Art. 28, paras 2 and 3. In *Onuekwere*[77] and *MG*[78] the Court found that "the imposition of a prison sentence by the 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".[79] Repudiation of the values of the host society was deemed to amount to a refusal to integrate. The result was that rights to permanent residence and hence enhanced protection under Art. 28, para. 2, and enhanced protection from expulsion under Art. 28, para. 3, in the case of *MG*, which were said to depend on a certain level of "qualitative" integration, were refused. Note that in *Onuekwere* it is not the period spent in prison as such that interrupts the process of integration but rather the act constituted by the commission of the underlying crime. It is the absence of integration, evidenced by the commission of the underlying crime, itself characterised as a repudiation of the values of the host society, which leads to a loss of rights by Union citizens and their family members. It would appear that respect for the values of the host society (at least as they are reflected in the criminal law of the Member State) is now a component in the assessment of the degree of integration of the Union citizen.[80]

The solution adopted in *Onuekwere* and *MG* was not without its problems. Is it in fact the underlying crime or the period in prison which breaks the links of integration? In particular, can it really be said that all crimes resulting in a custodial sentence necessarily indicate a repudiation of the values of the host society, at least to the extent that this would result in some form of rupture and failure of social integration? Equally, can periods spent in prison, where rehabilitation, closely linked with social reintegration, is a stated aim, be necessarily excluded from any assessment of the degree of integration of the Union citizen? These questions have recently been addressed by the Court of Justice in *B and Vomero*.[81]

In *B and Vomero* the Court upheld the core findings in *Onuekwere* and *MG* while nuancing it somewhat to take into account some of the issues just mentioned. Three findings in particular stand out. Firstly, the Court confirmed the need to acquire permanent residence in order for an individual to be eligible for the enhanced protection

[77] Court of Justice, judgment of 16 January 2014, case C-378/12, *Onuekwere*.
[78] Court of Justice, judgment of 16 January 2014, case C-400/12, *MG*.
[79] *Onuekwere*, cit., para. 26.
[80] For a more detailed account see S. Coutts, *Union Citizenship as Probationary Citizenship*, cit.
[81] Court of Justice, judgment of 17 April 2018, joined cases C-316/16 and C-424/16, *B and Vomero* [GC].

found in Art. 28, para. 3, of the Directive.[82] While not explicitly stated in the Directive, such a finding stems from the logic of the Directive as one based on progressive integration of the individual concerned.[83] Secondly, as in *Onuekwere* and *MG*, the ten year period mentioned in Art. 28, para. 3, is to be calculated backwards and may be broken by absences. Thus, even once acquired an individual will always face a risk of losing enhanced protection. Finally, and where *B and Vomero* adds to *Onuekwere* is in the introduction of an "overall assessment" of the integrative links of an individual when determining whether or not that ten-year period has been broken. However, while imprisonment will no longer lead to the automatic break of the ten-year period, it will "in principle" do so.[84] This overall assessment of the integrative links of an individual and the extent to which he or she has become "disconnected from the society of the host Member State"[85] must take into account the nature and the circumstances of the offence and the experience of the individual while in detention, which may operate to both further alienate that individual or lead to his reintegration. In addition, the social and family circumstances and his degree of integration into the host society prior to the commission of the offence must be taken into account.[86]

IV. Qualitative criteria of integration and the rise of the responsibilised citizen

These series of cases represent both change and continuity in the context of the concept of social integration and its use by the Court. Certainly, in terms of the broad trajectory of Union citizenship case-law and in particular the treatment of individual rights, this represents a dramatic restriction on individuals' rights and a reassertion of Member State interests in exclusion and the limitation of rights. However, it is argued that the roots of this approach can in fact be found within previous practice; both in the concept of integration and the jurisprudential technique employed by the Court of Justice. This development was not predicted and was certainly not inevitable, but nonetheless it is an evolution of past practice.

Union citizenship remains a status of integration. It is this notion which governs the gradual inclusion of the individual Union citizen within the society of the host Member State; it regulates the relationship between the Union citizen and the host society and allocates rights on that basis. This dynamic is evident either on the basis of jurispru-

[82] This may be particularly problematic when read in conjunction with the *Dano* line of case-law. It is very possible that an individual may reside in a Member State for decades without gaining permanent residence for various reasons (broken employment periods, absences).

[83] *B and Vomero* [GC], cit., para. 58.

[84] *Ibid.*, para. 70.

[85] *Ibid.*, para. 74.

[86] *Ibid.*, para. 72.

dence focusing on individual circumstances or by taking the scheme established by the Directive. Integration is still the operative principle for allocating rights to individuals, only now it is the absence of integration that limits those rights. Integration as a concept cuts both ways.

There is a broader continuity with the general approach of the Court of Justice to assessing the position of Union citizens in the host society. As pointed out by Barbou des Places, the Court operates a narrative technique; the life of the individual as a whole is assessed, as is her engagement in the various dimensions of the host society.[87] And while one may deplore the legal incoherence and possible inequality that may arise from such an individualised approach to judging,[88] it is undeniable that this focus on the narratives and social circumstances of the individual also lies at the heart of both the expulsion cases – such as *P.I.*, where the applicant and his crimes are demonised – and in the social welfare cases – such as *Dano*, where the Court paints a picture of a distinctly economically unproductive member of society, and hints by reference to her lack of education and language skills of not simply a failure to engage in the economic life of the host Member State, but indeed the very absence of any capacity to so engage. Indeed, we can contrast this with *Gusa*, where Mr. Gusa is presented as an individual who has never relied on the host Member State, even during his first year of unproductive residence in Ireland and indeed in subsequent years contributed fully, a key factor in his eventual success.[89]

However, if there is continuity in the importance and the operation of the principle of integration in Union citizenship law, there is also an important evolution. In terms of outcome, clearly there is a shift towards exclusion and limitation of rights. It seems integration is a malleable legal concept that can be deployed to both enhance the rights of individuals but also to justify their limitation and indeed exclusion from the host society as in the case of the expulsion and imprisonment jurisprudence.

However, it is also arguable that there is a shift in the nature of Union citizenship, or rather the role that the Union citizen is expected to play within the scheme of the Directive. As noted above in past cases, while a narrative technique has certainly been deployed, there has been a certain passivity about the role of the Union citizen and its relationship to rights acquisition. The individual was the object of integration; it was a socialisation process that happened to him or her.

Recent cases appear to focus on the acts and inactions of the individual and impute an agency to him or her more striking than in previous cases. Moreover, it is an agency that is used to attribute responsibility for his or her integration. Ultimately, therefore the individual is responsible for the consequences of the lack of integration, namely a

[87] S. Barbou des Places, *The Integrated Person in EU Law*, cit.

[88] M. Everson, *A Very Cosmopolitan Citizenship: But Who Pays the Price?*, in M. Dougan, N. Nic Shuibhne, E. Spaventa (eds), *Empowerment and Disempowerment of the European Citizen*, Oxford: Hart, 2012, p. 163 *et seq.*

[89] *Gusa*, cit., para. 16.

loss of rights and exclusion. Note, for example, the role that imprisonment now plays in the overall assessment of the integrative links of offenders discussed in *B and Vomero*. It is the actions of the individual in prison that matter; the extent to which he or she engages in rehabilitation services or furthers his or her disconnect from society. The Court speaks of the "behaviour"[90] and the "attitude"[91] of the person during detention. Similarly, note in *Gusa*, the key role that active economic contribution to the host society plays in the plaintiff's ultimate success. The Court underlines the fact that he is a deserving plaintiff because the cessation of his self-employment is due to circumstances outside his control,[92] implying that otherwise he would be responsible for his reduced circumstances and hence his right to equal treatment could be withheld.

Moreover, this is not a generalised, abstract responsibility but is translated into very concrete sets of obligations. One set of cases point to a responsibility to refrain from offending behaviour and from breaching the core values of the host Member State, at least as they are expressed in criminal law. While to some extent passive (merely refraining) it does reflect a broader expectation of conduct and of good conduct and a more general attitude of respect towards the values of the host society. More concrete still are the obligations generated from the conditions contained in the Directive to engage in economic activity, be it active or passive. Market citizenship[93] is back with a bang, if in fact it ever went away.[94]

This in turn generates certain normative expectations and builds a normative dimension into Union citizenship; the Union citizen is a law-abiding, economically productive member of the host society. These might be said to be features of "good citizenship" everywhere, but in Union law these are linked with very real consequences and in fact make the membership in the host Member State contingent on their being met. The precise content of these duties appears to be a mix of Union and national. Responsibilities are owed to the host Member States, however, particularly in the criminal law cases, there is reference to Union interests or values.[95] Likewise the social benefits cas-

[90] *B and Vomero* [GC], cit., para. 73.

[91] *Ibid.*, para. 74.

[92] *Gusa*, cit., para. 42.

[93] M. Everson, *The Legacy of the Market Citizen*, in J. Shaw, G. More (eds), *New Legal Dynamics of European Union*, Oxford: Claredon Press, 1995, p. 73 *et seq.* See also D. Kramer, *Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed*, in *Cambridge Yearbook of European Legal Studies*, 2016, p. 270 *et seq.* for an analysis in light of neoliberalism.

[94] See N. Nic Shuibhne, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, p. 1597 *et seq.*

[95] In *Tsakouridis* [GC], cit., para. 46, and *P.I.* [GC], cit., paras 26-28, reference is made to EU legislation criminalising certain behaviour to justify considering that behaviour sufficiently serious to warrant expulsion. In *K and HF* [GC], cit. direct reference is made to the values of the Union as expressed in Arts 2 and 3 TEU in paras 44 and 60.

es may very well reflect the construction of a broader ideal of the market citizen.[96] For if these cases to some extent responsibilise the Union citizen, it is a responsibility that is used to justify exclusion. In the case of criminal law and residence rights this is very obviously a case of literal exclusion from the territory of the host Member State and hence necessarily from its society.[97] In the case of welfare assistance it is an exclusion from the community of solidarity (at the very least).[98] A comprehensive and universal welfare system has long been recognised as a vehicle for social inclusion and to facilitate full participation of the individual in the social and political life of the community.[99] Denial of these rights to economically inactive Union citizens is in effect denial of their right to participate in a full and meaningful way in the host society.

[96] M. EVERSON, *The Legacy of the Market Citizen*, cit.

[97] For a discussion of the shifting concepts of territory at play in cases of exclusion and residence in Union citizenship law see L. AZOULAI, *Transfiguring European Citizenship: From Member State Territory to Union Territory*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 178 *et seq*.

[98] Note that as the Court stresses in *B and Vomero*, reliance on the social assistance regime of the host society may lead to expulsion for those who do not enjoy permanent residence. See *B and Vomero* [GC], cit. para. 55. See also *Brey*, cit.

[99] For the classic statement see T.H. MARSHALL, *Citizenship and Social Class*, London: Pluto Press, 1992.