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Novel Perspectives on the Right to Citizenship in the EU Member States: An Inquiry into Standard-Setting Rulings of the European Court of Human Rights and the Court of Justice of the EU*

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RÉSUMÉ

Depuis ces vingt dernières années, une littérature scientifique croissante tente de conceptualiser et de contextualiser la notion de citoyenneté. La palette des champs d'investigation sur le sujet est vaste, et brasse des thèmes allant de la théorie générale de la citoyenneté à l'étude de caractéristiques plus spécifiques inhérentes aux diverses formes de citoyenneté – mondiale, européenne, double, sociale, transpolitique ou autre. Le débat s'est essentiellement focalisé sur les contours du concept même de citoyenneté et sur ses différents modèles, délaissant ainsi largement la question de l'essence du droit à la citoyenneté. Cet article entend contribuer à la littérature existante en examinant l'enseignement autoritaire des principaux juges européens dans le domaine de la protection des droits de l'homme contemporains : la Cour européenne des droits de l'homme et la Cour de justice de l'Union européenne. Le droit à la citoyenneté – tel qu'il est conçu au sein de ces deux systèmes juridiques majeurs, conventionnel et communautaire – est éclairé à travers l'étude de récents jugements choisis, prononcés dans les affaires Genovese c. Malte, Biao c. Danemark, Mennesson c. France *(Cour eur. D.H.)*, Janko Rottmann c. Freistaat Bayern *et* O. et S. c. Maahanmuuttovirasto *et* Maahanmuuttovirasto c. L. *(C.J.U.E.). À côté de l'analyse centrale de ces perspectives prétoriennes novatrices et de leur évaluation comparative, cet article aborde le cadre théorique et légal pertinent pour appréhender la notion de citoyenneté (y compris européenne) et le droit à la citoyenneté en général.*

MOTS-CLÉS

Citoyenneté, droit à la citoyenneté, Cour européenne des droits de l'homme, Cour de justice de l'Union européenne.

ABSTRACT

Scholarly discourses aiming to conceptualise and contextualise the notion of citizenship have flourished in the last couple of decades. The scope of the

highlighted areas has been wide and varied, spanning themes from general citizenship theories to more specific reviews of peculiarities inherent to global, European Union, dual, social, transpolitical or other forms of citizenship. Thus, most debates have principally revolved around the framing of the very concept of citizenship and its prevalent modes, with only occasional legal reflections on the essence of the right to citizenship. This paper seeks to contribute to the existing literature on citizenship rights, by focusing on the recent authoritative interpretations of the leading European adjudicators in the domain of contemporary human rights protection: the European Court of Human Rights and the Court of Justice of the EU in relation to several EU Member States. In this fashion, the right to citizenship is addressed from the perspective of influential conventional and communitarian law systems, as construed in selected up-to-date judgements in the cases of Genovese v. Malta, Biao v. Denmark, Mennesson v. France *(ECHR) and* Janko Rottmann v. Freistaat Bayern *(CJEU). Along with the central analysis of the novel perspectives on the right to citizenship expounded in court rulings and their comparative assessment, the paper touches upon the corresponding theoretical and legal framework delineating the notion of citizenship (including EU citizenship) and the right to citizenship in general.*

I. INTRODUCTORY REMARKS

In the past couple of decades, the right to citizenship has received considerable attention within the framework of the Council of Europe and the European Union human rights agenda as a matter directly configured by a growing number of both universal and European citizenship-related norms on the one hand and the innovative case-law of the European Court of Human Rights and the Court of Justice of the EU on the other hand.[1] Academic discourses have been only partially in line with such an increased institutional and legal interest in the right to citizenship, focalising primarily on the notion of citizenship *per se*. Thus, scholarly research has principally revolved around the framing of the very concept of citizenship, encompassing a wide array of topics: from citizenship theories in general[2] to social,[3] environmental,[4] European Union,[5]

(1) See Fl. GOUDAPPEL, *The Effects of Citizenship: Economic, Social and Political Rights in a Time of Constitutional Change*, The Hague, T.M.C. Asser Press, 2010, 3.

(2) E.g. R. BEINER (ed.), *Theorizing Citizenship*, Albany, State University of New York Press, 1995.

(3) E.g. D. HEATER, *World Citizenship: Cosmopolitan Thinking and Its Opponents*, London/New York, Continuum, 2002, 106-122.

(4) *Ibid.*, 122-129.

(5) E.g. El. GUILD, Cr. J. GORTÁZAR ROTAECHE and D. KOSTAKOPOULOU (eds), *The Reconceptualization of European Union Citizenship*, Leiden/Boston, Brill Nijhoff, 2014; Fl. GOUDAPPEL, "The Effects of Citizenship", *op. cit.*, note 1, 26 *et seqq.*; St. HALL, *Nationality, Migration Rights and Citizenship of the Union*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1995.

dual/multiple,[6] political/transpolitical,[7] global,[8] and other forms of citizenship; yet, with a rather limited accent on the right to citizenship. In essence, the contemporary writing on citizenship has been modelled by two distinctive factors. First, by the vocational background of scholars who predominantly come from the circle of political theorists, anthropologists or sociologists, and only to a lesser extent from the clique of lawyers. Second, by their prevalent perceptions of citizenship, which commonly portray the concept either *as a legal status* (in terms of full membership in a particular political community) or *as a desirable activity* (in terms of the importance of the quality and extent of one's citizenship for the one's participation in a community).[9] On the basis of the former conception formulated through a legal status, an influential view of citizenship *as rights* has gradually developed since the early 1950's, according to which citizenship entails possession of rights (in terms of "ensuring that everyone is treated as a full and equal member of society").[10] This paper is built on the respective idea of citizenship as "the right to have rights"[11] with the aim of defining the content and scope of the right to citizenship and thus giving a modest contribution to the novel discourses on citizenship rights. It addresses contemporary trends from merely a legal perspective through a review of selected up-to-date court rulings of the two principal European adjudicators in the domain of human rights protection – the European Court of Human Rights and the Court of Justice of the EU. Hence, the evolution of the right to citizenship is examined from the recent standpoints of the Council of Europe and the European Union in relation to acquisition and loss of citizenship of several EU Member States, whereby a particular emphasis is put on the

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(6) E.g. Ol. VONK, *Dual Nationality in the European Union*, Florence, European University Institute, 2010; D. KALEKIN-FISHMAN and P. PITKÄNEN (eds), *An Emerging Institution? Multiple Citizenship in Europe – Views of Officials*, Bern, Peter Lang AG, 2008; Th. FAIST (ed.), *Dual Citizenship in Europe: From Nationhood to Societal Integration*, Aldershot/Burlington, Ashgate Publishing Limited, 2007; Th. FAIST and P. KIVISTO (eds), *Dual Citizenship in Global Perspective: From Unitary to Multiple Citizenship*, New York, Palgrave Macmillan, 2007; Al. M. BOLL, *Multiple Nationality and International Law*, Leiden/Boston, Martinus Nijhoff Publishers, 2007; R. HANSEN and P. WEIL (eds), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe*, New York/Oxford, Berghahn Books, 2002.

(7) E.g. G. STOKER *et al.*, *Prospects for Citizenship*, London, Bloomsbury Publishing, 2011, 110-132.

(8) E.g. D. HEATER, *World Citizenship*, *loc. cit.*, note 3; G. STOKER *et al.*, *ibid.*, 153-173.

(9) W. KYMLICKA and W. NORMAN, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory" *in Theorizing Citizenship*, R. BEINER (ed.), Albany, State University of New York Press, 1995, 284; R. ANDRIJAŠEVI , "Acts of Citizenship as Methodology" *in Enacting European Citizenship*, E. F. ISIN and M. SAWARD (eds), New York, Cambridge University Press, 2013, 50.

(10) See W. KYMLICKA and W. NORMAN, *ibid.*, 285. This trend of defining citizenship as a right commenced at the time of the first enactment of the right to citizenship by an international document, i.e. the Universal Declaration of Human Rights (1948). See *infra*, § 2.3.

(11) The statement originates from the 1958 US Supreme Court judgment in the case of *Perez v. Brownell* in which Judge Earl Warren argued that "Citizenship *is* man's basic right, for it is nothing less than the right to have rights". *Perez v. Brownell*, 356 U.S. 44, 31 March 1958.

interaction and interdependence between national and EU law, and correlated citizenships. In a wider perspective, the analysis tackles the sensitive parallelism of state sovereignty and the rules of international law on citizenship governance on the one hand and the challenge of positioning the right to citizenship in a broader human rights context on the other.

With the aim of shaping a theoretical framework for comprehensive analysis of judgments, the chapter following the introductory remarks provides for a concise overview of the conceptual determination of citizenship and draws a parallel between the classic notion of citizenship and supranational EU citizenship. It subsequently focuses on the right to citizenship in general, as defined by the most significant international treaties. For the purpose of contrasting the postulates of theoretical substructure with those of developing judicial practice, the review continuously revolves around the rights attached to citizenship and the image of citizenship as a separate right.

In the central chapter, the paper explores the modalities of subsuming the right to citizenship under existing conventional and communitarian law, by using the most notable and/or recent judgments of the two leading European courts as a point of reference: *Genovese v. Malta*, *Biao v. Denmark*, *Mennesson v. France* (ECHR) and *Janko Rottmann v. Freistaat Bayern* (CJEU). Owing to the fact that in each of the analysed judgments the respondent state is an EU Member State, the question of acquisition and loss of national citizenships simultaneously converts into a matter of the repercussions of these two acts on automatically acquired EU citizenship. Although confined to a few selected court rulings, the analysis of the case-law demonstrates a variety of situations in which the right to citizenship may come to the fore: in issues related to children born out of wedlock, migrations, international surrogacy, family reunification and fraudulent acquisition of citizenship. The analysis of the case-law of the two European courts encompasses three cases of the ECHR and one case of the CJEU. Such a disproportion can be justified primarily by the author's wish to adduce the most recent and/or relevant cases in the domain of the right to citizenship, but also by the fact that in relation to analytical assessments of the right to citizenship, the case-law of the ECHR has been more abundant than the CJEU's jurisprudence.

Finally, the paper offers a comparative assessment of the novel perspectives on citizenship rights expounded in the analysed court rulings and summarises a valuable contribution of the European courts in the standardisation of the right to citizenship and determination of the nature of its correlation with other rights.

II. DELINEATION OF THE NOTION OF CITIZENSHIP AND THE RIGHT TO CITIZENSHIP – CURRENT THEORETICAL FRAMEWORK

A. On the Concept of Citizenship in General

As an old concept with its roots in Athenian democracy and the Roman Republic, citizenship has over the centuries undergone a number of transformations, from a limited, "formal legal status with certain attached privileges or duties guaranteed or enforced by political authorities" to broader "individual membership, rights and participation in a polity".(12) Approached exclusively from a legal point of view, it is usually defined as a *real and effective legal link between the state and an individual.*(13) Hereof, citizenship denotes, in Bauböck's words, "a sorting device for allocating human populations to sovereign states".(14) The criteria of a "real" and "effective" link between the state and an individual (i.e. the principle of effective citizenship) were embedded in the notion of citizenship by the renowned judgment of the International Court of Justice in the *Nottebohm* Case (1955), which lays down that:

> "according to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties".(15)

The terminology of the historic *Nottebohm* Case fits into the general pattern of the preceding and ensuing international provisions on citizenship

(12) R. BAUBÖCK, "Citizenship and migration – concepts and controversies" *in Migration and Citizenship: Legal Status, Rights and Political Participation*, R. BAUBÖCK (ed.), Amsterdam, Amsterdam University Press, 2006, 15; J. SCHOETTLI, "From T.H. Marshall to Jawaharlal Nehru: Citizenship as Vision and Strategy" *in Citizenship as Cultural Flow: Structure, Agency and Power*, S. K. MITRA (ed.), Heidelberg/New York/Dordrecht/London, Springer, 2013, 26. On the grounds that citizenship as a concept brings back a trail of historical memories due to its omnipresence in various epochs, Mitra describes it as an "evocative term". Its dynamics has been potentiated by two different forces: local peculiarities of each country on the one hand and globalisation on the other. See S. K. MITRA (ed.), *Citizenship as Cultural Flow: Structure, Agency and Power*, Heidelberg/New York/Dordrecht/London, Springer, 2013, vii; S. K. MITRA, "Introduction: Citizenship as Cultural Flow – Shifting Paradigms, Hybridization, or Plus ça Change?" *in Citizenship as Cultural Flow: Structure, Agency and Power*, S. K. MITRA (ed.), Heidelberg/New York/Dordrecht/London, Springer, 2013, 2.

(13) J. CRAWFORD, *Brownlie's Principles of Public International Law*, 8th ed., Oxford, Oxford University Press, 2012, 513-520; V. LOWE and Ch. STAKER, "Jurisdiction" *in International Law*, 3rd ed., M. D. EVANS (ed.), New York, Oxford University Press Inc., 2010, 324; Vl.-Đ. DEGAN, *Međunarodno parvo*, Zagreb, Školska knjiga, 2011, 466; J. ANDRASSY *et al.*, *Međunarodno parvo 1*, Zagreb, Školska knjiga, 2010, 353; P. MALANCZUK, *Akehurst's Modern Introduction to International Law*, 7th ed., London, Routledge, 1997, 263.

(14) R. BAUBÖCK, *Citizenship and migration*, *op. cit.*, note 12, 16.

(15) *Nottebohm* Case *(Liechtenstein v. Guatemala)*, Second Phase, Judgment of 6 April 1955, I.C.J. Reports 1955, p. 23; J. CRAWFORD, *Brownlie's Principles of Public International Law*, *op. cit.*, note 13, 513-518.

which prefer the term of "nationality" over the term of "citizenship" for depicting a legal bond between an individual and the State. Nevertheless, it is quite common for scholarly writings and national legislations to employ the terms of "nationality" and "citizenship" interchangeably, i.e. as synonyms. For the fact that a number of countries do make a clear distinction between these two notions, designating "citizenship" as the above-mentioned legal link and "nationality" as someone's ethnic affiliation, the paper gives preference to the neutrally perceived term of "citizenship" and refers to "nationality" only when citing original documents.(16)

It is the very collision between the state sovereignty on the one hand and the person's identity on the other that makes the subject of citizenship highly sensitive. More broadly addressed, citizenship can be also viewed as a bond between an individual and international law, which comes into play when a person is abroad or has a property there.(17)

In reality, citizenship oftentimes transcends this dimension of sole legal identification of an individual with the state(18) and enters into the realm of the senses of belonging, loyalty, (socio-political) identity, economic benefits, patriotism and nationalism.(19) The concept is fluid because the dynamics between the state and an individual capacitates the person's ability to change her/his citizenship. Its contextual interconnectedness with the phenomena of multiculturalism, migrations, identity and statehood makes it multifaceted and as such, a challenging subject of the research conducted by theoreticians from diverse

(16) See Ol. DÖRR, "Nationality" *in Max Planck Encyclopedia of Public International Law*, Heidelberg/Oxford, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, 2012, 1; "Citizenship or Nationality?", European Union Democracy Observatory on Citizenship, 20 December 2015, http://eudo-citizenship.eu/databases/citizenship-glossary/terminology.

(17) R. JENNINGS and Ar. WATTS (eds), *Oppenheim's International Law*, New York, Oxford University Press, 2008, 857.

(18) J. CRAWFORD, *Brownlie's Principles of Public International Law*, *op. cit.*, note 13, 510; J. HABERMAS, "Citizenship and National Identity: Some Reflections on the Future of Europe" *in Theorizing Citizenship*, R. BEINER (ed.), Albany, State University of New York Press, 1995, 260-261.

(19) See more *in* R. BAUBÖCK, *Citizenship and migration*, *op. cit.*, note 12, 18-21; D. HEATER, *A Brief History of Citizenship*, New York, New York University Press, 2004, 1, 88-89; R. BEINER, "Introduction: Why Citizenship Constitutes a Theoretical Problem in the Last Decade of the Twentieth Century" *in Theorizing Citizenship*, R. BEINER (ed.), Albany, State University of New York Press, 1995, 1-28.

areas of social sciences.[20] A growing interest in the matters of citizenship has been especially apparent in the past twenty years.[21]

Every state is entitled to determine by its national legislation the conditions under which someone can acquire or lose her/his citizenship,[22] but this freedom in constituting the respective legislative framework is not absolute. The standard according to which the issue whether a certain matter falls under state's jurisdiction or not represents an essentially relative question which depends upon the development of international relations was first established in the Advisory Opinion of the Permanent Court of International Justice on Nationality Decrees Issued in Tunis and Morocco (1923). Consequently, the right of the state to use its discretion in shaping its citizenship regime is restricted, first, by obligations which may have been undertaken towards other States and, second, by rules of international law,[23] including EU law.[24] This philosophy was soon confirmed by the first legally binding treaty on citizenship, the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) and its Art. 1 which stipulates that:

> "it is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality".[25]

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(20) See S. K. MITRA, "Turning Aliens Into Citizens: A 'Toolkit' for a Trans-Disciplinary Policy Analysis" *in Citizenship as Cultural Flow: Structure, Agency and Power*, S. K. MITRA (ed.), Heidelberg/New York/Dordrecht/London, Springer, 2013, 65; H. GÜLALP, "Transcending the Nation-State?" *in Citizenship and Ethnic Conflict: Challenging the Nation-State*, H. GÜLALP (ed.), Abingdon, Routledge, 2006, 133-139; W. KYMLICKA and W. NORMAN, "Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts" *in Citizenship in Diverse Societies*, W. KYMLICKA and W. NORMAN (eds), New York, Oxford University Pres Inc., 2000, 1; Th. KOSHY OOMMEN, *Citizenship, Nationality and Ethnicity*, Cambridge, Polity Press, 1997, 223-243.

(21) According to W. Kymlicka and W. Norman, the reasons for "an explosion of interests in the concept of citizenship" since the 1990's can be identified primarily on the theoretical level, in a "natural evolution in political discourse" in which the concept integrates "demands of justice and community membership", which were the central concepts of political philosophy in the 1970's and 1980's. The other reason refers to the recent political events and trends in the world, such as the resurgence of nationalist movements in Eastern Europe and the turmoils generated by an increasingly multicultural population in Western Europe. W. KYMLICKA and W. NORMAN, *Return of the Citizen*, *op. cit.*, note 9, 283.

(22) On the doctrine of the margin of appreciation in relation to citizenship matters see J. CRAWFORD, *Brownlie's Principles of Public International Law*, *op. cit.*, note 13, 509.

(23) *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco*, 4, Permanent Court of International Justice, 7 February 1923, p. 24.

(24) S. CORNELOUP, "Réflexion sur l'émergence d'un droit de l'Union européenne en matière de nationalité", *Journ. dr. intern. (Clunet)* 3 (2011), 491.

(25) *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, 13 April 1930, League of Nations, Treaty Series, vol. 179, p. 89, no. 4137.

As noted earlier, this paper is built upon a stance that citizenship primarily constitutes *the right to have rights*.[26] In that vein, it supports the understanding that the concept "provides a principle vehicle through which most people access their universal human rights".[27] Such a dichotomy of the notion is best summarised in the Carlier's argument that citizenship means both "one of the fundamental rights and a factor in achieving these rights".[28] Citizenship rights are thereby usually divided into three categories: *civil* (e.g. the right to privacy, to freedom of thought and conscience, to freedom of speech, etc.), *political* (e.g. the right to vote, to petition, to freedom of association, etc.) and *social* (e.g. the right to education, to health, to social security, etc.).[29] Rights are, however, just one side of the coin, because citizenship as a status presupposes a balance between the *rights* and *responsibilities* of citizenship holders.[30]

B. On the concept of EU citizenship

The nature of the judgments analysed in the study in which all the respondent states are EU Member States calls for a concise overview of specificities inherent to EU citizenship.

The foundations of EU citizenship originate from the idea of European identity developed in the 1970's,[31] but the concept was formally inaugurated twenty years later – by Art. 8.1 of the Treaty on European Union (TEU, the Maastricht Treaty) in 1992[32] as a hybrid form of the legal link between an

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(26) See *supra*, note 11.

(27) L. MORRIS, "Citizenship and human rights: ideals and actualities", *British Journal of Sociology* 63 (2012), 43.

(28) J.-Y. CARLIER, "Droits de l'homme et nationalité", *Annales de Droit de Louvain* 63 (2003), 243.

(29) On classifications of citizenship rights see more W. KYMLICKA and W. NORMAN, *Return of the Citizen*, *op. cit.*, note 9, 285; R. BAUBÖCK, *Citizenship and migration*, *op. cit.*, note 12, 22-29; El. GUILD, "Does European Citizenship Blur the Borders of Solidarity?" *in The Reconceptualization of European Union Citizenship*, El. GUILD, Cr. J. GORTÁZAR ROTAECHE and D. KOSTAKOPOULOU (eds), Leiden/Boston, Brill Nijhoff, 2014, 190-191.

(30) Responsibilities related to citizenship may range from the duty to obey the law to compulsory education, paying taxes, military service, voting in elections, etc. See more W. KYMLICKA and W. NORMAN, *ibid.*, 291-301; R. BAUBÖCK, *ibid.*, 30-31; H. COFFÉ and C. BOLZENDAHL, "Partisan Cleavages in the Importance of Citizenship Rights and Responsibilities", *Social Science Quarterly* 92 (2011), 658-659, 662. See *contra* D. KOCHENOV, "EU Citizenship without Duties", *European Law Journal* 20 (2014), 482-498.

(31) See more B. PERCHINIG, "EU citizenship and the status of third country nationals" *in Migration and Citizenship: Legal Status, Rights and Political Participation*, R. BAUBÖCK (ed.), Amsterdam, Amsterdam University Press, 2006, 67; E. D. H. OLSEN, "European Citizenship: Toward Renationalization or Cosmopolitan Europe?" *in The Reconceptualization of European Union Citizenship*, El. GUILD, Cr. J. GORTÁZAR ROTAECHE and D. KOSTAKOPOULOU (eds), Leiden/Boston, Brill Nijhoff, 2014, 346-348.

(32) *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, OJ C 83, 30 March 2010.

individual and a supranational organisation. Every citizen of an EU Member State is automatically an EU citizen, whereby EU citizenship is additional to the national one and it is not its substitute. By way of explanation, EU citizenship is derivative and dependent,(33) but also transnational and dual.(34) The primacy of national citizenship becomes evident in two segments. First, EU citizenship follows the fate of a national one, so it can be acquired only by an individual who is a citizen of an EU Member State, wherefore the loss of national triggers the loss of EU citizenship. Second, every EU Member State retains its autonomous right to regulate by its internal norms the conditions for acquisition and loss of its national citizenship as a basis for EU citizenship. Consequently, the principles used in defining national citizenship policies reflect greatly on the evolution of the concept of EU identity based on EU citizenship.(35)

Having been introduced with the primary goal to facilitate free circulation of people across the diminished anachronic borders of EU Member States, EU citizenship has evolved into a promoter of the integrationalist approach to citizenship as opposed to the mainly exclusivist approach of national citizenship schemes.(36) It provides its holders with a number of important and far-reaching rights: namely, the right to move and reside freely within the territory of the Member States (Art. 20.2a); the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence under the same conditions as nationals of that State (Art. 20.2b); the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State (Art. 20.2c); the right to petition to the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language (Art. 20.2d); the right to contact and receive a response from any EU institution in one of the EU's official languages; the right to access European Parliament, European Commission and Council documents under certain conditions as well as the right of equal access to the

(33) J. CRAWFORD, *Brownlie's Principles of Public International Law*, *op. cit.*, note 13, 525.

(34) Fr. R. PFETSCH, "European Citizenship: A Concept of Interrelatedness and Conditionality" *in Citizenship as Cultural Flow: Structure, Agency and Power*, S. K. MITRA (ed.), Heidelberg/New York/Dordrecht/London, Springer, 2013, 87.

(35) Cr. J. GORTÁZAR ROTAECHE, "Identity, Member States Nationality and EU Citizenship: Restitution of Former European Nationals v. Naturalisation of New European Residents?" *in The Reconceptualization of European Union Citizenship*, El. GUILD, Cr. J. GORTÁZAR ROTAECHE and D. KOSTAKOPOULOU (eds), Leiden/Boston, Brill Nijhoff, 2014, 15-16.

(36) *Ibid.*, 16-17.

EU Civil Service.[37] When the Treaty of Lisbon came into force in 2009,[38] a new form of public participation of EU citizens was introduced – the Citizen's Initiative,[39] a procedure which affords the citizens the possibility of directly approaching the Commission with a request inviting it to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties as well as the possibility of directly shaping EU policies.

If approached from a broader perspective, the *ratio* of the genesis of EU citizenship is well-synopsised by Heater's exposition, according to which there are four moments that have guided the evolution of EU citizenship: the establishment of a system of European human rights protection by the Council of Europe (in the context of promotion of the rights of European citizens), the formation of the European Parliament (in the context of crystallising the so-called political citizenship, through active and passive voting rights), the practices of the European Commission (in the context of construing social and economic rights of EU citizens) and the formal institution of EU citizenship by the Maastricht Treaty.[40]

C. On the right to citizenship

The generic formulation of citizenship as the right to have rights, when applied to the right to citizenship, leads to the, at first glimpse, puzzling definition in which the respective right constitutes *the right to the right to have rights*. As a result, in order to have a clear view of the right to citizenship, it is necessary to thoroughly understand various facets of the notion of citizenship as a legal status, as illustrated in chapter 2.1 on the concept of citizenship in general. The lines below offer a description of the right to citizenship presented in the most notable citizenship-related international norms.

The conceptualisation of the right to citizenship has become an integral part of the contemporary codifications of international law through adoption of a historical act in the domain of human rights protection: the Universal Declaration of Human Rights (1948), which in Art. 15 grants everyone the right to citizenship, thus stipulating that no one shall be arbitrarily deprived of her/his nationality nor denied the right to change her/his nationality.[41] By explicit incorporation in the declaration which has for the most part evolved

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[37] European Commission, "EU Citizenship", 15 August 2015, http://ec.europa.eu/justice/citizen; *Consolidated version of the Treaty on the Functioning of the European Union*, *OJ* C 326, 26 October 2012.

[38] *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, *OJ* C 306, 17 December 2007.

[39] *Regulation (EU) No. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative*, *OJ* L 65/1, 11 March 2011.

[40] See more *in* D. HEATER, *A Brief History of Citizenship*, *op. cit.*, note 19, 103-104.

[41] *Universal Declaration of Human Rights*, General Assembly Resolution 217 A(III) of 10 December 1948.

into customary international law due to its moral strength, consistent application and fundamental role in defining the essential postulates of human rights protection,[42] the right to citizenship has been credited with an utmost importance in the corpus of norms which are aimed at protecting the integrity of an individual. However, some earlier codifications used to regulate certain matters in the sphere of citizenship too (e.g. the Convention on Certain Questions Relating to the Conflict of Nationality Laws,[43] the Protocol Relating to Military Obligations in Certain Cases of Double Nationality[44] and the Special Protocol Concerning Statelessness;[45] all adopted by the 1930 Hague Conference),[46] but in the focus of these legal acts was only the state's authority to determine by its internal legislation who could be considered its citizen. In such a constellation, granting the right to citizenship was just an indirect errand. In consequence, the Universal Declaration can be perceived as a groundbreaking document which has shifted emphasis from citizenship in the context of state sovereignty to citizenship in the context of human rights. In the second half of the 20th century, it came to a full swing in the development of the latter approach and to subsequent proliferation of correlated norms.

The plethora of treaties which address citizenship from the human rights perspective can be divided into two categories, depending on whether they regulate the right to citizenship by some or all of their provisions. The most notable acts from the first category include the Convention Relating to the Status of Refugees (1951)[47] and its additional Protocol (1967),[48] the Convention on the International Exchange of Information Relating to Civil Status (1958),[49] the International Convention on the Elimination of All Forms of Racial Dis-

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[42] Ph. ALSTON and R. GOODMAN, *International Human Rights – The Successor to International Human Rights in Context: Law, Politics and Morals*, Oxford, Oxford University Press, 2012, 158; S. D. MURPHY, *Principles of International Law*, 2d ed., St. Paul, Thomson/West, 2012, 345; Vl.-Đ. DEGAN, *Međunarodno pravo*, *op. cit.*, note 13, 488; Rh. K. M. SMITH, *Textbook on International Human Rights*, 4th ed., New York, Oxford University Press Inc., 2010, 37.

[43] *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, *loc. cit.*, note 25.

[44] *Protocol Relating to Military Obligations in Certain Cases of Double Nationality*, 12 April 1935, League of Nations, Treaty Series, vol. 178, p. 227, no. 4117.

[45] *Special Protocol Concerning Statelessness*, 12 April 1930, C.27.M.16.1931.V.

[46] The outcomes of the 1930 Hague Conference speak in support of the weightiness of the matters of citizenship since the Conference was the first international event organised solely for the purpose of codification of international law. See more H. MILLER, "The Hague Codification Conference", *American Journal of International Law* 24 (1930), 674.

[47] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

[48] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

[49] *Convention concernant l'échange international d'informations en matière d'état civil*, 4 September 1958, Convention CIEC No. 3. Available at: "Commission européenne. Commission Internationale de l'État Civil – CIEC", 15 August 2015, http://ec.europa.eu/justice_home/judicialatlascivil/html/lk_international_fr.htm.

crimination (1965),[50] the International Covenant on Civil and Political Rights (1966),[51] the American Convention on Human Rights (1969),[52] the Convention on the Elimination of All Forms of Discrimination against Women (1979),[53] the Convention on the Rights of the Child (1989)[54] and the African Charter on the Rights and Welfare of the Child (1999).[55] The second, key, category comprises the Convention Relating to the Status of Stateless Persons (1954),[56] the Convention on the Nationality of Married Women (1957),[57] the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (1963),[58] the European Convention on Nationality (1997)[59] and the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (2006).[60]

In order to gain an insight into the latest trends in the evolution of the right to citizenship, the paper primarily assesses the implementation of one of the founding pillars of human rights protection in the contemporary international community – the Convention for the Protection of Human Rights and Fundamental Freedoms (1950).[61] The treaty regulates the conducts of Euro-

(50) *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 November 1965, A/RES/2106(XX)A-B, pp. 47-51.

(51) *International Covenant on Civil and Political Rights*, 16 December 1966, A/RES/2200(XXI) A-C, pp. 52-58.

(52) *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969. Available at: Organization of American States (OAS), 15 August 2015, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

(53) *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180, pp. 194-198.

(54) *Convention on the Rights of the Child*, 20 November 1989, A/RES/44/25, pp. 167-172.

(55) *African Charter on the Rights and Welfare of the Child*, 11 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990).

(56) UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117.

(57) *Convention on the Nationality of Married Women*, 29 January 1957, A/RES/1040(XI), pp. 18-19.

(58) *Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality*, 6 May 1963, ETS No. 43. There are three Additional protocols to the Convention, one adopted in 1993 and the other two in 1977. See *Protocol amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality*, 24 November 1977, ETS No. 95; *Additional Protocol to the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in cases of Multiple Nationality*, 24 November 1977, ETS No. 96; *Second Protocol amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality*, 2 February 1993, ETS No. 149.

(59) *European Convention on Nationality*, 6 November 1997, ETS No. 166.

(60) *Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession*, 19 May 2006, CETS No. 200.

(61) *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14*, Rome, 4 November 1950, European Treaty Series, No. 5. On the importance of the Convention within the system of international human rights protection see Alston and Goodman, *International Human Rights*, *op. cit.*, note 42, 891-896.

pean states in relation to both citizens and non-citizens not only on their own territory, but also outside their national borders, in particular cases when they exercise control and authority over individuals or areas.(62) There are several reasons for examining the concept of citizenship from the angle of the international treaty which contains no explicit provision on the right to citizenship. The underlying criteria is an exceptional role of the European Court of Human Rights in advocating the right to citizenship in cases related to acquisition or loss of citizenship which the Court has innovatively linked to the right to respect for private and family life granted by Art. 8 of the Convention. By expanding the margins of the conception of private and family life, the European Court has confirmed the flexible character of the Convention which has over time metamorphosed into a living instrument being capable of continuous adjustment to the dynamics of the social relations of the European continent and international community at large,(63) both through rich jurisprudence(64) and continual modifications by additional protocols.(65) Moreover, as the paper centres on EU Member States, examining the elements of their citizenship legislation through the lens of the European Convention comes naturally because every EU Member State is, for being also a Council of Europe Member State, obliged to respect for rights and freedoms granted by the Convention.(66)

III. EUROPEAN CASE-LAW IN THE DOMAIN OF CITIZENSHIP

A. Cases of the European Court of Human Rights

The European Court of Human Rights has in a number of cases explicitly or implicitly dealt with the right to citizenship and thus effectively contributed to delineation of its essence and boundaries. Aside from the selected judgments outlined in the ensuing chapters, the other illustrious ones include *Petropa-*

(62) S. D. MURPHY, *Principles of International Law*, *op. cit.*, note 42, 370.

(63) M. FITZMAURICE, "The Practical Working of the Law of Treaties" *in International Law*, 3rd ed., M. D. EVANS (ed.), New York, Oxford University Press Inc., 2010, 188; Rh. K. M. SMITH, *Textbook on International Human Rights*, *op. cit.*, note 42, 96.

(64) On the role of the jurisprudence of international courts in the shaping of norms of international law see J. M. AMAYA-CASTRO, "International Courts and Tribunals" *in International Law for International Relations*, B. ÇALI (ed.), New York, Oxford University Press Inc., 2010, 180-181.

(65) On the Protocols see J. OMEJEC, *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava – starsbourški acquis*, Zagreb, Novi informator, 2013, 21-31; D. MOECKLI *et al.*, *International Human Rights Law*, New York, Oxford University Press Inc., 2010, 461-464.

(66) A country which aspires to become a member of the Council of Europe is bound to ratify the European Convention, which consequently means that every EU Member State is a state party to the Convention.

vlovskis v. Latvia (2015),[67] *Jeunesse v. the Netherlands* (2014),[68] *Kurić and Others v. Slovenia* (2012),[69] *Tănase v. Moldova* (2010),[70] *Andrejeva v. Latvia* (2009),[71] *Riener v. Bulgaria* (2006),[72] *Slivenko v. Latvia* (2003),[73] *Gaygusuz v. Austria* (1996),[74] etc. The following selection of judgments reflects the paper's objective to throw light primarily on the groundbreaking court rulings but also on the most recent ones.

1. Genovese v. Malta (2011)

The judgment in the case of *Genovese v. Malta* (2011)[75] is a historical decision in which the European Court of Human Rights adjudicated for the first time that (the right to) citizenship belongs to the scope of application of the Convention for the Protection of Human Rights and Fundamental Freedoms as part of the social identity of an individual that falls under the concept of private life protected by Art. 8 thereof.

Applicant Genovese was born in Scotland in 1996 where he was registered with a Register of Births. He is a child born out of wedlock to a British mother and a Maltese father and the fatherhood was proved both judicially and medically. However, the applicant's father was at first willing neither to acknowledge his child nor to maintain contact with him. The suspense in the case began with the mother's application for her son's admission into Maltese citizenship. The Maltese High Commission, which was in charge of making decisions on granting Maltese citizenship, ruled that the applicant had not met the requirements for obtaining Maltese citizenship since his mother is not a Maltese citizen and the extract from the Register of Births involved no data confirming that his father is a Maltese citizen. The Commission's ruling also stressed that information on the applicant's father's citizenship represents a valid legal ground for acquiring Maltese citizenship. Consequently, the applicant's mother initiated proceedings before Scottish courts applying for amendment of the applicant's Birth Certificate regarding the applicant's father's citizenship. The Birth Certificate was eventually amended as required, but the mother was informed that despite of official confirmation of the fatherhood of a Maltese citizen, the applicant was still not entitled to Maltese citizenship since

(67) Case of *Petropavlovskis v. Latvia*, Application no. 44230/06, 13 January 2015 (final, 1 June 2015).
(68) Case of *Jeunesse v. The Netherlands*, Application no. 12738/10, 3 October 2014.
(69) Case of *Kurić and Others v. Slovenia*, Application no. 26828/06, 26 June 2012.
(70) Case of *Tănase v. Moldova*, Application no. 7/08, 27 April 2010.
(71) Case of *Andrejeva v. Latvia*, Application no. 55707/00, 18 February 2009.
(72) Case of *Riener v. Bulgaria*, Application no. 46343/99, 23 May 2006 (final, 23 August 2006).
(73) Case of *Slivenko v. Latvia*, Application no. 48321/99, 9 October 2003.
(74) Case of *Gaygusuz v. Austria*, Application no. 17371/90, 16 September 1996.
(75) Case of *Genovese v. Malta*, Application no. 53124/09, 11 October 2011 (final, 11 January 2012).

pursuant to Art. 5.2b and 17.1a of the Maltese Citizenship Act, illegitimate children shall have the right to Maltese citizenship only if their mother is a Maltese citizen. The judgment of the Maltese Civil Court reaffirmed that the applicant's father is a Maltese citizen and he was ordered alimony payment, but due to the extramarital nature of his fatherhood, this piece of information turned out to be irrelevant for the applicant's right to Maltese citizenship.(76)

The applicant based his application on the assertion that the provisions of the Maltese legislation on the acquisition of citizenship on grounds of origin are discriminatory and contrary to Art. 14 taken in conjunction with Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.(77)

The facts in the case indicate two levels of discrimination: gender discrimination because a child born out of wedlock can obtain Maltese citizenship only on the ground of its matrilineality and discrimination with respect to the privacy of personal and family life since this reservation exists only in regard to "illegitimate children". Illegitimacy thus appears as a serious obstacle and source of discrimination when it comes to exercise of the right to citizenship.

The Maltese Government assigned a number of objections to the application. For instance, it suggested that the case was not subject to Art. 8 due to a lack of close family ties between the applicant and his father and that the respective biological reality is not sufficient for constitution of family life, which was supported by the assertion that it is very likely that in the concrete case it will not come to family life in the future. The Maltese Government also argued that the applicant, as an EU citizen, can pay free and infinite visits to Malta as well as reside and find a job there. Nevertheless, its most important argument referred to the fact that citizenship is not a conventional right and hence the applicant is in no position to call for violation of Art. 14 of the Convention.(78)

In its response thereto, the Court drew several conclusions which have become crucial for the perception of the relationship between citizenship and family life. Before all, it shed light upon the scope of EU citizenship in comparison with national citizenship, emphasising that in practice, Maltese citizenship would provide the applicant with a much wider range of rights than EU

(76) *Ibid.*, §§ 7-5, 22.

(77) Art. 14 thereof prohibits discrimination stipulating that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Art. 8 governs the right to private and family life and reads as follows: "Everyone has the right to respect for his private and family life, his home and his correspondence" (§ 1) and "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" (§ 2). *Convention for the Protection of Human Rights and Fundamental Freedoms*, *loc. cit.*, note 61.

(78) Case of *Genovese v. Malta*, *op. cit.*, note 75, § 27.

citizenship would. The applicant would be entitled to reside in Malta for an indefinite period of time and during such a period, he could establish a closer relationship with his father whereas EU citizenship caters just for the right of abode which is restrained by the conditions and formalities faced when dealing with the classical form of citizenship. In terms of interpretation of the concept of "family life", the European Court of Human Rights opted for an extensive approach, according to which Art. 8 of the Convention does not only encompass marital ties but also other forms of *de facto* family ties, which leaves open the possibility to raise the quality of the bond between biological fathers and their illegitimate children. Accordingly, "family life" does not comprise only established but also potential bonds which might develop and advance in such a complex interrelation between biological fathers and their children born out of wedlock. What should be taken into account on such an occasion is the father's interest and devotion to the child shown prior and after the child's birth. The Court expressed a similar need for a broader definition regarding "private life" as well. It underlined that this personal sphere relies both on physical and psychological integrity or in other words, various aspects of human physical and psychological identity. Therefore, although Art. 8 of the Convention does not grant the right to citizenship, arbitrary deprivation of this right may, under certain circumstances, constitute its violation due to the repercussions of the deprivation for the private life of the person in question. The historical part of the judgement relates to the Court's reasoning that deprivation of citizenship might be viewed as violation of Art. 8 on the ground of the influence of such practice on the private life of an individual which represents *a concept wide enough to embrace the aspects of a person's social identity*. The Court asserted that even though the right to citizenship is not explicitly granted by the Convention, it may affect the social identity of an individual and thus falls under the general scope of Art. 8 thereof. Taking into consideration the above facts, the Court highlighted that the *Genovese* case is subject to Art. 14 of the Convention in conjunction with Art. 8.[79] Moreover, it warned that the discrimination of the applicant based on his illegitimate status is deemed as one of the foundations of the prohibition of discrimination set forth by Art. 14 and that confirmation of such a standpoint can be derived from its earlier judgements *Marckx v. Belgium* (1979)[80] and *Inze v. Austria* (1987).[81] While assessing a potential breach of Art. 14 by the Maltese Government, the Court referred to the relevant rule that the "difference in treatment" by the Maltese Government should be interpreted as an act which is not *objectively* and *reasonably* justified, i.e. as an act that neither leads to a legitimate goal nor implies a reasonable relation between the applied instruments and desirable goal. The states enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise

(79) *Ibid.*, §§ 28-36.
(80) Case of *Marckx v. Belgium*, Application no. 6833/74, 13 June 1979.
(81) Case of *Inze v. Austria*, Application no. 8695/79, 28 October 1987.

similar situations justify different treatment in law, and the scope of this margin will vary according to the circumstances, the subject matter and its background. In the *Genovese* case, the status of an 'illegitimate child' arises from the fact that the child's parents were not married at the moment of its birth, which should, unless such differentiation is objectively justified, represent differentiation based on a status prohibited by the Convention. The argument of the Maltese Government that the reason for such differentiation is the social reality in which only the child's mother can always be identified could not be accepted by the Court. The latter singled out the fact that in cases in which the father is known and registered in the Birth Certificate, no matter if the registration resulted from the father's free will or from a judicial determination, there can be differences in treatment between legitimate and illegitimate children without just causes for such. Such an interpretation resulted in the Court's ruling that Genovese did experience violation of Art. 14 of the Convention in conjunction with Art. 8, which for the first time provided the right to citizenship with a place in the conventional system as an integral part of a person's social identity, subsumed under the conception of the right to private life.[82]

The case of *Genovese* can be seen as an extensive interpretation of an international norm on the prohibition of discrimination. According to Marchadier, by extending the meaning of Art. 14 beyond its designed limits, the Court has practically erased the dividing line between the respective non-freestanding provision on the prohibition of discrimination and Protocol 12 on general prohibition of discrimination. Such a manoeuvre of the Court has attracted criticism because Art. 14 stipulates the prohibition of discrimination only in relation to rights protected by the European Convention and its Protocols, and by stretching the scope of the provision in order to include the right to citizenship, the Court has evidently expunged the otherwise obvious difference between Art. 14 and Protocol 12.[83]

2. *Biao v. Denmark (2014)*

Due to the increase in the volume of migration flows in Europe, citizenship has come into focus of overflowing political debates centred upon immigration policies.[84] In the context of migrations, citizenship may be depicted as

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[82] Case of *Genovese v. Malta*, *op. cit.*, note 75, §§ 43, 46-49. See more R. DE GROOT and Ol. VONK, "Nationality, Statelessness and ECHR's Article 8: Comments on *Genovese v. Malta*", *European Journal of Migration and Law* 14 (2012), 317-325.

[83] See F. MARCHADIER, "L'attribution de la nationalité à l'épreuve de la Convention européenne des droits de l'homme: Réflexions à partir de l'arrêt *Genovese c. Malte*", *Rev. crit. dr. intern. privé* 101 (2012), 68.

[84] M. POHLMANN, J. YANG and J.-H. LEE, "Introduction" *in Citizenship and Migration in the Era of Globalization: The Flow of Migrants and the Perception of Citizenship in Asia and Europe*, M. POHLMANN, J. YANG and J.-H. LEE (eds), Heidelberg/New York/Dordrecht/London, Springer, 2013, 1.

"a distinction between members and outsiders based on their different relations to particular states".(85) The issue of migration seems to be the segment of social relations which is contextually and conceptually closely interwoven with the right to citizenship, particularly when its effects directly manifest as migrant family affairs. The European Court of Human Right has often decided on the rights of migrants and their families(86) and this paper is focused on one of the latest ones *Biao v. Denmark*.(87) Namely, in March 2014, the ECHR delivered quite a controversial judgment in the *Biao* case on the issue of granting citizenship to members of a migrant family and correlated family reunification, taking quite a strict stance towards the migrants' right to citizenship.(88) The case was subsequently referred for further adjudication to the Grand Chamber in September 2014.(89)

The case of *Biao v. Denmark* deals with complexities pertinent to the life's trajectories of a migrant family consisting of a father, a Danish citizen (of Togolese descent), a mother, a Ghanaian citizen, and their child, a Danish citizen, all residing in Sweden and striving to regulate their Danish citizenship. The father (the first applicant) was born in Togo, but had mostly lived in Ghana before coming to Denmark. He arrived to Denmark in 1993, at the age of 22, and married a Danish citizen in 1994, which enabled him to get a permanent residence permit. The couple got divorced in 1998, but the applicant acquired Danish citizenship in 2002. In 2003, he married the second applicant, a 24 year-old Ghanaian citizen he met on his visit to Ghana, who a few days after the wedding, requested a residence permit in Denmark with reference to her marriage. The Danish authorities rejected the request, stating that the applicants did not meet the requirements for family reunion set by the Aliens Act according to which the permit could be granted only if the spouses' aggregate ties to Denmark were stronger than their attachment to any other country. Namely, the authorities argued that the applicants' aggregate ties with Ghana were stronger than their ties with Denmark and that the couple could therefore settle in Ghana. Nonetheless, later in 2003, the second applicant came to Denmark on a tourist visa and the couple moved to Sweden. In 2004, they had a child in Sweden, born as a Danish citizen due to his father's citizenship. In the meantime, in December 2003, the Danish Aliens Act got amended so as to lift the attachment requirement for persons who had held Danish citizenship for at least 28 years. The further changes affected persons who were born or arrived

(85) R. BAUBÖCK, *Citizenship and migration*, *op. cit.*, note 12, 15.

(86) See *Handbook on European law relating to asylum, borders and immigration*, Luxembourg, Publications Office of the European Union, 2014.

(87) Case of *Biao v. Denmark*, Application no. 38590/10, 25 March 2014 (referral to the Grand Chamber 8 September 2014).

(88) However, such a stance has not been uniform and hence already a few months later, in the case of *Jeunesse v. the Netherlands*, the Court expressed the tendency of flexibilisation of strict immigration policies on behalf of migrants. *Ibid.*

(89) Case of *Biao v. Denmark*, *loc. cit.*, note 87.

in Denmark as small children, as they could be exempted from the respective requirement, provided they had resided lawfully there for 28 years.[90]

The decision of the Aliens Authority to refuse to grant the second applicant a residence permit in Denmark was repeatedly confirmed by all the higher instances the applicants appealed to (the Ministry of Refugee, Immigration and Integration Affairs; the High Court of Eastern Denmark and the Supreme Court). While addressing the High Court of Eastern Denmark, the applicants insisted that the rejection by the Ministry of Refugee, Immigration and Integration Affairs amounted to violation of Art. 8 of the European Convention, alone and in conjunction with Art. 14 of the Convention, as well as Art. 5.2 of the European Convention on Nationality.[91] They argued that the Ministry's decision accounted for indirect discrimination against them because of the discriminatory 28-year rule and the corresponding attachment requirement imposed only on those persons who acquired Danish citizenship later in life. The High and the Supreme court contested the applicant's arguments and found violation of none of the highlighted provisions of the European Conventions, thus drawing particular attention to the reasoning that Art. 8 of the European Convention on Human Rights "does not impose on the Contracting States any general obligation to respect immigrants' choice of the country of their residence in connection with marriage, or otherwise to authorise family reunion".[92]

The Court's assessment can be divided into two sections.

In the first one, the Court focused on the Denmark's compliance with Art. 8 of the European Convention on Human Rights on the right to respect for private and family life and accentuated several decisive postulates on the limits of state jurisdiction in the respective sphere. Hence, it started off with the axiom that the logic behind Art. 8 is to protect the individual against arbitrary action by the public authorities which should in essence always aim to strike a fair balance between the competing interests of an individual and of the community as a whole. The protection of private and family life may include both positive and negative obligations of the State. For the fact that the Danish authorities refused to grant the second applicant family reunion, the Court examined the Denmark's alleged failure to comply with its positive obligations. The starting point of the evaluation was the well-established fact that in general, states enjoy a considerably wide margin of appreciation in controlling the entry of aliens into their territory and their residence there. In cases related to immigration and family life, the extent of states' obligations to admit to their territory spouses of persons who already possess their citizenship depends on

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[90] *Ibid.*, §§ 5-20.

[91] Art. 5 of the *European Convention on Nationality* promotes the principle of non-discrimination and in its § 2 regulates that "Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently". *European Convention on Nationality*, *loc. cit.*, note 59.

[92] Case of *Biao v. Denmark*, *op. cit.*, note 87, §§ 20-21.

the specificities of an individual (e.g. her/his attachment to the state, effectiveness of family life, possibilities of settlement in the country of origin, etc.) and general interests. While assessing the key requirement for establishing family union in Denmark – ties with the state, the Court argued that the first applicant had strong ties to Togo, Ghana and Denmark while the second one had very strong ties to Ghana and no ties to Denmark. Her only tie to Denmark was a marriage with a Danish citizen, however, this circumstance could not be perceived as a *fait accompli* on the basis of which she should be granted a residence permit. *Ergo*, the Court adjudicated that Denmark did not transgress its margin of discretion when trying to strike a fair balance between its interests in the area of immigration control and the applicants' wish for family reunion in Denmark, i.e. it did not violate Art. 8.[93]

The second section of the Court's arguments tackles the alleged violation of Art. 8 taken in conjunction with Art. 14 on the prohibition of discrimination, i.e. of differences in treatment based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another. The issue at stake was the alleged indirect discrimination deriving from a difference in treatment between two categories of Danish citizens: born Danish citizens and persons acquiring Danish citizenship later in life, in relation to the 28-year rule. By way of explanation, the respective rule is applicable to both categories, but the attachment requirement applies to born Danish citizens only until they turn 28, while for the other category, the requirement becomes applicable from the date on which they acquire Danish citizenship. It was also argued that such differentiation induced another level of indirect difference in treatment between other two groups of Danish citizens: the ethnic and non-ethnic Danes for the fact that the majority of born Danish citizens are of Danish ethnic origin, while persons who acquire Danish citizenship later in life are predominantly the non-ethnic Danes. In general, the Court defended the introduction of the 28-year rule because it was in line with a previously analysed "standard of strong ties" with Denmark. In contrast, the Court asserted that the rule could possibly lead to the *de facto* division of Danish citizens along ethnic lines and prevent those who became Danish citizens later in life to reunite with their spouses, but it also added that the aim put forward by the Danish authorities for introducing the 28-year rule exception to the attachment requirement was not discriminatory, but legitimate and based on an objective criterion. Namely, apart from born Danish citizens, there is a large group of other persons who are exempted from the attachment requirement (e.g. "non-Danish citizens who were born and raised in Denmark, or came to Denmark as small children and were raised there, and who had stayed lawfully in the country for 28 years") and such a classification is not linked to race or ethnic origin. The sole purpose of the principle of lasting and long ties with Denmark in the cases of granting family reunion with a foreign spouse is

(93) *Ibid.*, §§ 52-60.

her/his successful integration into Danish society. Although the Court criticised the 28-year rule as excessively strict and noted that the standard considerably obstructed the chances of persons who acquired Danish citizenship later in life to reunite with a foreign spouse, it pointed out that it was not its task to review the Danish legislation *in abstracto*, but only to examine the issues raised by the case before it. In that vein, examining the first applicant's ties with Denmark, the Court recalled that he had been a Danish citizen for less than two years when he was refused family reunion and that such a short time cannot be considered disproportionate to the aim of the 28-year rule. Accordingly, it adjudicated that there was no violation of Art. 14 taken in conjunction with Art. 8 of the Convention.(94)

Nonetheless, such an approach to the rule with immeasurable and far-reaching effects on an individual's citizenship status and family life in general appears overly simplified. In the *Biao* case, the father and the son are Danish citizens, and if the 28-year rule would be rigidly applied, the family could not reunite before 2030. Besides, the Court overly focused on the period when the second applicant's request for a residence permit was first rejected (i.e. 2003 and 2004), without sufficiently taking into consideration the overall development of the family situation during next ten years, esp. at a time when the judgment was delivered. Hence, the joint dissenting opinion of judges Sajó, Vučinić and Kūris seems more to the point, even when they articulate their observations in an elusive and abstract way. By way of example, in the final lines of their reasoning, they decorously noted that "As a matter of common sense, however, for a citizen, even if naturalised, to have to wait twenty-eight years for permission to reunite in his country of citizenship is disproportionately, drastically and unjustly far too long and amounts for that human being, and for his spouse, to deprivation of their right to pursuit of happiness. We do not believe that the Convention was meant to endorse such deprivation".(95)

3. Mennesson v. France (2014)

In 2011, the European Court of Human Rights started adjudicating two similar cases on legal recognition of children born through surrogacy whereat both the surrogate mother and the child's parents were nationals of different states: *Mennesson v. France*(96) and *Labassee v. France*.(97) With these judgments, the Court has shaped the standards widely recognised as an important step forward in the protection of children delivered by surrogate mothers and

(94) *Ibid.*, §§ 77-107.
(95) *Ibid.*, Joint Dissenting Opinion of Judges Sajó, Vučinić and Kūris, § 34.
(96) Case of *Mennesson v. France*, Application no. 65192/11, 26 June 2014 (final, 26 September 2014).
(97) Affaire *Labassee c. France*, Requête no. 65941/11, 26 June 2014 (définitif, 26 September 2014).

in liberalisation of surrogacy in general. Due to an extensive overlap of the facts in the cases, the lines below focus solely on analysis of the *Mennesson* case. Although the judgement primarily focuses on the rights of the children and parents who constitute a triadic nexus in the surrogacy, the case should also be approached from the perspective of exercise of the respective children's right to the citizenship of their parents since citizenship is not automatically acquired in such a complex legal situation.

The applicants are the Mennessons: mother and father, who are French citizens, and their two children – twin sisters Fiorella and Valentina, who are citizens of the United States of America. The entire family lives in France. After unsuccessful attempts to conceive a child, including *in vitro* fertilization by their own gametes, the couple opted for medically-assisted reproduction by means of the father's gametes and the donor's ovum and subsequent transfer of the fertilised egg into the donor's uterus. The spouses chose California for the fertilisation venue since this American state considers IVF a legal procedure and permits conclusion of surrogacy agreements. When it was known that the donor carries twins, the Californian Supreme Court ruled that the father was to be declared the *genetic father* and the mother the *legal mother* of the children to be borne by a surrogate mother. As instructed by the Supreme Court, the applicants were then registered in the children's Birth Certificate as their "mother" and "father". The problem emerged after the father had referred to the French Embassy in Los Angeles for the sake of registration of the Birth Certificates with the French Register of Births and registration of the twins' names in his passport in order to ensure a safe trip back to France. The Embassy, however, rejected his application since the applicants could not demonstrate that the mother had been registered in the Birth Certificate as the biological mother of the twins and due to suspicion of surrogacy, the case was forwarded to the French public prosecutor. Despite the rejection, the couple managed to return to France with their children because the American Federal Administration provided the twins with American passports in which the applicants were entered as the children's mother and father. The proceedings initiated by the French prosecutor qualified the decision of the Californian Supreme Court and the relating Birth Certificates as null and void since they were contrary to the French concept of the international and French public policy.[98]

The applicants assumed the posture that due to the inability to be issued French legal recognition of their parental status legally obtained abroad, the children's best interests were put in jeopardy as well as was their common right to private and family life in a way granted by Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The ruling of the European Court of Human Rights ascertained that the French authorities interfered with the private life of the applicants, thus violating their rights

(98) Case of *Mennesson v. France*, *op. cit.*, note 96, §§ 6-18.

stipulated by Art. 8 thereof. The decision of the French authorities would have been justifiable only if it had been compliant with the law and necessary for accomplishing one or more legal goals. The term of "necessity" implies that the interference corresponds to a pressing social need and, in particular that it is proportionate to the legitimate aim pursued. The Court underscored that the position of the French authorities was legitimate since the national law deems surrogacy agreements as null and void, regardless of the territory where they are concluded (in France or a foreign country). Nonetheless, it could not find justification for "the 'necessity' of such a decision of the French authorities, primarily due to the fact that states" margin of appreciation is vastly restrained in cases affecting the most important elements of human existence or identity. The encroachment on the occasion of assessment of "necessity" brought to interference with a number of elements of family and private life. Considering family life, the failure to acknowledge the existence of a legal tie between the parents and children reflected in a variety of segments of the applicant's everyday family life, threat accounting for practical problems such as children's admission to school, regulation of insurance, obtaining family subsidies and similar. Still, the children's inability to acquire their parents' citizenship turned out to be a particularly serious repercussion since this affected the right to citizenship, the lack of which led to prevention of exercise of an array of other rights. Notably, without being provided with French citizenship, the children might be banned from staying in France after they reach full legal age or from untroubled travelling abroad with their parents. In compliance with Art. 18 of the French Civil Code, children may acquire French citizenship if at least one of their parents is a French citizen, but in the referring case, the scope of the provision was subject to the limitations laid down in Art. 47 of the same Code governing the issue of the legal validity of civil status certificates issued abroad. Such documents shall be regarded as valid unless certain parts of other documents or of the certificate itself suggest that the respective data are illegal, false or do not correspond to the real status of the person concerned. In the light of the restrictive French attitude towards the matter of the legitimacy of (foreign) surrogacy agreements, the case can be qualified as an exception which can prevent acquisition of French citizenship. Yet, after estimating the level of proportionality of the official French position about the issue of the legal effects of surrogacy agreements and practical problems arising therefrom on behalf of the applicants, the Court adjudicated that the disproportion is not serious enough to be regarded as violation of the *right to family life*. For the sake of balance, the Court also highlighted the circumstances that the applicants were given an opportunity to settle down in France immediately after the birth of their children, that they are able to have a family life compatible with the life of other French families and that with respect to the French legislation, there are no indications of a danger of separation of family members. *A contrario*, it as well pointed to several details supporting the claim that the twins had experienced violation of the right to *private life* granted by Art. 8 of the Convention.

The legal ground for the respective right includes, before all, the possibility of a person to determine the details of their identity as a human being, including the aspects of the legal relationship between the child and its parent. Although the particularities of that relationship are transparently set forth by American law, they still confront with the French legal system, due to which the children found themselves in the position of legal insecurity while the possibility of a clear definition of their identity within the French society was largely diminished. Even though Art. 8 does not grant the right to citizenship, the *Genovese* case undoubtedly proved that citizenship represents an important element of a person's identity, so any insecurity of the kind may have a negative impact on the perception of the entire identity of an individual. From the formal-legal viewpoint, children born through surrogacy are discriminated based on French law and inheritance rights, which additionally changes the perception of the value of the relationship with their parents as the crucial part of their identity. The French position occurred to be highly controversial in the part referring to recognition of the legal tie between the children and their biological parent, particularly due to the fact that such a tie was confirmed by the legal system of a foreign country and that all the applicants insisted thereon. Failing to recognise this obvious bond, France exceeded the permitted margin of appreciation. Taking into consideration all the aforementioned facts, the Court ruled that the treatment of the children by the French authorities was not compatible with the best interests of the former and hence their right to private life granted by Art. 8 of the Convention had been violated.[99]

B. Case-law the Court of Justice of the European Union in the Domain of Citizenship

Unlike the European Court of Human Rights which has had a tendency to explicitly address the right to citizenship and analytically scrutinise it, the Court of Justice of the EU has been more inclined towards pondering on the boundaries of the notion of (EU) citizenship *per se* in relation to the rights associated therewith or derived therefrom. Some of the most eminent citizenship cases include *O. and S.* (2012),[100] *Dereci and Others* (2011),[101] *McCarthy*

[99] *Ibid.*, §§ 43, 48-50, 59, 77-102; Gr. PUPPINCK and Cl. DE LA HOUGUE, "ECHR: Towards the Liberalisation of Surrogacy: Regarding the *Mennesson v. France* and *Labassee v. France* Cases (No. 65192/11 and No. 65941/11)", *Revue Lamy Droit Civil* 118 (2014), 78.

[100] *O. and S. v. Maahanmuuttovirasto*, and *Maahanmuuttovirasto v. L.*, C-356/11 and C-357/11, 6 December 2012.

[101] *Murat Dereci and Others v. Bundesministerium für Inneres*, C-256/11, 15 November 2011.

(2011),[102] *Zambrano* (2011),[103] *Rottmann* (2010),[104] *Grzelczyk* (2001),[105] *Kaur* (2001),[106] *Micheletti* (1992),[107] etc. The lines below offer a synoptic review of one of the CJEU's landmark judgments, which questions the matter of hierarchy and interrelatedness of national and EU citizenships and its effects on a number of human rights.

Janko Rottmann v. Freistaat Bayern (2010)

The Judgment in the *Rottman* Case passed on 2 March 2010[108] represents a milestone contribution of the Court of Justice of the EU to the analytical debates on the relevance of EU law in shaping the notion of citizenship. It addresses the delicate matter of the interconnection of EU and national law through the prism of loss of national citizenship which renders a person stateless, e.g. deprived of both national and, consequently, EU citizenship. Its overall impact on the analyses assessing the general interdependence between the internal and EU legal systems was remarkable, and a number of discourses have centred on the dubiety whether with the *Rottmann*'s case, the CJEU challenged the Member States' sovereignty in nationality law.[109]

Dr. Janko Rottmann was born as an Austrian citizen, but later in life, he obtained German citizenship by naturalisation which triggered an automatic loss of Austrian citizenship. He transferred his residence to Germany following an investigation in Austria about suspected serious fraud he had committed in the exercise of his profession; however, he abstained from sharing this critical information with the German authorities during the naturalisation procedure. The Austrian authorities eventually disclosed the facts about Rottmann's fraud and the Austrian arrest warrant to the city of Munich which had the effect of withdrawing his naturalisation with retroactive effect as, in the light of new circumstances, he obtained German citizenship by deception. The withdrawal of Rottmann's naturalisation was in line with German law although the effects of the respective act rendered him stateless.[110]

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[102] *McCarthy v. Secretary of State for the Home Department*, Case C-434/09, 5 May 2011.

[103] *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM)*, C-34/09, 8 March 2011.

[104] *Janko Rottmann v. Freistaat Bayern*, C-135/08, 2 March 2010.

[105] *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, Case C-184/99, 20 September 2001.

[106] *The Queen v. Secretary of State for the Home Department,* ex parte*: Manjit Kaur, intervener: Justice*, Case C-192/99, 20 February 2001.

[107] *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, C-369/90, 7 July 1992.

[108] *Janko Rottmann v. Freistaat Bayern*, *loc. cit.*, note 104.

[109] J. SHAW, "Setting the scene: the *Rottmann* case introduced", European Union Democracy Observatory on Citizenship, 3 December 2015, http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law.

[110] *Janko Rottmann v. Freistaat Bayern*, *op. cit.*, note 104, §§ 22-29.

Chronologically, the first act on the withdrawal of the applicant's naturalisation with retroactive effect relates to the Decision of Freistaat Bayern (2000), which was subsequently upheld by the judgment of a second instance court – the Administrative Court of the Land of Bavaria (2005). The appeal on a point of law ("Revision") was thereafter brought before the Federal Administrative Court, which decided to stay proceedings and refer the following two questions to the Court of Justice for a preliminary ruling. First, is it contrary to EU law that someone loses her/his EU citizenship (with the rights and freedoms attached thereto) as a consequence of withdrawal of naturalisation acquired by intentional deception if such an act leads to that person's statelessness? Second, if the answer is positive, should the Member State which has naturalised the respective EU citizen and afterwards decided to withdraw the naturalisation acquired by intentional deception refrain from withdrawing if the respective withdrawal would lead to loss of EU citizenship? Moreover, is the Member State of the former citizenship obliged to interpret, apply or adjust its national law so as to avoid loss of EU citizenship?[111] The responds to these questions bear utmost importance for a person confronted with statelessness because the status of a stateless person denies her/him all the benefits of any citizenship anywhere, i.e. "denies her/his right to rights".[112]

Thus, the principal issue the Court needed to adjudicate was whether the withdrawal of the applicant's citizenship acquired by naturalisation was in line with the provisions of the Treaty establishing the European Community relating to EU citizenship, in particular with its Art. 17 EC.[113] The Court's starting point in analysing the relevant EU law encompassed two acts from 1992: Declaration No. 2 on Nationality of a Member State[114] and the Decision of the Heads of State and Government concerning certain problems raised by Denmark on the Treaty of European Union adopted at a meeting within the European Council at Edinburgh ("the Edinburgh decision"),[115] both of which establish that "the question whether an individual possesses the nationality of

(111) *Ibid.*, §§ 28-30, 35.

(112) *Pham (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2015] UKSC 19 On appeal from: [2013] EWCA Civ 616, 25 March 2015, § 40.

(113) Art. 17 of the Treaty establishing the European Community reads as follows: "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship. 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby". *Treaty establishing the European Community (Nice consolidated version) – Part Two: Citizenship of the Union – Article 17 – Article 8 – EC Treaty (Maastricht consolidated version)*, OJ C 224, 31 August 1992 P. 0010 – Consolidated version; OJ C 340, 10 November 1997 P. 0186 – Consolidated version; OJ C 325, 24 December 2002 P. 0044-0044.

(114) *Declaration No 2 on nationality of a Member State, annexed to the Final Act of the Treaty on European Union*, OJ C 191, 29 July 1992, p. 98.

(115) *Decision of the Heads of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty of European Union*, OJ C 348, 31 December 1992, p. 1.

a Member State shall be settled solely by reference to the national law of the Member State concerned". Conforming to the relevant provisions of Austrian law, "any person who acquires foreign nationality at her/his own request, or by reason of a declaration made by her/him or with her/his express consent, shall lose her/his Austrian nationality unless he/she has expressly been given the right to retain [it]".[116] In cases similar to the *Rottmann* one, under Austrian law, if a person loses her/his Austrian citizenship due to acquisition of foreign citizenship and later on, loses a foreign one as well, the loss of the one acquired by naturalisation will not result in automatic and retroactive recovery of Austrian citizenship.[117] The general rule of German law is that "no German may be deprived of her/his citizenship. Citizenship may be lost only pursuant to a law, and against the will of the person affected only if he/she does not become stateless as a result".[118] However, in contrast to this, the law also envisages that an unlawful administrative act may be withdrawn in whole or in part, for the future or with retroactive effect, if it is obtained by fraud.[119] Evidently, the German authorities were confronted by conflicting alternatives consisting of the possibility to withdraw a fraudulent administrative act, on the one hand, and the incapacity to deprive its citizen of citizenship if that would make her/him stateless, on the other hand. Their decision to opt for the deprivation was first interpreted through the lens of the relevant provisions of international law. The analysis commenced with consideration of Art. 15 of the Universal Declaration of Human Rights (1948) which provides that everyone has the right to a nationality.[120] It continued with restoring to the Convention on the Reduction of Statelessness (1961) which accentuates, *inter alia*, the duty of a state to prevent a loss of citizenship in cases when it permits the renunciation of citizenship and the acquisition of foreign citizenship by naturalisation (Art. 7.1a and 7.2).[121] Nonetheless, such a loss is not absolutely prohibited because the Convention leaves open the possibility of depriving someone of her/his citizenship if the citizenship was obtained, for instance, by fraud (Art. 8.2b).[122] The same permissive approach to rendering someone stateless on the basis of a loss of citizenship acquired by means of fraudulent conduct is also embodied into Art. 7.1b and 7.3 of the European Convention on Nationality (1997).[123]

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(116) Art. 27(1), *Bundesgesetz über die österreichische Staatsbürgerschaft (Staatsbürgerschaftsgesetz 1985 – StbG)*, BGBl. 311/1985.

(117) *Janko Rottmann v. Freistaat Bayern*, *op. cit.*, note 104, § 11.

(118) Art. 16(1), *Grundgesetz für die Bundesrepublik Deutschland*, vom 23 Mai 1949 (BGBl. S. 1), zuletzt geändert durch Artikel 1 des Gesetzes vom 23 Dezember 2014 (BGBl. I S. 2438).

(119) Art. 48(1) and (2), *Bayerisches Verwaltungsverfahrensgesetz*, vom 23 Dezember 1997 (GVBl. 1997, S. 235), zuletzt geändert durch Gesetz vom 22 Dezember 2009 (GVBl. 2009, S. 628).

(120) *Universal Declaration of Human Rights*, *loc. cit.*, note 41.

(121) *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

(122) *Ibid.*

(123) *European Convention on Nationality*, *loc. cit.*, note 59.

Having taken all the above standards into consideration, the Court proceeded with the elaboration of the two questions referred to it by the Federal Administrative Court with an aim to ascertain whether it was contrary to EU law, in particular to Art. 17 EC, to withdraw citizenship of an EU Member State acquired by naturalisation and obtained by deception if such a withdrawal gives rise to deprivation of the status of an EU citizen and the whole set of the rights and benefits attached thereto. The Court's assessment evidently discloses a two-fold approach to (EU) citizenship: one based on the human rights imperative to avoid statelessness and the other which shifts the focus on the specific rights attached to EU citizenship that might be lost in case of withdrawal of naturalisation.(124) Its principal findings can be summarised along the following few lines.

First, the Court supported the doctrine of the primacy of internal law in laying down the conditions for acquisition and loss of nationality, but only as long as these norms are in compliance with Community law.(125) By way of explanation, even in the matters that fall within the competence of the EU Member States, the latter must have due regard to EU law in situations affecting the rights conferred and protected by the legal order of the Union.(126) As EU citizenship is deemed an essential element of the fundamental status of citizens of the EU Member States,(127) the rule on due regard to EU law is inevitably applicable to the matters of citizenship likewise.(128) The Court was of the opinion that the decision on withdrawal of naturalisation on the basis of deception corresponded to a reason relating to the public interest and was therefore compatible with EU law. Its momentous pronouncement established that it was legitimate for a Member State "to wish to protect the special relationship of solidarity and good faith between it and its citizens and also the reciprocity of rights and duties, which form the bedrock of the bond of citizenship".(129) Hence, it was on the national court to ascertain whether the withdrawal decision respected the principle of proportionality, both in the light of EU and national law, in relation to consequences it entailed for the applicant's status. While examining this interrelationship, the Court is obliged to establish three points: first, whether a loss of citizenship is justified in relation to the gravity of the offence committed by the applicant; second, whether the act is in tune

(124) J. SHAW, "Setting the scene", *loc. cit.*, note 109.

(125) This viewpoint was furthermore endorsed by calling attention to some earlier relevant cases (*Mario Vicente Micheletti*, *op. cit.*, note 107, § 10; *Belgian State v. Fatna Mesbah*, Case C-179/98, 11 November 1999, § 29; and *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, Case C-200/02, 19 October 2004, § 37). *Janko Rottmann v. Freistaat Bayern*, *op. cit.*, note 104, § 39.

(126) *Janko Rottmann v. Freistaat Bayern*, § 48.

(127) See *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, *op. cit.*, note 105, § 31 and *Baumbast and R v. Secretary of State for the Home Department*, Case C-413/99, 17 September 2002, § 82.

(128) *Janko Rottmann v. Freistaat Bayern*, *op. cit.*, note 104, §§ 41, 43, 45.

(129) *Ibid.*, §§ 50-51.

to the lapse of time between the naturalisation decision and the withdrawal decision; and third, whether it is possible for the applicant to recover her/his original citizenship. As for the latter, the Member State which citizenship the applicant has acquired by a fraudulent act is not obliged to refrain from the withdrawal of naturalisation solely because the applicant had not recovered the citizenship of the Member State of his origin.(130) The due regard imposed on the Member States by EU law has resulted in restricting their discretionary right to decide upon matters related to the withdrawal decision. Such a limitation can be rightfully depicted as an infringement of the State's sovereignty.(131) Although nationality law is commonly seen as "the last bastion in the citadel of sovereignty",(132) the nature of the EU as a supranational organisation inevitably softens this rigid conception, even in the sphere of citizenship laws which are also expected to be in line with the standards inherent to EU law.(133) The autonomy of the Member States in citizenship matters is, therefore, relative.(134) For the fact that every citizen of a Member State is simultaneously an EU citizen, Davies pinpoints that "any national measure determining the scope of national citizenship also affects the scope of Union citizenship, and as such the scope of EU rights".(135) As a consequence of such a prominent interrelatedness between national and EU citizenship, it is plausible to claim that citizenship laws fall within the competence of EU law and are obliged to respect its rules and principles. As Davies rightfully concludes, the *Rottmann* case is an example of "a very conventional application of EU law".(136)

In relation to a conundrum if the Member State of the applicant's original citizenship, i.e. Austria, is required to allow him to recover its citizenship because of a loss of citizenship of another Member State/EU citizenship and ensuing statelessness, the Court did not give a definite ruling because at the time, the withdrawal decision in Germany had not yet become definitive. Be that as it may, the Court set a general point of departure that the principles and rules stemming from the respective judgment and regulating powers of the EU

(130) *Ibid.*, §§ 55-57.

(131) J. SHAW, "Setting the scene", *loc. cit.*, note 109.

(132) P. J. SPIRO, "A New International Law of Citizenship", *The American Journal of International Law* 105 (2011), 746.

(133) J. SHAW, "Setting the scene", *loc. cit.*, note 109.

(134) D. KOSTAKOPOULOU, "European Union citizenship and Member State nationality: updating or upgrading the link?", European Union Democracy Observatory on Citizenship, 4 December 2015, http://eudo-citizenship.eu/commentaries/citizenship-forum/citizenship-forum-cat/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?showall=&start=5.

(135) G. T. DAVIES, "The entirely conventional supremacy of Union citizenship and rights", European Union Democracy Observatory on Citizenship, 3 December 2015, http://eudo-citizenship.eu/commentaries/citizenship-forum/citizenship-forum-cat/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?showall=&start=1.

(136) *Ibid.*

Member States in the domain of citizenship apply both to the Member State of the naturalisation and to the Member State of the original nationality.(137)

The final wording of the ruling sets a landmark and the often-quoted standard that "it is not contrary to European Union law, in particular to Art. 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality was obtained by deception, on condition that the decision to withdraw observes the principle of proportionality".(138) In other words, on the occasion of withdrawing citizenship obtained by deception, national courts should always strive to strike a balance between national interests on the one hand and the repercussions of loss of EU citizenship on the other hand.(139) In this fashion, by employing the principle of proportionality, Rottmann has undeniably limited the States' manoeuvring area which may lead to statelessness. Yet, taken into account the imprecise character of the conception of proportionality, it could be plausible to predicate that the *Rottmann* case has indirectly potentiated arbitrariness in judging proportionality because it has rather easily opened the door for stripping someone off her/his citizenship and thus, rendering her/him stateless, which appears like a strikingly dangerous practice from the perspective of the fundamental human rights protection.(140)

In lieu of a conclusion, it seems opportune to accentuate Mantu and Guild who support the view that the Rottmann judgment sits on the triadic intersection composed of "EU citizenship, human rights and the moral dilemmas associated with the constitution of the European demos" and "introduces new concerns over human rights in the construction of EU citizenship".(141) The concerns are predominantly generated by the wide discretionary powers of states in shaping their citizenship policies, i.e. in deciding who is and who is not eligible to become part of their political communities. By now, the principles stemming from the *Rottmann* case have been confined only to the matter of deprivation of citizenship, but there are views which underpin the idea that Rottmann's *ratio* could be likewise applied to refusal of acquisition of citizenship.(142) If the refusal violates the principle of proportionality, i.e. goes

(137) *Ibid.*, §§ 60-64.

(138) *Ibid.*, § 65.

(139) J. SHAW, "Setting the scene", *loc. cit.*, note 109.

(140) A similar standpoint see *in* D. KOCHENOV, "Two Sovereign States *vs.* a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters", European Union Democracy Observatory on Citizenship, 3 December 2015, http://eudo-citizenship.eu/commentaries/citizenship-forum/citizenship-forum-cat/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?showall=&start=2.

(141) S. MANTU and El. GUILD, "Acts of Citizenship Deprivation: Ruptures Between Citizen and State" *in Enacting European Citizenship*, E. F. ISIN and M. SAWARD (eds), New York, Cambridge University Press, 2013, 121.

(142) J. SHAW, "Setting the scene", *loc. cit.*, note 109; G. T. DAVIES, "The entirely conventional supremacy of Union citizenship and rights", *loc. cit.*, note 135.

beyond necessary, it may evidently obstruct an individual's right to acquire EU law rights and as such, it should be subject to EU law. In that regard, it seems opportune to echo Davies' argument which accentuates that "since an exclusion from Union citizenship impacts just as much on the scope and enjoyment of that citizenship as a deprivation, there is no reason why EU law should be more engaged in one circumstance than another".(143)

The further evolution of the principles enshrined in the Rottmann judgment can be accurately followed in the adjudications of national courts, which contain references to the Rottmann case. By now, national courts have consistently called for observance of the principle of proportionality in decisions on withdrawal of naturalisation, with the aim to keep the principles of national legislation in line with the principles of EU law and to accentuate the far-reaching effects of loss of the (citizenship) rights enjoyed by every citizen of the EU.(144) In certain cases, the *Rottmann* case has been extensively interpreted thus subsuming under the effects of European principles naturalised persons who had not been citizens of a Member State before they obtained Member State citizenship,(145) while in a number of Dutch cases, courts have rigidly interpreted the *Rottmann* case and applied it only in circumstances in which the naturalised persons were citizens of a Member State even prior to the process of naturalisation.(146) In the former group of cases, national courts have aspired to protect *all* EU citizens from the negative effects of the decision on withdrawal of citizenship which is in violation of the proportionality principle. National courts have mostly referenced to the *Rottmann* case while adjudicating the problem of deprivation of citizenship acquired fraudulently through the process of naturalisation (e.g. through a sham marriage,(147) concealing prior criminal law investigations,(148) and concealing an earlier citizenship status).(149) Yet, they have also reflected on the *Rottmann* case in relation to deprivation

(143) G. T. DAVIES, *ibid.*

(144) Verwaltungsgerichtgericht Sigmaringen, 1 K 1752/10, 20 July 2011; Verwaltungsgerichtshof (VwGH), RIS 2009/01/0064, 14 November 2011; Verwaltungsgerichtshof (VwGH), RIS 2009/01/0067, 14 November 2011; Verwaltungsgerichtshof (VwGH), RIS 2011/01/0251, 26 June 2013.

(145) Verwaltungsgerichtgericht Sigmaringen, *ibid.*; Verwaltungsgerichtshof (VwGH), RIS 2009/01/0064, *ibid.*; Verwaltungsgerichtshof (VwGH), RIS 2009/01/0067, *ibid.*; Latvijas Republikas Augstākās tiesas, Lieta Nr. C03058707, 4 March 2013; Verwaltungsgerichtshof (VwGH), RIS 2011/01/0251, *ibid.*

(146) Afdeling Bestuursrechtspraak Raad van State, 201002224/1/V6, 24 November 2010; Rechtbank 's-Gravenhage, 324446/HA RK 08-1195, 7 April 2011; Rechtbank 's-Gravenhage, 400440/HA RK 11-453, 26 January 2012; Afdeling Bestuursrechtspraak Raad van State, 201203417/1/V6, 30 January 2013; Rechtbank Limburg, 03 AWB-11-641, 6 March 2013; Rechtbank Den Haag, C/09/421802/HA RK 12-342, 7 March 2013; Rechtbank Den Haag, C/09/454467/HA RK 13-58, 12 June 2014.

(147) Verwaltungsgerichtshof, RIS 2009/01/0064, *loc. cit.*, note 144; Verwaltungsgerichtshof, RIS 2009/01/0067, *loc. cit.*, note 144; Verwaltungsgerichtshof, RIS 2011/01/0251, *loc. cit.*, note 144.

(148) Verwaltungsgerichtgericht Sigmaringen, *loc. cit.*, note 144.

(149) Latvijas Republikas Augstākās tiesas, *loc. cit.*, note 145.

of EU citizenship triggered by non-compliance with administrative procedures (e.g. a failure to submit a declaration of conservation of citizenship in a timely manner)[150] and links to terrorism.[151]

IV. COMPARATIVE ASSESSMENT OF THE APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION REGARDING THE RIGHT TO CITIZENSHIP

The hereby examined case-law of the European Court of Human Rights and the Court of Justice of the EU has proven a variety and complexity of situations associated with the matters of acquisition and loss of citizenship and, consequently, with the exercise of the right to citizenship. Although each judgment stems from a different factual background, their comparative assessment discloses some interesting similarities and points of convergence. These particularities and overlaps can be summarised in the following six points.

First, in relation to the European Court of Human Rights, the concept of citizenship has always been flexibly interpreted through the right to respect for private or family life as an aspect of a person's social identity granted by Art. 8 of the European Convention. In that fashion, the international treaty which does not lay down the right to citizenship *expressis verbis* has become its major shaper and guardian in a conventional law system. The Court's ever-growing case-law in the domain of citizenship, which has been continuously linking the concept with the European Convention, supports the paper's thesis that citizenship should be scrutinized as a right *per se*. Although the presented judgments prove that by now, Art. 8 has served rather well to protect the right to citizenship, it remains questionable whether the provision safeguarding the private life of an individual can effectively cover all the specificities of citizenship which by its nature (i.e. an indissoluble link with the State) transcends the concept of private life. Taken into account both the dynamic character of the European Convention, which has already been modified sixteen times, as well as the increased scholarly and legislative interest in the matters of citizenship, it seems opportune to argue if there was room for explicit introduction of the right to citizenship into the conventional system of human rights protection. As far as communitarian law is concerned, the respective parallel between the right to citizenship and either the right to respect for private and family life or any other specific right has not been drawn in a ruling of the Court of Justice of the EU nor has the Court reflected on the European Convention. No alternative right to the right to citizenship was needed because, as opposed to the European Convention, the primary legal basis for adjudication of the Court

(150) Cour d'appel (CA), 2011/AR/14337, 11 April 2013.

(151) *Pham (Appellant) v. Secretary of State for the Home Department (Respondent)*, *loc. cit.*, note 112.

of Justice of the EU – Art. 20 TFEU (ex Art. 17 EC) does expressly refer to citizenship (of the Union) and defines it as a precondition for enjoyment of the rights conferred by EC Treaty. As for the cross-reference from the CJEU to the ECHR, the citizenship cases of the former have not usually included references to the latter.(152)

Second, both Courts have widened the scope of applicable citizenship norms. By interpreting the right to citizenship as a paradigm of the right to respect for private and family life, the ECHR expanded the European Convention's margins in a manner which transformed conditional Art. 14 on prohibition of discrimination into a norm similar to autonomous Protocol No. 12 on general prohibition of discrimination. With regard to the CJEU, the scope of EU law was widened by the act of bringing under the EU law's jurisdiction, what Saiz Arnaiz and Torres Pérez termed, a "purely internal situation".(153) This proves that even rigid norms which commonly fall within the almost absolute jurisdiction of the States may be softened by human rights law requirements. As it was earlier depicted, citizenship laws are one of those solid "citadels of sovereignty" where the States retain broad freedom in shaping national policies, so the respective flexibilisation of existing international law provisions with direct effect on internal legislations may be seen as a momentous challenge of a State's sovereignty.

Third, the case-law has confirmed the sensitive character of the concept of citizenship which strives to balance the two at times competing claims: the applicants' right to citizenship and the right of states to freely regulate issues falling under their exclusive jurisdiction. Both Courts have in all the analysed judgments called for a fair balance and the principle of proportionality between these two rights.(154) The case-law has thereby disclosed a dual nature of the principle and questioned its potency. As it is explained in the analysis of the Rottmann case, the principle has been introduced with the aim of restricting a State's arbitrariness in the domain of citizenship, but due to its inherent ambiguity, it has actually frequently potentiated arbitrariness. In other words, the real impact of the principle of proportionality on deconstruction of the "citadel of sovereignty" has not been particularly wide, let alone grandiose.

Fourth, for the fact that the court rulings of both Courts have tackled highly sensitive issues which generally fall under the jurisdiction of each state

(152) Al. Saiz Arnaiz and A. Torres Pérez, *Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights*, Brussels, European Parliament, 2012, 99.

(153) *Ibid.*, 49.

(154) If applied in a broader EU context, the principle of fair balance and proportionality would mean that national measures seeking to limit the exercise of Community rights enjoyed by EU citizens must be proportionate and applied in a non-discriminatory way. See J. McMahon, A. Cygan and E. Szyszczak, "II. EU Citizenship", *International and Comparative Law Quarterly* 55 (2006), 981-982.

(citizenship, the status of a child born out of wedlock, surrogacy and migration laws), it appears challenging to accurately determine the future effectiveness, limits of implementation and influence of judgments on national legislations. A partially positive shift has taken place in relation to Malta which amended its citizenship law in 2007, i.e. shortly after the case of *Genovese* had been filed, and thus removed provisions which amounted to gender discrimination. Nonetheless, although the citizenship law was additionally modified in 2013, the debatable provision on children born out of wedlock has remained ever since.[155] An important step has also been taken by France in 2015 when surrogate children were granted legal recognition which allows them to acquire their parents' citizenship and thereby enjoy the same rights as other French citizens. However, the respective landmark judgment delivered by the French Supreme Court (fr. *la Cour de cassation*) has not removed the ban of surrogacy in France in general.[156] For the fact that the ECHR has no authority to impose obligatory measures on the respondent States which violate rights granted by the European Convention,[157] full implementation of the analysed judgments will greatly depend on the goodwill of the States which have consistently showed considerable reluctance towards the proposed amendments of their nationality laws. As elucidated in the chapter on Rottmann, similar disinclination to fully implement the principles specified in the CJEU's judgments has been evident in post-*Rottmann* cases adjudicated by national courts as well. In general, the States still find it difficult to restrict their sovereignty on the account of granting individuals a wider right to citizenship.

Fifth, unlike the Court of Justice of the EU, the European Court of Human Rights has not put great emphasis on the analysis of the acquisition or loss of citizenship of the EU Member State in relation to EU citizenship, but has instead been more focused on the interpretation of national legal frameworks. The relative exceptions are judgments in *Genovese* and *Jeunesse* cases. Such a practice appears surprising, given the fact that the respondent States in all the analysed judgments were EU Member States, which means that in cases in which the applicants were not citizens of an EU Member State, acquisition or

(155) Namely, pursuant to Art. 17 (1) (a), "any reference to the father of a person shall, in relation to a person born out of wedlock and not legitimated be construed as a reference to the mother of that person". See E. BUTTIGIEG and D. DEBONO, *Country Report on Citizenship Law: Malta*, Florence, EUDO Citizenship Observatory/EUI, 2015, 27-28; *Maltese Citizenship Act*. Available at: "Ministry for Justice, Culture and Local Government", 15 August 2015, http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8702&l=1.

(156) See "France: Surrogate Children Win Legal Recognition", 3 July 2015, *New York Times*, 26 December 2015, http://www.nytimes.com/2015/07/04/world/europe/france-surrogate-children-win-legal-recognition.html?_r=0; "La Cour de cassation valide l'inscription à l'état civil d'enfants nés de GPA à l'étranger", 3 July 2015, *France Info*, 26 December 2015, http://www.franceinfo.fr/actu/societe/article/la-cour-de-cassation-valide-l-inscription-l-etat-civil-d-enfants-nes-de-gpa-l-etranger-700392.

(157) See J. OMEJEC, *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava*, *op. cit.*, note 65, 246.

loss of its national citizenship automatically triggered acquisition or loss of EU citizenship with a wide array of rights attached thereto.

Finally, sixth, both the European Court of Human Rights and the Court of Justice of the EU have largely contributed to the delineation of the right to citizenship on the European continent with their for the most part innovative judgments and it is expected that their influence in crystallising the scope of the respective right will widen further in the future.

V. CONCLUSION

The notion of citizenship is conceptually multi-layered and contextually intertwined with various aspects of a person's identity. Although the rigid legal definition depicts it as a legal link between an individual and the state, the concept is elusive and well-suited for flexible interpretations. Its versatile character is particularly apparent in the domain of human rights, within which the diversified relations of interdependence between the right to citizenship and a plethora of other rights have been induced. Over the past recent years, a valuable contribution in the standardisation of the right to citizenship and determination of the nature of its correlation with other rights has been made by the innovative jurisprudence of the European Court of Human Rights and the Court of Justice of the EU. The analysed case-law underpins a viewpoint that the right to citizenship can be approached from different perspectives: the one related to children born out of wedlock, to children conceived through surrogacy arrangements, or to migrants and their families; nevertheless, the outlined cases are just a small fraction of themes which may accompany the concept of citizenship.

The rich jurisprudence of the European Court of Human Rights and the Court of Justice of the EU in citizenship-related matters has demonstrated their considerable powers in setting novel standards in the construction of the right to citizenship. Confronted with recent tendencies of a number of EU Member States to tighten conditions for the acquisition of their national citizenships, it is assumed that the Courts' role in construing the right to citizenship in line with fundamental human rights postulates will become more challenging. However, along with international treaties and national laws, the Courts would certainly keep constituting a key shaper and guardian of the right to citizenship on the European continent.