
Being a Person in the European Union

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On our intellectual journey in the preparation of this book we encountered a whole host of issues related to the notion of person as grasped by EU law. In this introduction we propose to select a number of those pivotal themes, rather than setting out the arguments developed in each of the individual chapters of the book. These have their own rationale, dynamics and complexity and we would not do justice to them by presenting them summarily. In each of these chapters, the reader will find original ideas, rich developments and paths to further research. The best we can hope to do here is to try to briefly address the main points advanced in the book by making explicit reference to the authors of individual chapters in the text (with the authors' names in brackets). Even such an erratic approach should at least evoke something of the commonality which brought the authors of this book together. It should say something about the centrality of the question of the person in European integration's current context.

I. Person and Action

'The Union places the individual at the heart of its activities' states the preamble of the Charter of Fundamental Rights of the European Union. This statement reads differently in the different official languages of the Union. The French, Italian and Spanish versions read: *'The Union places the person at the heart of its action'*. The Dutch, German, Portuguese and Swedish versions read instead: *'The Union places the human being at the heart of its action'*. But these different versions share, in fact, the same conception. This conception is common in Western legal texts and points back to the Christian tradition. It refers to an individual endowed with moral significance and legal protection.

In a famous lecture given in London in 1938 and which appears to be his last published text, Marcel Mauss argued that, in European society, the 'person' is a 'fundamental form of thought and action'. By comparing Western society to other societies, he aimed to demonstrate that the reference to a human being possessing

moral value is specific to our society, solidly embedded in the system of social and legal relations.¹ Writing in 1938 faced with a collapsing Europe, he reminds his contemporaries, however, that ‘with us the idea could disappear’. It is against the backdrop of the collapse of Europe and its ‘legacies of injustice and fear’ that the Universal Declaration of Human Rights, 1948, forcefully stated that the human being is to be considered as a person, master of herself and of her acts, who has a right to be recognised and to be respected.² The Charter of Fundamental Rights, 2007, clearly endorses this conception. From the whole text emerges the notion that the European individual is vested with dignity, self-determination, a capacity to enjoy rights and to hold values, and a corresponding sense of responsibility.

Note, however, that the EU Charter does not only refer to the recognition of the individual as a human being/person. Its actual phrasing is deliberately more sophisticated. It suggests a place for the individual. The stress lies as heavy on *individual/person/human being* as it does on *Union’s activities/action*. The Charter makes salient that individuals are granted rights, roles and responsibilities within the Union. It intimates that the Union invests in individuals. This investment goes hand in hand with the development of common policies and institutional projects. In other words, individuals as framed by EU law play a role in EU’s institutional projects.

II. Person as Agent

The first and still dominant European project is the establishment of the Internal Market. It is defined in Article 3(3) TEU (Treaty on the European Union) as an impersonal area in which factors of production circulate without restriction. However, in practical terms, it is individuals who engage in the European market, who develop transnational activities and who trigger cross-border exchanges. Therefore, to make this project real and effective, the Union has relied on the technique of granting subjective rights to individuals. This technique emerged in the landmark *Van Gend en Loos* decision of the Court of Justice of the European Union.³ Whereas the European construction was originally seen and shaped as an institutional phenomenon, concerned with establishing a special type of relationship between the Member States through mechanisms of cooperation and transfer

¹ M Mauss, ‘Une catégorie de l’esprit humain: la notion de personne, celle de “moi”’ (1938) *Journal of the Royal Anthropological Institute*. For an English translation see ‘A Category of the Human Mind: the Notion of Person; the Notion of Self’ in M Carrithers, S Collins and S Lukes (eds), *The Category of the Person. Anthropology, Philosophy, History* (Cambridge, Cambridge University Press, 1985).

² K Günther, ‘The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture’ in P Alston (ed), *The EU and Human Rights* (Oxford, Oxford University Press, 1999) 127.

³ Case C-26/62 *Van Gend en Loos* EU:C:1963:1.

of powers, the Court made clear that the Internal Market comprises not just the Member States but also the nationals of those States acting as traders, workers or consumers. This statement upset the traditional principle of the international legal order according to which the action of the states entirely conditions that of their citizens. It mirrored a general commitment to market integration that was broadly agreed amongst Member States, even though in individual cases it conflicted with Member States' self-interest. Internal market law was therefore clearly intended to elaborate on rights of individuals as market participants as well as on the social and personal conditions that structure and foster the development of interstate trade.

As a result of *Van Gend en Loos* and the subsequent case-law, individuals are given an autonomous space of legal action to match the transnational space of economic transactions that the Union strives to make real. As originally conceived, this legal space has two main features. First, it is a space based on Member States' obligations. The rights conferred on individual mainly arise, as stated by the Court, 'by reason of obligations which the Treaty imposes upon the Member States'.⁴ These are rights to initiate legal proceedings before a national court to enforce States' obligations. The remedial aspect is central. Second, it is a purposive space. The rights are conferred for the purpose of making the Internal Market function properly. Whilst being an agent moved by selfish ends, the individual remains committed to an institutional project. As aptly captured by Judge Lecourt sitting in the *Van Gend en Loos* Court's formation, 'when an individual appears before the judge to defend the rights he derives from the Treaties, that individual does not only act in his own interest, he immediately becomes an auxiliary agent of the Community'.⁵

Starting from this rather limited construction EU law grants individual capacities of action across national jurisdiction boundaries in ever wider fields of economic and social life. Individuals enjoy different rights depending on their classification as trader, employer or employee, worker, producer or consumer, farmer, service provider or service recipient, patient, student, taxpayer, family member, care-taker or job seeker, to take but a few classic labels. EU law constructs and differentiates various categories of individuals. It organises a great variety of activities to which correspond various regimes of individual action and different sets of rights. It creates a distinctive form of agency based on a series of roles. As a result, a single individual may be endowed with different legal roles⁶ or the other way around, ie two entities may be treated as a single person for the purpose of the application of a specific set of rules.⁷ This technique of classification of persons

⁴ *ibid*, at 12.

⁵ R Lecourt, *L'Europe des juges* (Bruxelles, Bruylant, 1976) 260.

⁶ On the juxtaposition of 'worker' and 'student' classifications in a single case see eg Case C-46/12 LN EU:C:2013:97.

⁷ On the case of two legal persons seen as the same company for the purpose of EU law see Case C-378/10 VALE *Eptési* EU:C:2012:440.

is present, of course, in any sophisticated legal system (Micklitz). What is distinct in the EU law's construction, however, is that these persons are all participating in the building of a new socio-economic order. EU law is not about the creation or reproduction of social order but about the transformation of pre-established domestic socio-economic orders. It is about the shifting of both governments' and individuals' preferences for the purpose of establishing a new transnational concrete order. To fully account for the operation of EU law, the terms of the Charter's formula should therefore be adjusted and reversed: *EU law places the (many) Union's activities at the heart of the construction of the individual.*

The traditional literature on 'European Law and the Individual' has been too much focused on the limited role of individual within the supranational institutional sphere and issues of the legal protection of private parties.⁸ The EU law's concept of person is not reducible to the informed natural or legal person initiating judicial proceedings that we saw emerging in *Van Gend en Loos*. It involves specific forms of agency and it implies different sets of personal dispositions, be it an active producer engaged in cross-border transactions, a vulnerable consumer making a purchase in non-transparent conditions or an individual able to develop emotional or social ties in family context. The first purpose of this book is to restore some of EU law's complexity in the construction of the category of the person.

III. Person and Integration

It is fair to say that the Internal Market was never conceived merely as an impersonal area. Besides the circulation of goods and entrepreneurship was provided the free movement of labour and persons. In the social area, EU law has granted the individual a 'position which begins to resemble a constitutional position'.⁹ The regulation on freedom of workers within the Community of 15 October 1968 refers to 'freedom and dignity' as preconditions to exercise the right to free movement.¹⁰ The notion of the person, in this context, denotes a certain moral and social content to EU law and policies and thus offers a means

⁸ See among a vast literature M Torrelli, *L'individu et le droit de la Communauté européenne* (Montréal, Presses Universitaires de Montréal, 1970); FG Jacobs (ed), *European Law and the Individual* (Amsterdam, North-Holland Company, 1976); FIDE, *The Individual and European Law* (Luxembourg, FIDE VII, 1977); HG Schermers and D Waelbroeck, *Judicial Protection in the European Union* (The Hague, Kluwer Law International, 2001).

⁹ M Cappelletti, M Seccombe and JHH Weiler, 'Integration Through Law: Europe and the American Federal Experience' in M Cappelletti, M Seccombe & JHH Weiler (eds), *Integration Through Law* Vol 1, Book 1 (Berlin, de Gruyter, 1986) 60.

¹⁰ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ (1968) 475.

of developing a constitutional reading of European integration. In the Court of Justice's case-law, the dignity of the person is used not as a direct source of rights but as a justificatory value which serves as a basis for broadening the scope of the provisions on free movement of workers but also for giving a strict reading of the limitations on free movement.¹¹ The migrant worker who is a national of a Member State is treated as a person provided with basic conditions (a social and family status including, for example, the right to social benefits granted by host Member States and the preservation of the integrity of family life) in order to be able to move and integrate in any other Member State.

The re-interpretation of EU law with a view to secure the 'corollaries' and 'conditions' required to enjoy free movement rights eventually went beyond the domain of the free movement of workers.¹² As a result of this development, Internal Market law generates a different form of agency from that deriving from the circulation of goods and factors of production.¹³ Inextricably linked to the development of 'non-trade' areas of EU law, ie social law and fundamental rights, it requires a minimum social and moral protection for those who are exercising their freedom of movement.¹⁴ This development materialised with the emergence of family reunification law, Union citizenship law and, to a lesser extent, EU immigration law (Thym).

In this context, a new figure emerges: the *integrable person*. The focus shifts from cross-border action to social integration (Barbou des Places; Coutts). Typical is the role of the principle of non-discrimination in this context. It takes on a new, positive meaning: it is conceived of not just as a prohibition on discrimination against non-nationals on their territory but further as a rule encouraging the Member States to allow individuals to integrate into different parts (marketplace, family, profession, educational or healthcare system) and groups (social, cultural or ethnic groups) within society (Azoulai; Robin-Olivier). Beyond granting an autonomous space of action to categories of individuals, EU law widens the traditional struggle for recognition of persons beyond the boundaries of the Member States. It provides new anchors for personal identity. The package of capacities typical of a person integrated into society—making choices, making life plans,

¹¹ Case C-36/76 *Rutili* EU:C:1975:137.

¹² Case C-186/87 *Cowan* [1989] ECR 195; Case C-60/00 *Carpenter* [2002] ECR I-6279.

¹³ A Favell, 'The Fourth Freedom: Theories of Migration and Mobilities in "Neo-Liberal" Europe' (2014) 17(3) *European Journal of Social Theory* 275.

¹⁴ On this development see E Spaventa, 'From *Gebhard* to *Carpenter*: Towards a (Non-)Economic European Constitution' (2004) 41 *Common Market Law Review* 743; Ní Shuibhne, 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights' in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Oxford, Hart Publishing, 2009) 168; J Snell, 'And then There Were Two: Products and Citizens in Community Law' in T Tridimas and P Nebbia (eds) *European Union Law for the Twenty-First Century: Internal Market and Free Movement Community Policies* vol 2 (Oxford, Hart Publishing, 2004) 49; P Caro de Sousa, 'Catch Me if You Can? The Market Freedoms' Ever-Expanding Outer Limits' (2011) 4(2) *European Journal of Legal Studies* 162.

holding responsibilities, making ties—may be considerably affected by this broadening of her legal space (De Witte).

Of course, there remain limits and conditions to this integration and certain categories of persons may be excluded from it (Coutts; Kochenov; Robin-Olivier). With the new construction, Member States lose exclusive control over the composition of the society whilst they cannot expect, as with the establishment of the Internal Market, any direct benefit. This construction has met and still faces fierce resistance. This may result in the main European players, ie Member States and European institutions, retreating back from this ambitious construction.¹⁵ The book proceeds to account for both this shift in EU law agency form—from ‘market agency’ to ‘identity recognition’—and its ambivalent effects in terms of inclusion and exclusion.

IV. Poor Self

One way to engage in this account is to critically assess the effects of this development (Somek). If we seek to analyse further the concept of a person equipped with broad capacities and invested with many social roles, it is almost inevitable that we inquire into the social and structural background of this construction, the kind of profile it favours, the form of personal identification it entails, the communities it concerns and the public structures it affects (Kochenov). This is the puzzle with which different chapters in this book engage. Looked at this way, EU law is about recognition or misrecognition of personal identities of aliens, solidarity with non-nationals, or lack of it, and re-affirmation or structural transformation of States and local communities.

Whilst being strong in its assertion of the individual as a ‘constitutional subject’, in particular when confronted with external systems suggesting less protective visions (Beaucillon), the Union remains poor in its way of providing an institutional, financial, political and cultural background to support this affirmation (Chalmers; Dani). The Union lacks any capacity to support, not to say frame, a genuine political community (De Witte). It is unable to articulate principles of justice applicable to all Member States and to every individual living on the European territory. It suffers a lack of moral and political credit with real individuals engaged in concrete lives (Chalmers). This may result in what Axel Honneth has called ‘pathologies of individual freedom’.¹⁶ Rather than a rational

¹⁵ An excellent example is provided by Case C-333/13 *Dano* EU:C:2014:2358 and Case C-67/14 *Alimanovic* EU:C:2015:597 referred to in Azoulai’s, Barbou des Places’ and De Witte’s contribution in this volume.

¹⁶ A Honneth, *Pathologies of Individual Freedom: Hegel’s Social Theory* (Princeton, Princeton University Press, 2010).

and self-organised individual, capable of integrating in society, EU is likely to produce 'de-socialised' individuals experiencing a form of 'indetermination', encouraged to evade any kind of obligations and subject to broader forces, especially market forces (Dani). This may negatively affect the tissue of social relations and forms of life in European societies (Somek) and might even lead to some form of historical regression (Kochenov).

An essential part of this book is concerned with the argument that EU law's actualisation of the notion of person militates against the values of dignity, freedom, responsibility and sociability enshrined in EU law's discourse and in particular in its Charter of Fundamental Rights.¹⁷ It intends to deepen this capital ambiguity. But it also proceeds further towards a reconstruction of personhood in EU law.

V. Personhood as Status

Personhood lies beyond the traditional reach of EU law. EU law has a regulative and not a constitutive role. Its main job is to facilitate transnational activities and to regulate the conduct of public authorities and private parties concerned with the building of a new economic and social order. It is not meant to constitute its own legal subjects. EU law still heavily relies on the States' definition of identity (Leroy). As repeatedly stated by the Court of Justice, the constitution of legal persons as well as the nationality of natural persons as a precondition to be granted EU rights is a matter of national law.¹⁸ Union law is functional and not ontological. This may be one of its inherent flaws.

What we see emerging in EU law, however, is the surfacing of a frame whereby issues of identity are brought to the fore. The book describes cases in which EU law goes beyond agency and the realm of regulative rules. This concerns the case where individuals or communities are anxious to secure their place in situations of disaffiliation, multi-affiliation or vulnerability. This applies for instance to a Member State's national who has exercised her rights to free movement who has committed crime in the host society (Coutts), children of Union citizens who present multiple social and family connections within the Union (Pataut) or else an irregular immigrant who has made the Union the centre of his social, personal and moral life (Azoulai). This also concerns matters of life as in the case of the definition of the human embryo (Hennette-Vauchez). In these cases, the situations at hand are framed as being at once economic, social and moral *facts*. What

¹⁷ See similarly JHH Weiler, 'On the Distinction Between Values and Virtues in the Process of European Integration' (2010) Institute for International Law and Justice (unpublished).

¹⁸ As recalled by the Court in Case C-210/06 *Cartesio* EU:C:2008:723 para 109.

is original in this construction is that these facts are not only part of the context but they are used to define the legal position of the individuals concerned. As a result, their position is not reduced to their predetermined role and rights. The Court of Justice contemplates them in terms of personal identity and its potential deprivation.¹⁹

Through the legal qualification of life or the apprehension of socially contested or morally troubling cases, issues regarding the concrete modes of *being* of individuals are tackled. This does not exactly amount to what is traditionally referred to as ‘personhood’. In Western civil law, personhood is seen as an exclusive attribute of the state, which has the power to constitute individuals or entities as legal subjects. In international human rights law, it is seen as an inherent attribute of the human being (Thym). In EU law, instead, the reference is to a concrete mode of living and being within society while complying with the values attached to life and society. Traces of biological or social existence are evaluated and then turned into legal forms of individual existence. As a result, issues of identity or responsibility toward society arise and become central (Azoulai; Barbou des Places; Coutts).

This is perhaps to be seen in the context of a profound distrust of individuals in the EU institutional system and more broadly in the destabilisation of any institutional projection. In the absence of the likelihood of a possible identification to institutional Europe or to any other form of community, EU law offers its resources to help individuals to re-appraise their position within society. They may get from EU law a sense of the unity of their lives, a form of personal integrity and continuity in a highly fragmented and de-institutionalised social context (Pataut).

What we see emerging is that EU law is engaged in the production of statuses. Status does not refer here to the pre-modern concept of an individual inextricably attached to a particular community, ie the ‘feudal subject’ (Micklitz). It also goes beyond the mere attribution of functional roles. Status is something which makes the exercise of individual rights possible, an ‘*underlying idea*’ of what it means to be a citizen, a student or a child in relation to others within society.²⁰ Such idea informs the legal regimes of these individuals. When producing statuses, EU law does not only fashion agents. It creates identities carrying with them ideas about modes of being-in-society. This involves the production of axiological assessments on what it means to live a life of dignity in Europe and a decent life within society.

¹⁹ It should be noted that this construction by affecting the distribution of powers within the Union and raising ontological issues about identity of people remains fragile. The *Ruiz Zambrano* saga is illustrative of this. After an audacious move (Case C-34/09 *Ruiz Zambrano* EU:C:2011:124), the Court of Justice has taken a step back bringing the ‘identity’ construction down to a conventional rights construction (see for instance Case C-434/09 *McCarthy* [2011] ECR I-3375; Case C-40/11 *Iida*, judgment of 8 November 2012; Case C-86/12 *Aloka*, judgment of 10 October 2013).

²⁰ On this notion of status see J Waldron, ‘Is Dignity the Foundation of Human Rights?’ (2013) *NYU School of Law, Public Law Research Paper No 12-73*, emphasis added.

As a result, values are entered in EU law's discourse.²¹ This may lead, of course, to forms of social control and instances of excessive moralism (Hennette-Vauchez).²²

This form of intervention which goes beyond the mere granting of individuals' rights and roles can only be a partial solution to a much broader problem, the problem of a 'just society' and the possibility of forging a collective project beyond the nation-state. However, in view of the multifaceted character of the profound crisis afflicting Europe, which affects not only the economic stability and the social structures of the Member States but also the political dynamics and the moral setting of many European peoples, we would hope that this book will manage to draw attention to legal techniques, concepts and visions which have the potential to contribute to the establishment of a 'decent European society'.²³

²¹ F de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law' (2013) 50 *Common Market Law Review* 1545.

²² See eg Case C-34/10 *Brüstle* [2011] ECR I-2821; Case C-348/09 *PI*, EU:C:2012:300.

²³ A Margalit, *The Decent Society* (Cambridge MA, Harvard University Press, 1996).