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Saggi

The right to citizenship in Europe. Brexit as a stress test

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1. Introduction

The value of citizenship for individuals is often at odds with the value of citizenship for states. This is true in particular with reference to the right to citizenship. As it is well known, the right to citizenship, as the «right to have rights» (Arendt 1948) was introduced in international law – within the context of the international human rights law (Gargiulo and Montanari 2012) – as a safeguard for individuals against the wide autonomy of states in this matter, which led, among the atrocities committed by the authoritarian regimes in the XX century, even to the denationalisation of entire peoples (Panella 2012).

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Democrazia e Sicurezza – Democracy and Security Review
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anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

However, the right to citizenship is still far from being effective (Spiro 2011), due to the permanent need to find a balance between the rights of the individuals and the principle of national sovereignty (Weis 1979, 65-70), in particular in times of stress, such as, for example, the struggle against international terrorism, the crisis of the multicultural societies, etc. In particular, the right to citizenship has shown all its fragility in the context of the European Union. In fact, the European Court of Justice, while defining European citizenship as the «fundamental status of the citizens of the member states»[1], is reluctant in recognizing the right to retain national citizenship against the decision of withdrawal of national authorities. Furthermore, even though any withdrawal of national citizenship, in order to be compatible with EU law, has to respect the principle of proportionality[2], no autonomous right to European citizenship has ever been recognised by the ECJ. Indeed, as pointed out by the Court, the proportionality test has to be carried out by national authorities, which, therefore, remain the masters of citizenship in Europe.

All the incontinences of the right to citizenship in the EU emerged in the context of Brexit (Mindus 2017), which can be definitely considered as a stress test on this issue. On the basis of these premises, this paper focuses on the right to citizenship in Europe, with the aim of demonstrating that its fragility is strictly connected to the ambiguity of EU citizenship itself and the uncertain institutional nature of the European Union.

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

[2] ECJ, *Janko Rottman v. Freistaat Bayern*, 2 march 2010, C-135/08.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

2. The emergence of the right to citizenship in international and regional law

Citizenship today is considered more as a fundamental right rather than a sovereign prerogative immune to international interference. However, the right to nationality at international level is far from being effective (van Waas 2008), due to its minimal content and its general formulation.

In particular, art. 15 UDHR – while providing for the positive right to have and to change nationality, as well as for the prohibition of arbitrary revocation of nationality – is too general and not directly applicable, since it does not refer to the will of states, neither to national legislation on nationality (Lauterpacht 1950).

Even the measures provided by the 1954 United Nations Convention relating to the Status of Stateless Persons – adopted with the aim to give further effect to art. 15 UDHR – are weak, both with reference to the range of individuals who might benefit from them as well as in terms of contents.

At a first glance, the Convention on the reduction of statelessness – adopted in 1961 with the aim to complement the 1954 Convention[3] – seems to offer stronger protection to the right to nationality. Indeed, on one side, it provides for the duty of the states to grant nationality to the individuals born on their territory who would otherwise be stateless and, on the other, prohibits the states from nationality revocation, should this

[3] As it is declared in the Introductory Note to the Text of the 1961 Convention on the Reduction of Statelessness.

act cause statelessness[4] and/or racial, ethnic, religious and political discriminations[5]. However, wide powers of citizenship revocation are still reserved to the states on the basis of art. 8 of the Convention and, among the few states that have ratified the convention so far[6], several have adopted reservations.

In addition to the duty of the states to reduce and prevent cases of statelessness, almost all the human rights international treaties provide for the right to nationality without discriminations[7]. Even these provisions, however, are restrictive, since important cases of discrimination are lacking.

As a result, the international right to nationality has only a minimal content, introducing measures aiming only at preventing/reducing statelessness (Ganczer 2014) and avoiding discriminations. On the contrary, regional law offers much higher protection to the right to nationality. However, this right seems much more established in the American than in the European system of human rights (Bialosky 2015).

[4] Art. 1 Convention on the Reduction of Statelessness.

[5] Art. 9 Convention on the Reduction of Statelessness.

[6] The Convention, indeed, entered in force in 1975 and has been ratified by 71 countries, in many cases several years after its adoption.

[7] Art. 9 of the Convention on the Reduction of statelessness; Art. 5 (d) (iii) International Convention on the Elimination of All Forms of Racial Discrimination; 1957 Convention on the Nationality of Married Women; Art. 18-1-a), b) Convention on the Rights of Persons with Disabilities; Art. 24 cl. 3, International Covenant on Civil and Political Rights; Art. 7 cl. 1 1989 Convention on the Rights of the Child; Art. 29 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Art. 18 Convention on the Rights of Persons with Disabilities.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

In fact, art. 20 of the Inter-American Convention on Human Rights (IACHR) goes even further than art. 15 UDHR, by imposing on the contracting states an obligation to protect the individual right to have, retain and change nationality. More precisely, the Inter-American Court of Human Rights, in *Re Amendments to the Naturalisation Provisions of the Constitution of Costa Rica*, defined the right to nationality as an «inherent right of all human beings.» Indeed, according to the Court, international law does impose certain limits on the national powers on this issue, since «the classical doctrinal position, which viewed nationality as an attribute granted by the state to its subjects, has gradually evolved to the point that nationality is today perceived as involving the jurisdiction of the state as well as human rights issues»[8].

On the contrary, the European Convention on Human Rights (ECHR) does not refer to the right to nationality. Even the project for the adoption of an additional protocol on this issue, launched by the Committee of Experts for the Development of Human Rights in 1998, has been abandoned. As it has been pointed out, the reasons behind the failure of the project were mainly political, since the States were probably unwilling to renounce their sovereignty recognising, through the adoption of the protocol, the jurisdiction of the European Court of Human Rights in nationality issues (Chan 1991).

The European Convention on Nationality (European Convention), adopted in 1996 by the Council of Europe, at a first glance fills the gap of

[8] I/A Court H.R., *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica* Advisory Opinion OC-4/84 of January 19, 1984, Series A No. 4, at par. 32.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

the right to nationality in Europe[9]. However, also the European Convention is weak, both in terms of contents and in terms of procedure. In particular, with reference to the contents, all the conventional principles and rules must be interpreted in the light of the Preamble – explicitly recognising the need to find a balance between the «legitimate interests of States and those of individuals» in all questions concerning nationality – as well as art. 3, that, quoting almost literally art. 1 of the 1930 Hague Convention, establishes that it is the competence of each state to determine who are its citizens. Also in terms of procedure, the European Convention, not being part of the jurisdiction of the European Court of Human Rights, does not improve the protection of the right to nationality (Hall 1999).

With reference to the right to nationality at regional level, therefore, a divide between the American and European system of human rights clearly emerges and this assumption is confirmed when comparing the case law of the American and European Courts of Human Rights. In fact, while the Inter-American Court of Human Rights offers a direct protection of art. 20 IACHR[10] – on the grounds of the principle of human dignity

[9] The European Convention on Nationality was adopted by the Council of Europe in 1996 and opened for signatures in 1997. It entered into force on March, 1st, 2000 and it has been ratified, so far, by 21 states. It introduced principles and rules with reference to several aspects concerning nationality law, with the aim, in particular, on one side, to render the acquisition of a new nationality or the recovery of a former one easier and, on the other, to ban arbitrary withdrawal of nationality. In reflecting the democratic and demographic changes occurred in Europe since the Eighties, it collects the most crucial international commitments concerning nationality.

[10] Starting from I/A Court H.R., *Proposed Amendments.*

– the European Court of Human Rights introduced only implicitly a certain degree of protection of the right to nationality (Milani 2017) based on the argument that nationality denial can lead to the infringement of other rights explicitly recognised in the ECHR, including in particular the right to respect for private and family life (art. 8) and the principle of non-discrimination (art. 14)[11]. However, as declared in the case of *Petrapopavlovskis v. Latvia*: «The Court reiterates that a "right to nationality" similar to that in Article 15 of the Universal Declaration of Human Rights, or a right to acquire or retain a particular nationality, is not guaranteed by the Convention or its Protocols»[12].

3. The right to citizenship in the European Union between national sovereignty and European integration

In the EU Treaties no mention is made to any right to EU or national citizenship. However, there is a reciprocal influence between them (Carrera Nunez and De Groot 2015). Indeed, the right to EU citizenship is dependent on the right to national citizenship and also the opposite is true. Nevertheless the ECJ is reluctant in recognising that EU citizenship can be the object of a right, despite some timid attempts to protect this status from abuse of discretion by national authorities.

[11] For example, in: *Ramadan v Malta* App no 76136/12 (ECHR, 21 June 2016); *A. Karassev v Finland* App no 31414/96 (ECHR, 12 January 1999); *Genovese v. Malta* App no 53124/09 (ECHR, 11 October 2011); *Kurić and Others v Slovenia* App no 26828/06 (ECHR, 13 July 2010).

[12] *Petrapopavlovskis v. Latvia* App no 44230/06 (ECHR, 13 January 2015).

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

European citizenship has been defined by the European Court of Justice in the case of *Grezelczyck* as the «fundamental status of the citizens of the European Union»[13]. This ambiguous definition clearly reflects the paradoxical nature of this status, strictly dependent on the uncertain institutional nature of the European Union, a little more than an association of sovereign States and a little less than a federation (Shaw 2018; Cartabia 1995; Menendez and Olsen 2020).

Indeed, with the aim of preserving national sovereignty, the Maastricht Treaty and the following European treaties state that EU citizenship does not intend to replace the citizenship of the member states. On the contrary, as declared by art. 9 of the Treaty on the European Union, «Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship». EU citizenship, therefore is a dual status (Lippolis 1994, 61-109), deriving from national citizenship (Closa 1992, 1995; Kovar and Simon 1993; Montanari 2012; Hall 1996).

The additional nature of EU citizenship clearly emerges from the Declaration on nationality of a Member State, annexed to the Treaty on the European Union, according to which: «The Conference declares that, wherever in the Treaty establishing the European Community reference

[13] *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, 20 September 2001, 2001 I-06193, where it was stated: «Union citizenship is destined to be the fundamental status of nationals of the member states, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for».

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned»[14].

Accordingly, at section A of the Conclusions of the 1992 Edinburgh European Council it is clearly declared that:

> The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned[15].

Moreover, EU citizenship does not produce any effect on the rules on the acquisition of national citizenship in the Member States, who are still absolutely free to define their rules on citizenship. As a result, in Europe, after the introduction of EU citizenship, the principle of exclusive national jurisdiction on citizenship issues has not been weakened, but, on the contrary, reinforced.

On the basis of these premises, it is evident that due to the interconnection between national and European citizenship new problematic issues

[14] Treaty on European Union - Declaration on nationality of a Member State, 11992M/AFI/DCL/02, Official Journal C 191 , 29/07/1992 P. 0098.

[15] European Council in Edinburgh, 11-12 December 1992, Conclusions of the Presidency, EC Bull. 12-1992.

arise, with particular reference to the right to citizenship. Indeed, do European citizens have a right to EU citizenship? If recognised, should this right be autonomous or dependent on the right to national citizenship?

Due to the silence of the European treaties on these issues, the EU case-law has been in charge with the complex task of answering the above mentioned questions. However, the ECJ jurisprudence is still hesitant and contradictory, thus confirming all the fragility of the status of European citizenship as well as of the institutional nature of the EU itself.

3.1. Citizenship, exclusive domestic jurisdiction and rights

The complex relationship between national sovereignty and EU citizenship emerges clearly in the Micheletti case[16], decided by the ECJ in 1992. In the case at stake, in fact, the Court declared that, on one side, member states are free to determine their own rules on the acquisition and loss of citizenship while, on the other, this power should however be carried out «having due regard to community law»[17].

The case was referred to the Court of Justice by the Tribunal Superior de Justicia, Cantabria, with the aim of obtaining the correct interpretation of the EU rules concerning free movement of persons and freedom of establishment of EU citizens. In particular, the case arose from the request

[16] *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, 7 July 1992, C-369/90, 1992 I-04239.

[17] *Micheletti*, at par. 10.

made by Mr Micheletti – a dual Argentine and Italian national – to Spanish authorities for a permanent residence card as a Community national in order to set up as a dentist in Spain. The request was dismissed because the Italian nationality, enabling Mr Micheletti to exercise the community right to establishment in Spain, was not recognised. Indeed, according to Art. 9 of the Spanish Civil Code, in cases of double nationalities, of which none was Spanish, the nationality of the place of habitual residence before the arrival in Spain – which in the case of Micheletti was the Argentinian one – had to be taken into consideration.

The Court, in recognising the right to establishment of Mr Micheletti, delivered a paramount judgment on the limits of the freedom of member states to determine the conditions enabling individuals to enjoy the status and the rights connected to EU citizenship. Indeed, according to the Court, «Under international law, it is for each Member State, having due regard to Community Law, to lay down the conditions for the acquisition and loss of nationality. However it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another member state […]»[18]. Therefore, allowing member states to recognise the status of EU citizenship only if particular conditions are met, according to the Court, is not permissible, since «the consequence of allowing such a possibility would be that the class of persons to whom the Community rules on freedom of establishment were applied might vary from one Member State to another»[19].

[18] *Micheletti*, at par. 10.

[19] *Micheletti*, at par. 12.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

The Court, therefore, while not denying the right of member states to define their own rules on citizenship, established at the same time the rule according to which, with reference to EU citizenship, the states have to respect community law, including in particular the right to non-discrimination.

The relevance of the Micheletti case with reference to the interpretation of the effects of EU citizenship in terms of rights is undeniable. Indeed, it paved the way for the introduction – starting from the Zambrano case[20] – of the rule according to which member states cannot adopt national measures having the effect to prevent the genuine enjoyment of the substance of the rights attached to EU citizenship. The rule – that in the Zambrano case prevented the member state from refusing the right of residence to a third-country national upon whom his EU citizen minor children were dependent – in limiting the national sovereignty of the states and expanding the application of EU rules on citizenship in a purely internal situation, laid down the foundations for a constitutional dimension of EU citizenship (van Eijken and de Vries 2011). The ECJ case-law seemed to reflect, in legal terms, the political idea of the "civic EU citizenship", firstly introduced in the 2000 Communication of the Commission[21], consisting in a set of core rights and obligations to be recognised not only to those possessing the formal status of EU citizenship but also to third-country nationals, after a minimum period of residence in a member state (Bell 2007; Triggiani 2017; Moccia 2018).

[20] *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, 8 march 2011, C-34/09, 2011 I-01177.

[21] Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy, Brussels, 22.11.2000, COM(2000) 757 final.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

Nevertheless, the genuine enjoyment test has been applied narrowly by the ECJ in the following case-law, thus preserving a wide margin for member states' discretion in the regulation of questions concerning the correlation between fundamental rights, EU and national citizenship in the EU, as the cases of McCarthy[22], Ymeraga and Others[23] and Dereci[24] demonstrate. However, more recently, in the Chávez-Vílchez and Others decision[25], the ECJ confirmed and reinforced the rule according to which a third-country national who is a parent of an EU minor citizen has a right to residence in an EU member state, even in contrast with national legislation, if the denial of the right to residence of the parent, forcing both the parent and the child to leave the EU, has the effect of depriving the minor of the enjoyment of the rights conferred by the status of EU citizenship.

As a result of the ECJ case-law following the Micheletti decision, therefore, it has been maintained that the member states' sovereignty is not absolute, in particular concerning residence rights deriving from EU citizenship (Cambien 2018; Langer 2018). However, the Court is still far from introducing any right to EU citizenship, even though the foundations for the prospective introduction of such a right were laid down. Also the idea of the introduction of the civic citizenship has been abandoned. Indeed,

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

[23] *Ymeraga and others v. Ministre du Travail, de l'Emploi et de l'Immigration*, 8 May 2013, C-87/12.

[24] *Dereci and others v. Bundesministerium für Inneres*, 15 November 2011, C-256/11.

[25] *Chávez-Vílchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and others*, 10 May 2017, C-133/15.

the following case-law has been hesitant and contradictory, as the Rottman and more recently the Tjebbes cases demostrate.

3.2. Towards the Right to European Citizenship?

The Rottman case[26] provided the ECJ with the opportunity to reason again on the issue of a prospective right to EU citizenship (Montanari 2005; Mouton 2010; Shaw 2011; De Groot, Seling 2011).

The case arose from a preliminary reference raised by the *Bundesverwaltungsgericht* (Germany), concerning the correct interpretation of the EC Treaty rules on EU citizenship. In particular, the referring Court asked to the ECJ to ascertain if:

> It is contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation and obtained by deception inasmuch as that withdrawal deprives the person concerned of the status of citizen of the Union and of the benefit of the rights attaching thereto by rendering him stateless, acquisition of that nationality having caused that person to lose the nationality of his Member State of origin.[27]

Mr. Rottman was an Austrian national by birth. On 5 February 1999 he obtained German citizenship by naturalisation. According to the Austrian citizenship legislation, following the naturalisation in Germany, he lost

[26] *Janko Rottman v. Freistaat Bayern*, 2 march 2010, C-135/08, 2010 I-01449.

[27] *Rottman*, at par. 36.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

Austrian nationality. On 4 July 2000, Rottman was informed that his German citizenship had been revoked with retroactive effect on the grounds that he had obtained German citizenship with deception, having failed to inform German authorities that, during the naturalisation procedure, he was the subject of judicial investigation. The effect of the measure was that Rottman might become stateless, with the additional result to lose not only German but also European citizenship. For these reasons, he submitted an action for annulment of the withdrawal of German citizenship before the *Bayerischer Verwaltungsgerichtshof* (Administrative court of the Land of Bavaria). The Court held, by judgment of 25 October 2005, that the withdrawal was not in contrast with German law. Therefore the applicant appealed before the *Bundesverwaltungsgericht* (Federal administrative court), that referred the following questions to the ECJ:

> (1) Is it contrary to Community law for Union citizenship (and the rights and fundamental freedoms attaching thereto) to be lost as the legal consequence of the fact that the withdrawal in one Member State (the Federal Republic of Germany), lawful as such under national (German) law, of a naturalisation acquired by intentional deception, has the effect of causing the person concerned to become stateless because, as in the case of the applicant [in the main proceedings], he does not recover the nationality of another Member State (the Republic of Austria) which he originally possessed, by reason of the applicable provisions of the law of that other Member State?
>
> (2) [If so,] must the Member State […] which has naturalised a citizen of the Union and now intends to withdraw the naturalisation obtained by deception, having due regard to Community law, refrain altogether or temporarily from withdrawing the naturalisation if or so long as that with-

> drawal would have the legal consequence of loss of citizenship of the Union (and of the associated rights and fundamental freedoms) […], or is the Member State […] of the former nationality obliged, having due regard to Community law, to interpret and apply, or even adjust, its national law so as to avoid that legal consequence?[28]

In Rottman therefore all the problematic issues concerning the right to citizenship emerged. Indeed, as it has been summarised in the previous paragraphs, deciding on the right to citizenship means deciding on the questions of the limits to national sovereignty. It is for this reason that the protection afforded by this right is often weak and minimal. In the EU context, the national concerns on the preservation of national sovereignty are even stronger.

For these reasons, all the governments that submitted observations in the proceedings maintained that since it is a competence of the member states to adopt the rules on the acquisition and loss of nationality, the referred question concerned a purely internal situation, not concerning in any way EU law.

Considering how problematic is the issue of the right to citizenship both in general and in particular in the context of EU, it is not surprising that the ECJ gave a truly compromise-decision.

Indeed, the Court, while recognising that, according to its case-law, citizenship issues fall within the competences of the member states, stated,

[28] *Rottman*, at par. 35.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

quoting its previous case-law, that, since «citizenship of the Union is intended to be the fundamental status of nationals of the Member States»[29], «the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law»[30].

As a result, the Court, considering that the case could be subject to judicial review in the light of EU law, stated that the general principle that no one can be arbitrarily be deprived of his nationality is valid also with reference to EU citizenship issues. In particular, when withdrawal of citizenship of a member state has the effect of depriving the individual of the EU citizenship, it is important that the principle of proportionality should be respected. Nevertheless, according to the Court, it is not for the ECJ but «for the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality»[31].

It seems that, at least implicitly, the ECJ is willing to recognise the existence of a right to EU citizenship and that, therefore, due to the additional nature of EU citizenship, issues concerning the right to national citizenship can affect the right to EU citizenship. Indeed, in the reasoning the Court makes reference to art. 15 UDHR, the Convention on the Reduction of Statelessness as well as European Convention on Nationality.

However, the aim of the Court is to underline that the right to citizenship is not absolute, in particular in the European context. Indeed, according to the Court, on the basis of the general rules of international law: i)

[29] *Rottman*, at par. 43, referring to Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 31; Case C-413/99 Baumbast and R [2002] ECR I-7091, at par. 82.

[30] *Rottman*, at par. 45, quoting *Micheletti.*

[31] *Rottman*, at par. 59.

only arbitrary withdrawal of citizenship is prohibited, in particular if the effect of this act is to make an individual stateless; ii) judicial review on revocation of member states' citizenship should be provided by national courts, on the basis of a proportionality test.

As a result, on one side, the ECJ makes reference only to the minimal conception of the right to citizenship, while, on the other, the Court has lost a unique opportunity to introduce an autonomous right to EU citizenship, thus deserving protection by EU authorities and encompassing national discretion in this field. In particular, as it has been pointed out, the effect of referring to the principle of proportionality in questions concerning citizenship revocation in the EU context might be that of further jeopardising the right to citizenship, not only at EU but also at national level (Gloynker 2018; Kochenov 2012). In the end, «The Court's decision in Rottmann reveals that the right to a nationality, enshrined in the Universal Declaration of Human Rights constitutes an empty vessel» (Konstadinides 2010, 414).

This approach has been confirmed in the following ECJ case law. Consider in this sense the *Tjebbes* case, decided in 2019 (van Eijken 2019; Kochenov 2019; Vlieks 2019)[32].

The case arose from the referral made by the Dutch Council of State on the interpretation of art. 15 and 16 of the law on nationality of the Netherlands, with reference to art. 20 and 21 TFUE. Indeed, according to art. 15-1 of the law on citizenship, «an adult shall lose his Netherlands nationality» if, holding a second nationality, «he has his principal residence for

[32] ECJ (Grand Chamber), *M.G. Tjebbes and Others v. Minister van Buitenlandse Zaken*, 12 March 2019.

an uninterrupted period of 10 years outside the Netherlands [...] and outside the territories to which the [EU Treaty] applies». Also minors lose Netherlands nationality following their parent's nationality withdrawal according to art. 15 (art. 16 cl-1).

The Court, confirming the rule introduced in Rottman, stated that the case had to be decided by national courts on the basis of the principle of proportionality. According to the Court:

> Article 20 TFEU, read in the light of Articles 7 and 24 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding legislation of a Member State such as that at issue in the main proceedings, which provides under certain conditions for the loss, by operation of law, of the nationality of that Member State, which entails, in the case of persons who are not also nationals of another Member State, the loss of their citizenship of the Union and the rights attaching thereto, in so far as the competent national authorities, including national courts where appropriate, are in a position to examine, as an ancillary issue, the consequences of the loss of that nationality and, where appropriate, to have the persons concerned recover their nationality *ex tunc* in the context of an application by those persons for a travel document or any other document showing their nationality. In the context of that examination, the authorities and the courts must determine whether the loss of the nationality of the Member State concerned, when it entails the loss of citizenship of the Union and the rights attaching thereto, has due regard to the principle of proportionality so far as concerns the consequences of that loss for the situation of each person concerned and, if relevant, for that of the members of their family, from the point of view of EU law[33].

[33] *Tjebbes* at par. 50.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

In particular, in Tijebbes, the European Court specifies that the proportionality test should be carried out taking into consideration, on a case by case basis, the consequences on the persons concerned[34]. The measures should not determine any infringement of the fundamental rights provided by the Charter of Fundamental Rights of the European Union, including especially the right to respect for family life (art. 7)[35] as well as the child's best interests (art. 24)[36].

In conclusion, from the ECJ case law it can be inferred the principle according to which EU member states are still the masters of citizenship. Their sovereignty, in particular with reference to the power to grant and revoke national citizenship, has not been eroded. Moreover, due to the fact that the additional nature of EU citizenship has never been narrowed neither questioned (Montanari 2019), in the end, it is up to each European state to define the conditions for the recognition of the right to citizenship, both at national and at the European level. As a consequence, since, on the basis of the well-established rule according to which the right to have and retain citizenship can been the object of a balancing test with countervailing national interest, the right to citizenship in Europe is extremely weak, as the case of *G1*, decided by the court of Appeal for England and Wales in 2012[37], and the case of *Pham*, decided by the UK Supreme Court in 2015[38]. demonstrate.

[34] *Tjebbes* at par. 41.

[35] *Tjebbes* at par. 45.

[36] *Tjebbes* at par. 47.

[37] *R (G1) v Secretary of State for the Home Department* [2012] EWCA Civ 867.

[38] *Pham* (Appellant) *v Secretary of State for the Home Department* (Respondent), [2015] UKSC 19.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

Saggi

4. The Right to EU citizenship and the Constitutional Identity of the Member States: the United Kingdom Case-Law

All the above mentioned problematic issues concerning the likely introduction of a right to EU citizenship emerged in the case-law of the UK Supreme Court.

While the case of *G1* does not directly concern the right to nationality, some passages of the reasoning provide relevant insights concerning the effects – as well as the limits – of the *Rottman* doctrine in the context of member states' constitutional law. In particular, since, as pointed out by Lord Justice Law, a number of difficulties arose from the reasoning in *Rottman*, this decision should be «read and applied with a degree of caution»[39].

In particular, according to the Court of Appeal, the provisio according to which the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law, should be balanced with the principle of the constitutional identity of the states: «The conditions on which national citizenship is conferred, withheld or revoked are integral to the identity of the nation State. They touch the constitution; for they identify the constitution's participants»[40].

Therefore, the principle of constitutional identity (Jacobsohn 2006, 2010) is considered as a counter-limit against any possible interference of the European law on UK law concerning nationality legislation. This concept is confirmed in the case of *Pham*, directly concerning the implementation of the *Rottman* judgment in national law.

[39] *R (G1) v Secretary of State for the Home Department* [2012] EWCA Civ 867 at par. 41.

[40] *R (G1) v Secretary of State for the Home Department* [2012] EWCA Civ 867 at par. 43.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

The case arose from the appeal submitted by Mr. Pham, who was a Vietnamese national by birth and acquired UK citizenship in 1995. In 2011, the UK Secretary of State decided to issue an order ex art. 40 British Nationality Act depriving Pham of British citizenship, on the grounds that this act would have been "conductive to the public good" since Pham had been involved in terroristic activities. According to the Secretary of State, the deprivation order would have not made Pham stateless, because she was convinced that he would have retained Vietnamese citizenship. Pham appealed, arguing that on the contrary the withdrawal would have made him stateless, because the Vietnamese government had refused to recognise him as a citizen. In addition, according to Pham, the revocation of British citizenship was unlawful because deprivation, determining the effect of the loss of EU citizenship, had to be measured in the light of the proportionality test as provided in *Rottman.* As a result, according to the appellant, the measure was not in compliance with the principle of proportionality.

The Supreme Court dismissed the appeal, on the basis of a complex reasoning concerning both question of national as well as European law. In particular, with reference to the EU issues, the Court analysed the effects of *Rottman* in the UK legal system.

To this aim, Lord Carnwath stated that the withdrawal decision adopted by the UK Secretary of State could not be challenged on the ground that the principle of proportionality had not been respected as required by the ECJ in Rottman. In the reasoning he explicitly referred to

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

the principle of national citizenship as part of the constitutional identity of a State quoting par. 43 of the Court of Appeal decision in G1[41].

Lord Mance goes even further stating that the question must be solved taking into consideration «the constitutional fact that the United Kingdom Parliament is the supreme legislative authority within the United Kingdom. European law is part of United Kingdom law only to the extent that Parliament has legislated that it should be»[42]. In order to support this argument, he quotes Advocate General Cruz Villalón's Opinion in the ECJ case *Gauweiler v Deutscher Bundestag*, 14 January 2015[43], suggesting that «any 'reservation of identity', independently formed and interpreted by the competent – often judicial – bodies of the Member States […] would very probably leave the EU legal order in a subordinate position, at least in qualitative terms»[44]. On the basis of this reasoning, therefore, according to Lord Mance, it should be recognised that «Europe has not yet reached a situation where it is axiomatic that there is constitutional identity between the Union and its Members»[45].

[41] *Pham* (Appellant) *v Secretary of State for the Home Department* (Respondent), [2015] UKSC 19 at par. 54.

[42] *Pham* (Appellant) *v Secretary of State for the Home Department* (Respondent), [2015] UKSC 19 at par. 76.

[43] ECJ, Case C-62/14, paras 30-69.

[44] *Pham* (Appellant) *v Secretary of State for the Home Department* (Respondent), [2015] UKSC 19 at par. 78, quoting ECJ Case C-62/14 at par. 60.

[45] *Pham* (Appellant) *v Secretary of State for the Home Department* (Respondent), [2015] UKSC 19 at par. 79.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

It is for these reasons that, according to the Court, «unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed»[46].

Therefore, in order to solve the question of the possible referral to European rules in issues concerning the withdrawal of UK citizenship, according to Lord Mance, it should be assessed if the European Treaties, which have been introduced into the UK legal order by the means of the 1972 European Act, provide for any rule conferring the competence to confer/revoke national citizenship to the EU or European institutions, such as the ECJ. Reasoning on the dependant or derivative nature of EU citizenship, he states that «There is nothing on the face of the Treaties to confer on the EU, or on a Union institution such as the Court of Justice, any power over the grant or withdrawal by a Member State of national citizenship, even though such grant or withdrawal has under the Treaties automatic significance in terms of European citizenship»[47].

Therefore, according to Lord Mance, any decision on the issue of the European limits to the national power to confer/revoke nationality entails an assessment on the jurisdictional limits of the competences conferred by the European Treaties to the European institutions. In the case at stake – concerning nationality, namely a status touching the Member States' constitutional identity – this assessment should be carried out «with mutual

[46] *Pham* (Appellant) *v Secretary of State for the Home Department* (Respondent), [2015] UKSC 19 at par. 80.

[47] *Pham* (Appellant) *v Secretary of State for the Home Department* (Respondent), [2015] UKSC 19 at par. 85.

respect and with caution»[48]. He therefore does not exclude the possibility that in the future this sensitive issue might be considered by the Court. However, the case at stake is not the occasion for this task, unless Union law offers advantages over the relevant domestic law in the case at stake[49].

However, according to the judge, EU law does not offers any advantages, since there is not real difference between the EU proportionality test and the common law reasonabless review. Indeed, it is «improbable that the nature, strictness or outcome of such a review would differ according to whether it was conducted under domestic principles or whether it was also required to be conducted by reference to a principle of proportionality derived from Union law»[50].

All judges, as a consequence, agree on the point that citizenship withdrawal cannot be assessed with reference to the EU proportionality test, due to the fact that citizenship is an issue involving the constitutional identity of member states and that the UK law provides for a similar test. However, this does not exclude any possibility of judicial review of the measure on the basis of national law.

The Court therefore provides for a detailed analysis of the lawfulness of sect. 40 withdrawal powers with reference to the common law principle of reasonabless. The result of the reasonabless test is that, as declared by

[48] *Pham* (Appellant) *v Secretary of State for the Home Department* (Respondent), [2015] UKSC 19 at par. 91.

[49] *Pham* (Appellant) *v Secretary of State for the Home Department* (Respondent), [2015] UKSC 19 at par. 92.

[50] *Pham* (Appellant) *v Secretary of State for the Home Department* (Respondent), [2015] UKSC 19 at par. 98.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

Lord Sumption, the right to nationality is without any doubt «at the weightiest end of the sliding scale» of human rights in the UK. However, according to the judge, at the opposite end of the scale there is the security of the UK, as a «countervailing public interest»[51]. As a consequence, the UK Supreme Court, while recognising that the power to revoke citizenship is «a radical step» whose exercise would consequently require a «strict standard of judicial review»[52] decided to confirm the decision of withdrawal, even though conductive to a situation of *de facto* statelessness (Elliot 2015; Khan 2015; Noyce 2015; Martino 2016).

The decision of the UK Supreme Court in the *Pham* case demonstrates that European citizenship is an extremely ambiguous status, while national citizenship is still considered the expression of the constitutional identity of the states. In addition, referring to the proportionality/reasonableness test in order to assess question concerning the right to European/national citizenship means leaving the Courts with an extremely wide margin of appreciation in the context of a challenging issue.

Therefore, the fragility of the right to citizenship at both national and European level is confirmed and EU citizenship does not seem to be able to reinforce this contested right. All the problematic issues concerning the need to find a balance between citizenship as a human right, on one side, and national sovereignity, on the other, emerge also – and maybe even in more radical terms – in the context of Brexit. It the end, it can been suggested that the fragility of the right to citizenship in the EU is strictly linked

[51] *Pham* (Appellant) *v Secretary of State for the Home Department* (Respondent) [2015] UKSC 19, opinion laid down by Lord Sumption [108].

[52] *Pham* (Appellant) *v Secretary of State for the Home Department* (Respondent) [2015] UKSC 19, opinion laid down by Lord Mance, at par. 98.

both with the ambiguous nature of the status of European citizenship as well as with the uncertain institutional nature of the European Union.

5. Brexit and EU citizenship

Following the referendum on Brexit and the conclusion, after four years of strenuous negotiations[53], of the Withrawal Agreement[54], since January 31st 2020 the UK is no longer a member of the EU. The negotiations have been particularly complex due to the disagreement on several relevant issues concerning the basic principles and values of the whole UK constitutional system (Martinelli 2017; Frosini 2019; Bogdanor 2019), including the place of the referendum in the complex UK constitutional architecture (Torre and Frosini 2012), the allocation of powers between the Government and the Parliament (Torre 2017; McConalogue 2020), the implications of Brexit to devolution and the relationship between UK and Scotland (Frosini 2017), as well as its effects regarding individual rights (Gianello 2017)[55].

[53] As widely known, the referendum on the withdrawal of the UK from the EU was held on June 23, 2016. With a majority of 51,9%, the British people decided to leave the EU. The negotiations started soon after the referendum, but it was not until the end of 2019 that the Withdrawal Agreement was concluded and ratified by the UK Parliament.

[54] *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (2019/C 384 I/01), which entered into force on 1st February 2020.

[55] Indeed, in the context of the negotiations two major cases were brought in front of the UK Supreme Court: *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant), [2017] UKSC 5; R (on the application of*

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

The question of the future of the rights of British nationals residing in other EU member states as well as of EU citizens residing in the UK after Brexit – raising both constitutional and European issues – has been one of major concern since the beginning of the negotiations. Those problems have been discussed not only in terms of fundamental rights of the EU citizens but also with reference to the right to EU citizenship.

Indeed, due to the derivative nature of the European citizenship, the withdrawal of the UK from the EU should entail as an automatic effect the revocation of EU citizenship of British nationals as well as the revocation of all the rights connected with the status of EU citizenship of those European individuals who, not being UK nationals, were settled in the UK at the time of the withdrawal.

However, it has been claimed that, considering the ECJ case-law, the loss of EU citizenship following UK withdrawal should have respected the principle of proportionality. Therefore, if not proportional, the automatic loss of EU citizenship should not be admitted. It was based on this reasoning the preliminary reference submitted by the District Court of Amsterdam to the ECJ on February 28 2018 (Arnull 2018)[56], The reference arose from judicial proceedings initiated before the District Court by a group of UK citizens residing in Amsterdam who claimed that their right to abide in the Netherlands was confirmed notwithstanding Brexit. The Court decided to refer the Case to the ECJ on the basis of AG Maduro's conclusions in the

Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland), [2019] UKSC 41.

[56] District Court of Amsterdam, *Private law division, civil law presiding judge*, C/13/640244/KG ZA 17-1327 FB/AA, 7 February 2018.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

Rottman case according to which «Once lawfully acquired, EU citizenship is an independent source of rights and obligations that cannot be simply reduced or affected by national government action»[57]. On these basis, the Court referred to the ECJ the following questions:

> Does the withdrawal of the United Kingdom from the EU automatically lead to the loss of the EU citizenship of British nationals and thus to the elimination of the rights and freedoms deriving from EU citizenship, if and in so far as the negotiations between the European Council and the United Kingdom are not otherwise agreed? If the answer to the first question is in the negative, should conditions or restrictions be imposed on the maintenance of the rights and freedoms to be derived from EU citizenship?[58]

The ECJ has never had the chance to answer the preliminary question since the Court of Appeal annulled the referral considering the issue abstract and hypothetical (McCrea 2018). However, it might reasonably be presumed that, on the basis of its previous case-law, the European Court would have answered the question in the negative. Indeed, the Rottman and the Tijebbes cases – concerning the question of the possible right of an individual right to retain the status of EU citizenship notwithstanding the revocation of national citizenship – can hardly be considered as relevant precedents for the Brexit case, concerning the loss of the status of EU

[57] District Court of Amsterdam, *Private law division, civil law presiding judge*, C/13/640244/KG ZA 17-1327 FB/AA, 7 February 2018 at par. 5.20.

[58] District Court of Amsterdam, *Private law division, civil law presiding judge*, C/13/640244/KG ZA 17-1327 FB/AA, 7 February 2018 at par. 5.27.

citizenship following the decision of a member state to withdraw from the EU (van der Mei 2018).

In other terms, in the light of the treaties currently in force and the ECJ case-law, there is no place in the EU for any right to EU citizenship, neither in individual nor in collective terms.

In this sense, it is not surprising that the proposal supported by the Welsh party Plaid Cymru to maintain the status of EU citizenship for British citizens residing in a EU member state, founded on the existence of a right to EU citizenship, that, once acquired, cannot be revoked (Worster 2018; Dawson, Augenstein 2016), was not taken in consideration during the negotiations.

In contrast, the proposal to introduce the status of associate EU citizenship after Brexit (Roeben, Snell, Minnerop, Telles and Bush 2017), while problematic on several different grounds, seemed more coherent with the current development of EU citizenship.

The associate citizenship was intended as a new status, aiming at introducing a "quasi-EU citizenship" on the model of the status recognised to Greenlander citizens, founded on the idea according to which, even though EU citizenship is not considered as an autonomous status, its effects are nevertheless independent. As a consequence, suspending all the right deriving from EU citizenship would have been contrary to the principle of effectiveness of EU law (Kostakopoulou 2018), as well as to the principle of proportionality as required in *Rottman* (Rieder 2013; but in contrast: Davies 2016).

However, the proposal to introduce the status of associate citizenship was rejected. Indeed, this peculiar status was contested on legal, pragmatic and democratic grounds. As to the legal grounds, as it was pointed out, the introduction of the associate citizenship would have required

Treaty amendments. In addition, it was suggested that the status of associate citizenship would have failed on pragmatic grounds since it would have been in contrast with the principle of reciprocity and its effect would have been to make desirable any future exit process from the EU (Kochenov and van den Brink 2018, 2019). With reference to the democratic grounds, the associate citizenship would have consisted in the circumvention of the popular will as expressed in the Brexit referendum (Yong 2016). In particular, the introduction of a tax or fee connected with the status of EU associate citizens had been criticized based on economic discrimination grounds (Oliva 2017; Lashyn 2019).

The debate that preceded the conclusion of the Withdrawal Agreement shows that the question of the status of EU citizenship is crucial, with reference not only to the Brexit case but also to the future development of the process of EU integration.

Indeed, the Agreement established detailed rules concerning the rights of UK and EU citizens after Brexit. However, the aim of the provisions is narrowly defined in terms of «reciprocal protection for Union citizens and United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this Agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination»[59].

[59] Withdrawal Agreement, Preamble.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

Accordingly, part II of the Withdrawal Agreement, devoted to citizens' rights, provides only for residence rights,[60] the right to exit and entry,[61] and the right of permanent residence[62] of EU and UK citizens who had previously exercised free movement rights based on EU citizenship. The rules are enforceable only with reference to: a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter; b) United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter; c) Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter; d) United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union law before the end of the transition period and continue to do so thereafter. The same rights are also extended to the family members of the above mentioned citizens.[63]

In contrast, no mention is made to EU citizenship as a right nor to any possible form of autonomy from national citizenship for UK citizens, who, in the end, after Brexit, simply lost their status of EU citizens. The fragility of EU citizenship is confirmed.

[60] Withdrawal Agreement, art. 13.

[61] Withdrawal Agreement, art. 14.

[62] Withdrawal Agreement, art. 15.

[63] Withdrawal Agreement, art. 10, *Personal Scope*.

Democrazia e Sicurezza – Democracy and Security Review
ISSN: 2239-804X

anno X, n. 1, 2020
data di pubblicazione: 29 maggio 2020

6. Final Remarks. A Right to Citizenship in Europe?

As it has been pointed out, EU citizenship is facing an «existential crisis» (Garner 2018), calling for its re-foundation and all the incontinences of this status are emerging in the context of Brexit (Garner 2016). It can be suggested that the crisis of EU citizenship is both cause and effect of the unfinished process of political European integration. It is an effect because in the EU, as an association of sovereign states, the power to adopt the rules on the conferral and the revocation of citizenship are still considered as an exclusive national privilege. At the same time, however, it is a cause, because, at is has been stated by the UK Supreme Court, it is through the status of citizenship that the constitutional identity of a community is shaped.

As highlighted in this paper, the effects of the status of EU citizenship concerning the rights of the individuals of the member states are considerable. Accordingly, its impact on the sovereignty of national states is significant. However, when fundamental rights connected with EU citizenship are at stake, the balance between member states' discretion and EU authority is ambiguous. This is particularly true with reference to the supposed existence of a right to EU citizenship. Indeed, the right to citizenship is extremely weak not only at the international level but also in the context of the European Union.

The ECJ case-law following the Rottman decision seemed at a first glance to offer a more flexible interpretation of the rule of the additional nature of EU citizenship and therefore to the absolute denial of any right to EU citizenship. However, leaving to the member states the final author-

ity to decide on the proportionality of citizenship revocation, it is confirmed the principle according to which in Europe the states are still the masters of citizenship. As a result, it is not possible to derive from the interpretation of the Treaties currently in force and the ECJ case-law any principle of autonomy of EU citizenship and, therefore, any right to EU citizenship. These remarks are reinforced when considering the narrow rules adopted to solve the citizenship questions in the context of Brexit.

In the light of the current crisis of both the process of EU integration and of the status of EU citizenship itself, recognising EU citizenship as an autonomous status, to be considered as a right instead of a privilege awarded on the basis of the will of national states, would be therefore an important step in the process of the re-foundation not only of EU citizenship but of the European Union as a whole. This is however an extremely hard task, requiring not only legal action but also a strong political will both at national and at European level.

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Saggi

Abstract

The right to citizenship in Europe. Brexit as a stress test

The right to citizenship was introduced in international law as a safeguard for individuals against the wide autonomy of states in this matter, which led, among the atrocities committed by the authoritarian regimes in the XX century, even to the denationalisation of entire peoples.

However, the right to citizenship is still far from being effective, due to the permanent need to find a balance between the rights of the individuals and the principle of national sovereignty, in particular in times of stress, such as, for example, the struggle against international terrorism, the crisis of the multicultural societies, etc. The right to citizenship has shown all its fragility in the context of the European Union. Brexit can be considered as a stress test for the right to citizenship in the European Union.

On the basis of these premises, this paper focuses on the right to citizenship in Europe in the context of Brexit, with the aim of demonstrating that its fragility is strictly connected to the ambiguity of EU citizenship itself and the uncertain institutional nature of the European Union.

Keywords: right to citizenship; Europe; Brexit; ECJ; security.