Special Issue
EU Citizenship: Twenty Years On

Nationality and Identity Issues—A Danish Perspective

By Eva Ersbøll[*]

A. Introduction

According to the European Convention on Nationality (1997), nationality—or the term "citizenship" used as synonymous with nationality—means a legal bond between a person and a state. As such, nationality is linked to nation building. Nationality can also be defined as equal membership in a political community, and as a status to which rights and duties, participatory practices and a sense of national identity are attached.[1] In other words, nationality constitutes an important element of a person's identity.[2]

European Union citizenship is linked to nationality in an EU Member State. Union citizenship grants rights to the Member State nationals and may be defined as membership in a larger political community, the EU. Union citizenship is meant to foster a feeling of European identity. The third report of the Commission on Citizenship of the Union described citizenship as "both a source of legitimation of the process of European integration, by reinforcing the participation of citizens, and a fundamental factor in the creation among citizens of a sense of belonging to the European Union and of having a genuine European identity."[3]

Surveys, though, indicate that EU nationals do not share strong feelings of belonging to and solidarity with the EU. If we measure membership in a political community by participatory practices, it is striking that the participation of European voters in European

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[1] *See, e.g.*, Dora Kostakopoulou, *Co-creating European Union Citizenship, in* EUROPEAN COMMISSION POLICY REVIEW 14 (2013).

[2] *See, e.g.*, United Nations Convention on the Rights of the Child art. 8, Nov. 20, 1989, 1577 U.N.T.S. 3 (concerning the child's right to preserve his or her identity, including nationality, name and family relations).

[3] *See Report from the Commission—Third Report from the Commission on Citizenship of the Union*, at 7, COM (2001) 506 final (Jul. 9, 2001).

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Parliament elections has steadily decreased since the first direct European election in 1979, last documented at 43 % in 2009 and 43.9 % in 2014.[4]

The literature is rich with analyses of nationality, Union citizenship and identity issues. Among the important works is Elspeth Guild's analysis of the legal elements of European identity.[5] Elspeth Guild points to citizenship and migration as ways of classifying types of identity and belonging, identifying rights of residence and equal treatment as the core of identity and citizenship.[6] She expects that the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) will contribute to clarifying the meaning of the legal elements of identity in Europe while maintaining that the most important test is whether the people of Europe embrace the concept as it is developing and accepts its legitimacy.[7]

This paper deals with some of the latest judgments from these two European courts and offers a Danish perspective as to the relationship of the individual to the EU through EU citizenship as introduced by the Maastricht Treaty. The structure of the paper is as follows: Part B. gives an account of citizenship and identity issues based on the case law of the European Court of Human Rights. Part C. focuses on the citizens' view of EU citizenship and Union citizenship rights. Part D. is devoted to the introduction of Union citizenship in the Maastricht Treaty. Part E. examines the development of Union citizenship, mainly through the case law of the European Court of Justice. Part F. focuses on national versus European identity. Part G. discusses the possibilities for European coordination in matters of nationality, and part H. contains the concluding remarks.

B. Citizenship and Identity Issues and the Perspective of the ECtHR

As mentioned above, citizenship constitutes an important element of a person's identity. It signifies belonging to a political community usually in the form of a State and classifies identity. Within the last few years, the concept "personal identity" has come to play a role in international law. The European Court of Human Rights has established that "private life" as protected in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights or ECHR) is a term that is broad enough to embrace multiple aspects of the person's physical and social identity. In *Dadouch v. Malta,* the ECtHR found that "private life" may include means of

[4] *See Results of the 2014 European Elections*, EUR. PARLIAMENT (May 25, 2014), http://www.results-elections2014.eu/en/turnout.html.

[5] ELSPETH GUILD, THE LEGAL ELEMENTS OF EUROPEAN IDENTITY—EU CITIZENSHIP AND MIGRATION LAW (2004).

[6] *Id*. at 1.

[7] *Id*. at *xi*.

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personal identification, for instance "ethnic identification."[8] And in *Genovese v. Malta,* the ECtHR found that a refusal of nationality had such impact on the applicant's social identity as to bring it within the general scope and ambit of Article 8 and consequently, render Article 14 on non-discrimination applicable.[9] Thus, arguably, nationality or citizenship may be a means of personal identification.

EU citizenship was meant to foster popular support and allegiance to the EU through its institutions and policies and thus also a sense of European identity.[10] In the European Year of Citizens 2013, it is natural to ask to which extent EU citizenship really has the potential to promote the development of a genuine EU identity. [11] Moreover, to the extent that a European identity can be considered a means of personal identification, another interesting question is whether the CJEU will deal with this issue as far as it finds that a member state's refusal of nationality and thus EU citizenship falls within the ambit of EU law.

In order to discuss these questions, a closer look must be taken of the CJEU's reasoning exhibited in case law concerning the denial of citizenship. In *Rottmann,* the CJEU established that a Member State's decision on loss of nationality and consequently also EU citizenship by reason of its nature and consequences falls within the ambit of EU law.[12] In this regard, the Court focused on the rights conferred by EU law that would be lost. So far the approach of the CJEU is in line with modern citizenship thinking: That rights—that are rights of residence and equality of treatment—are at the core of identity and indeed citizenship.[13] The question is how this corresponds to the ECtHR's reasoning on nationality as an expression of national identity as a means of personal identification.

The *Genovese* case was about denial of nationality/citizenship by descent *a patre* based on the fact that the applicant was born out of wedlock.[14] The applicant's complaint alleged that Maltese law regulating the acquisition of citizenship by descent discriminated against him, contrary to ECHR Article 14 in conjunction with Article 8.[15] The ECtHR reiterated that

[8] Dadouch v. Malta, ECHR App. No. 38816/07, para. 47 (Oct. 20, 2010), http://hudoc.echr.coe.int/.

[9] Genovese v. Malta, ECHR App. No. 53124/09, paras. 33–34 (Jan. 11, 2012), http://hudoc.echr.coe.int/.

[10] *See* Andreas Føllesdal, *Union Citizenship: Unpacking the Beast of Burden* (Arena Center for European Studies, Working Paper No. 01/9, 2001).

[11] See the launch of the European Year of Citizens by the Irish Presidency at http://eu2013.ie/ireland-and-the-presidency/abouttheeu/theeuandyou/europeanyearofcitizens/

[12] Janko Rottmann v. Freistaat Bayern, CJEU Case C-135/08, 2010 E.C.R. I-1449.

[13] *See* ELSPETH GUILD, THE LEGAL ELEMENTS OF EUROPEAN IDENTITY—EU CITIZENSHIP AND MIGRATION LAW 17 (2004)

[14] Genovese v. Malta, ECHR App. No. 53124/09, paras. 12, 41 (Jan. 11, 2012), http://hudoc.echr.coe.int/.

[15] *Id.* at para. 22.

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although Article 8 does not guarantee a right to acquire a particular nationality or citizenship, its concept of "private life" is a broad term not susceptible to exhaustive definition but rather covers the physical and psychological integrity of a person.[16] It can therefore embrace multiple aspects of the person's physical and social identity. While the right to citizenship is not a convention right, and while its denial in the present case was not such as to give rise to a violation of Article 8, the ECtHR found that its impact on the applicant's social identity brought it within the general scope and ambit of Article 8.[17]

Consequently, Article 14 ECHR was applicable; the prohibition of discrimination enshrined in Article 14 extends beyond the enjoyment of the rights and freedoms that the convention and its protocols require each state to guarantee. It also applies to those additional rights falling within the general scope of any convention article for which the state has voluntarily decided to provide. Because Maltese legislation expressly granted the right to citizenship by descent for children born abroad to a Maltese national and established a procedure to that end, the State, which had gone beyond its obligations under Article 8 in creating such a right—a possibility open to it under Article 53 ECHR—must ensure that the right was secured without discrimination within the meaning of Article 14. [18]

In *Karassev v. Finland*, the ECtHR stated that it could not be ruled out that an arbitrary denial of citizenship in certain circumstances might raise an issue under Article 8 ECHR because of its impact on the private (or family) life of the individual.[19] The applicant in *Karassev* was a child of Russian origin, born in Finland. He had among other things complained about the Finnish authorities' procrastination in regularizing his stay in Finland and the resultant effects on his entitlement to various benefits. In spite of views obtained from the Russian authorities on the applicant's insecure status under the Russian Citizenship Act, the Finnish authorities refused to consider the applicant a Finnish citizen by birth.[20] The applicant invoked both Articles 8 and 14 in this respect.

In *Karassev*, the ECtHR examined the complaints under Article 8 ECHR and concluded that the decision not to recognize the applicant as a Finnish citizen was not arbitrary in a way that could raise issues under Article 8.[21] As to the consequences of the denial of

[16] *Id.* at para. 30.

[17] *Id.* at para. 33.

[18] *Id.* at paras. 34–36.

[19] Karassev v. Finland, ECHR App. No. 31414/96 (Jan. 12, 1999), http://hudoc.echr.coe.int/.

[20] The Finnish Nationality Act entitled a child born in Finland who did not at birth receive the citizenship of any other country to Finnish nationality.

[21] Karassev v. Finland, ECHR App. No. 31414/96, para. 1b (Jan. 12, 1999), http://hudoc.echr.coe.int/.

citizenship, the Court noted that the applicant was not threatened with expulsion from Finland, either alone or together with his parents.[22] His parents had residence permits and alien's passports, and similar documents could also be issued to him at their request. The applicant also enjoyed social benefits such as municipal day care and child allowance.[23] His mother also received unemployment allowance that included the applicant in its calculation. Based on this, the Court did not find that the consequences of the refusal of citizenship, taken separately or in combination with the refusal itself, could be considered sufficiently serious so as to raise an issue under Article 8.[24] In addition, leaving open the question whether the applicant's complaint felt within the ambit of Article 8 so as to make Article 14 applicable, the ECtHR did not find any substantiation for the allegation that the refusal of citizenship was discriminatory based on the ethnic and national background of the complainant's parents as well as their status as displaced persons.[25]

Through the judgment in *Genovese,* the ECtHR clarified that the right to citizenship by descent—and probably also by other means—falls within the general scope and ambit of Article 8.[26] The underlying reasoning is that denial of citizenship has an impact on a person's social identity. Thus, if a State's national legislation grants the right to citizenship by descent conferred from parents or other means and a procedure has been established to that end, the State must assure that the right to citizenship is secured without discrimination within the meaning of Article 14 ECHR.[27] In this judgment, the ECtHR assessed citizenship's informal significance rather than the formal. The Court seems to focus on the refusal's impact as to the applicant's feelings of belonging and social identity rather than its consequences in the form of lost rights, contrary to what the parties actually had focused on. The Maltese government had submitted that the case did not fall within the ambit of Article 8, as the applicant was already an EU citizen and as such could visit, reside and also work in Malta. The applicant, on the other hand, had submitted that the circumstances of the case fell within the ambit of "private life," irrespective of his father's lack of will to foster a relationship with him because Maltese citizenship would enable him to spend an unlimited time in Malta which he could devote to fostering and deepening a relationship with his father.[28] In applicant's opinion, his Union citizenship had

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id*. at para. 2.

[26] *See also* Rene de Groot & Oliver Vonk, *Non-discriminatory access to the nationality of the father protected by the ECHR, A comment on Genovese v. Malta (European Court of Human Rights, Oct. 11, 2011)*, http://eudo-citizenship.eu/caselawDB/docs/Case%20Law%20Notes/Genovese%20case%20comment.pdf.

[27] *See* Genovese v. Malta*,* ECHR App. No. 53124/09, para. 34 (Jan. 11, 2012), http://hudoc.echr.coe.int/.

[28] *Id*. at para. 28.

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no bearing on the facts of the case since it did not allow him to acquire Maltese citizenship, and since the relevant EU directives created a series of residence rights subject to conditions and formalities and could not be comparable to outright citizenship.[29] Thus, the parties seemed to focus on what one could call the utility of citizenship.

The ECtHR did not touch upon the significance of EU citizenship. Instead the Court maintained that refusal of Maltese citizenship had such an impact on the applicant's social identity as to bring it within the general scope and ambit of Article 8 ECHR.[30] Additionally, since the applicant had been subjected to different treatment as a person born out of wedlock, and since the Court found no reasonable or objective grounds to justify such difference, the Court resolved that there had been a violation of Article 14 in conjunction with Article 8 ECHR.[31]

In a dissenting opinion, Justice Valenzia argued that the Court had not defined social identity nor explained how citizenship defined the applicant's identity.[32] Neither had the applicant produced proof "to show how this deprivation of Maltese citizenship has affected his private life and impacted on his social identity."[33] The effect was being presumed and taken for granted by the Court. Justice Valenzia noted that the applicant was born in 1996 and that already then his mother had started proceedings; and the constitutional proceedings started in Malta in 2006 when the applicant was nine years old.[34] Nowhere in the proceedings did Justice Valenzia find any proof of or claim made as to how the applicant was affected. Therefore, in his opinion, the facts in the case did not warrant the Court pushing that concept too far.

In this author's opinion, Justice Valenzia rightly argues that the ECtHR has taken the general viewpoint that acquisition of citizenship—at least acquisition by descent from parents—has such impact on a person's social identity that it falls within the ambit of Article 8 ECHR.[35] This is a general assumption and not something that must be established in every concrete case.

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[29] *Id*. at para. 28.

[30] *Id*. at para. 33.

[31] *Id*. at paras. 48–49.

[32] Genovese v. Malta, ECHR App. No. 53124/09 (Jan. 11, 2012), http://hudoc.echr.coe.int/ (Valenzia, J., dissenting).

[33] *Id*.

[34] *Id*.

[35] *Id.*

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In contrast, the CJEU in *Rottmann* focused on Mr. Rottmann's loss of Union citizenship *rights*.[36] The CJEU has repeatedly stressed that EU citizenship is destined to be the fundamental status of nationals of the member states, however, what matter in a loss situation are "the consequences that the decision entails for the person concerned and, if relevant, for the members of his family *with regard to the loss of the rights enjoyed by every citizen of the Union*."[37]

The scope of the CJEU's review in these kinds of cases is not yet known. It could be argued that an approach applied to cases of loss of citizenship might also apply to refusals of acquisition.[38] If so, there is a link to EU law, and a refusal of citizenship must be in accordance with the applicant's fundamental right to respect for family and private life and the non-discrimination principle laid down in the Charter of Fundamental Rights Article 7 and 21(1),[39] which are consistent with Articles 8 and 14 ECHR. In this context identity issues may arise.

In any case, the two European Courts' case law reinforces each other. Genovese has already convinced Denmark and Sweden that they have to place all children born of their nationals on an equal footing in regard to acquisition of nationality at birth.[40] Consequently, more children born out of wedlock outside these countries will acquire their nationality, and more children may take up residence in their country of nationality according to the principles established by the CJEU in *Zambrano*.[41]

Before trying to assess the applicability of the ECtHR's viewpoints in relation to EU citizenship, we will have to take a closer look at the public opinion of EU citizenship and

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[36] Janko Rottmann v. Freistaat Bayern, CJEU Case C-135/08, 2010 E.C.R. I-1449, paras. 42, 49.

[37] *Id.* at para. 56 (emphasis added).

[38] *See* Jo Shaw, *Setting the scene: the* Rottmann *case introduced*, 1–4 (Robert Schuman Center for Advanced Studies, EUI Working Paper No. 62, 2011), *available at* http://eudo-citizenship.eu/docs/RSCAS_2011_62.pdf; Gareth T. Davies, *The entirely conventional supremacy of Union citizenship and rights*, 5–10 (Robert Schuman Center for Advanced Studies, EUI Working Paper No. 62, 2011), *available at* http://eudo-citizenship.eu/docs/RSCAS_2011_62.pdf.

[39] Charter of Fundamental Rights of the European Union, Mar. 30, 2010, 2010 O.J. (C 83/389) arts. 7, 21(1).

[40] Read about the Swedish reform at http://www.regeringen.se/download/07304fa5.pdf?major=1&minor=215710&cn=attachmentPublDuplicator_0_attachment; *see* Danish Nationality Act, Consolidation Act No. 422, July 1, 2014, § 1 *available at* https://www.retsinformation.dk/Forms/R0710.aspx?id=163631.

[41] Gerado Ruiz Zambrano v. Office national de l'emploi (ONEM), CJEU Case C-34/09, 2011 E.C.R. I 2011 I-01177; *see also* Careth T. Davies, *The Family Rights of European Children: Expulsion of Non-European Parents* (Robert Schuman Center for Advanced Studies, EUI Working Paper No. 4, 2012), *available at* http://cadmus.eui.eu/bitstream/handle/1814/20375/RSCAS_2012_04.pdf?sequence=1.

Union citizenship rights in order to assess to which extent the status and the rights attached to the status have stimulated European or EU identities.

C. EU citizenship: The Public Opinion

According to a Flash Eurobarometer survey from 2012 on EU citizenship, the vast majority of EU citizens/respondents say that they are familiar with the term "citizen of the European Union" (81 %) and almost as many know that as citizens of a Member State, they are automatically Union citizens.[42] Although, less than one-half of all respondents (46 %) say that they are familiar with the term "citizen of the EU" and know what it means—an improvement by five percentage points since 2007.[43] The respondents' awareness of their rights ranks even lower. Just over one third (36 %) state that they feel informed about their rights as EU citizens.[44] The respondents are most familiar with their right to free movement (88 %) and their right to petition key EU institutions (89 %).[45] Moreover, just over 80 % know that Union citizens residing in a member state other than their own have a right to be treated in the same way as nationals of that State.[46]

In the spring of 2013, the European Year of Citizens, a standard European survey measuring public opinion in the EU was carried out.[47] According to that survey, just over six out of ten Europeans see themselves as citizens of the European Union (62 %). The reverse is that more than one-third (37 %) do not share the feeling of being citizens of the EU.[48] Wide differences exist between countries.[49]

The Standard Eurobarometer (71) from 2009/2010 on the future of Europe, designed with a view to "reveal" Europeans' feelings of identity with their own nation, the EU and the world should be compared to the 2013 survey of the public opinion in the European

[42] EUR. COMM'N, *European Citizenship Report* 4 (2013), http://ec.europa.eu/public_opinion/flash/fl_365_en.pdf.

[43] *Id.* at 6.

[44] *Id*. at 21.

[45] *Id.* at 26–27.

[46] *Id.*

[47] *See* EUR. COMM'N, *Public Opinion in the European Union, First Results* (2013), http://ec.europa.eu/public_opinion/archives/eb/eb79/eb79_first_en.pdf.

[48] *Id*. at 5.

[49] *Id.* More than three in four respondents in Luxembourg, Malta and Slovakia feel that they are citizens of the EU, while less than half do so in Bulgaria, the United Kingdom, Cyprus and Greece. However, these are the only four Member States where a majority of respondents do not feel that they are citizens of the EU.

Union.[50] The respondents were asked to which extent they personally felt that they were "European." A majority (74 %) felt that they were European, while one-quarter of the respondents (25 %) did not share that feeling.[51] These respondents were also asked about the two most important elements "that go to make up a European identity."[52] Here, the respondents selected "democratic values" (41 %) above all other options, while "geography" was the next most defining feature of a European identity (25 %).[53] Thus, what was measured was not so much "feelings of identity with the EU," but rather feelings of belonging to Europe as compared to belonging to a nation/state and being a "citizen of the world."[54] Interestingly enough, when asked about the factors that affect a national versus a European identity, two answers tied in top place, namely "to feel" a particular nationality and "to be born in" the country (both 42 %) and "to feel" European (41 %) and "to be born in" Europe (39 %).[55] Exercising citizen rights, for example, voting rights, was selected by 29 % as an important characteristic of being both a national and a European.[56] Unfortunately, the respondents were not asked about the importance of having a national or European citizenship. One can hardly rule out that the respondents' opinion on citizenship, national and European, as an identity marker could have influenced the survey's conclusion. As matters stood, the conclusion was how "remarkably" alike the respondents found the characteristics of national and European identity.

According to the 2013 Standard European survey, a majority of European citizens would like to know more about their rights as citizens of the EU (59 %).[57] This proportion has decreased since 2010, when 72 % shared this opinion. Conversely, the proportion saying that they are not interested in knowing more about their rights has increased (from 26 % in 2010 to 39 % in 2013). When asked about the most positive results of the EU cooperation, more than one-half of the respondents point to the free movement of people, goods and services (56 %) and peace among member states (53 %).[58] All other items (such as the euro, the ERASMUS program, EU's influence in the world, the welfare level and the common agricultural policy) are selected by around one-quarter and one-fifth of the

[50] *See* EUR. COMM'N, *Eurobarometer 71: Future of Europe* (2010), http://ec.europa.eu/public_opinion/archives/eb/eb71/eb713_future_europe.pdf.

[51] *Id*. at 34.

[52] *Id.* at 39.

[53] *Id*.

[54] *Compare id*. at 35–36, *with id.* at 37–38.

[55] *Id.* at 42–50.

[56] *Id.*

[57] EUR. COMM'N, *supra* note 47, at 5.

[58] *Id*. at 8.

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respondents.[59] The survey also highlighted that trust levels in national political institutions are decreasing (25-26%) while trust in EU institutions is increasing (31 %).[60] The image of the EU is stable (39 % say they are neutral and 30 % that they are positive; 29 % are negative).[61] In relation to the EU's future, 49 % are optimistic and 45 % are pessimistic.[62] At the individual level, about two-thirds of the respondents felt that their voices do not count in the EU (67 %).[63] This proportion has increased since the crisis started in 2009.[64] Unemployment is the main concern of Europeans. Regarding the consequences of the crisis, there is still a large majority of Europeans who say that the EU countries will have to work more closely together (84 %).[65] An absolute majority of Europeans say that the objectives of the Europe 2020 strategy are important.[66] The feeling of being closer to citizens in other European countries as a consequence of the crisis has, however, lost some ground (from 44 % in 2012 to 42 % in 2013).[67]

The surveys suggest that most Europeans are aware of their status as Union citizens and of the most important rights that follow from this status. Europeans recognize the importance of free movement rights and see the EU as a peace-keeping institution. All the same, they do not have much trust in the EU, but neither do they trust their own governments and parliaments. Thus, from an overall perspective there does not seem to be a general EU opposition.

Although, it appears worrisome that about two-thirds of the EU citizens do not think that their voices count in the EU and that less than one-half say that they are familiar with the term "citizen of the EU" *and* know what it means.[68] Moreover, an increasing proportion (now 39 %) expresses that they have no interest in learning more about their rights as EU citizens—although they admit that they do not know these rights.[69] This apparent apathy

[59] *Id.*

[60] *Id*. at 9.

[61] *Id*. at 10.

[62] *Id*.

[63] *Id*. at 11.

[64] *Id.*

[65] *Id*. at 27.

[66] *Id*. at 29.

[67] *Id*. at 27.

[68] *Id*. at 11; EUR. COMM'N, *supra* note 42, at 21.

[69] EUR. COMM'N, *supra* note 42, at 6; EUR. COMM'N, *supra* note 47, at 7.

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may be reflected in the fact that 37 % do not feel like "a citizen of the EU."[70] There seems to be a discrepancy between EU citizens' reactions and the general perception that a sense of belonging depends on the entitlements and obligations assigned to an individual. Likewise, from the outset it is not easy to reconcile citizens' reactions with the general assumption that a legal link can foster a sense of a "common identity and shared destiny" and that this particularly may apply in the EU, where law has played a significant role in the integration process.[71]

The following discusses whether there are inherent problems in the architecture and/or development of the EU citizenship that hamper its ability to foster popular support and a feeling of belonging to the EU. As a starting point, we will take a Danish perspective.

D. Introduction of EU citizenship, a Danish Perspective

In order to understand the concept of "EU citizenship," its functioning and the reactions it has provoked, it is necessary to look back to its introduction. It is a well-known fact that the idea of introducing a European citizenship emerged very early on during EC cooperation. In 1990, Spain came to play an active role in its preparation with the publication of a Spanish Memorandum entitled "Towards a European citizenship."[72] In Danish, the title was translated to "Mod et EF-statsborgerskab." *Statsborgerskab* is the Danish word for "citizenship"; however, in an EU context and literally spoken, *statsborgerskab* may indicate a (new) citizen-state relation—in line with the German word *staatsangehörigkeit*.

In any case, when the Maastricht Treaty introduced Union citizenship and Union citizens' rights in the EC Treaty through Articles 8-8(e), it gave occasion for a Danish opt-out from the treaty. Union citizenship was considered an element in nation or state building and taken as one of the explanations for the Danish "no" vote in the 1992-referendum on ratification of the Maastricht Treaty.[73] The same applied to three other areas where Denmark wanted to stay outside the development of the European Union; namely in defense, the Economic and Monetary Union (EMU) and the Justice and Home Affairs-cooperation (JHA).[74] After the grant of four opt-outs from the Maastricht treaty, the Danish

[70] EUR. COMM'N, *supra* note 47, at 5.

[71] *See* Karolina Rostek & Gareth Davies, *The Impact of Union Citizenship on National Citizenship Policies*, 22 TUL. EUR. & CIV. L. F. 95, 96 (2007).

[72] *See Spanish Memorandum: Towards a European Citizenship*, Council Doc. SN 3940/90 (Feb. 21, 1991), http://eudo-citizenship.eu/inc/policydoc/Spanish%20Memorandum.pdf.

[73] *See* DANSK INSTITUT FOR INTERNATIONALE STUDIER, DE DANSKE FORBEHOLD, UDVIKLINGEN SIDEN 2000, 30, 34 (2008).

[74] *Id*.; *see also* Henrik Larsen, *British and Danish policies in the 1990s: A Discourse Approach*, 5(4) EUR. J. OF INT'L. REL. 464, 466 (1999).

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voters voted "yes" to the ratification of the treaty.[75] Prior to this, a "national compromise" had been agreed upon. All Danish political parties stood behind the compromise, except the right-wing Progress Party. The compromise was set down in a document entitled "Denmark in Europe" listing the four opt-outs that should reassure the Danish no-voters.[76] It was the general understanding that a majority among the Danes did not want "the United States of Europe."[77]

The Danish opt-out from Union citizenship was formally introduced with the conclusion of the Edinburgh European Council on 12th December 1992 and worded as follows:

> 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.[78]

In fact, there was no disagreement among the member states as to this understanding of EU citizenship. The Birmingham declaration of 16 October 1992 made it clear that Union citizenship brings the member states' citizens additional rights and protection without in any way taking the place of the states' national citizenship.[79]

For the Danish political parties, however, it seemed to be important to demonstrate detachment to Union citizenship as a traditional citizenship concept. According to the national compromise, Denmark was not committed by the citizenship of the Union, and a Danish unilateral declaration, associated to the Danish ratification of the Maastricht Treaty, supported this viewpoint by stating as follows:

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[75] *See* DANSK UDENRIGSPOLITISK INSTITUT, UDVIKLINGEN I EU SIDEN 1992 PÅ DE OMRÅDER, DER ER OMFATTET AF DE DANSKE FORBEHOLD 31 (2000).

[76] *See The National Compromise: Denmark in Europe* (1992), http://www.eu-oplysningen.dk/dokumenter/traktat/eu/nationalkompromis/.

[77] *Id.* at § A. Introductory Remarks.

[78] *See Edinburgh Agreement,* FOLKETINGET (1992), http://www.eu-oplysningen.dk/emner_en/forbehold/edinburgh/.

[79] *See* EUROPEAN COUNCIL, *Birmingham Declaration* (Oct. 16, 1992), http://europa.eu/rapid/press-release_DOC-92-6_en.htm.

> (1) Citizenship of the Union is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system. Nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-state. The question of Denmark participating in any such development does, therefore, not arise.
>
> (2) Citizenship of the Union in no way in itself gives a national of another Member State the right to obtain Danish citizenship or any of the rights, duties, privileges or advantages that are inherent in Danish citizenship by virtue of Denmark's constitutional, legal and administrative rules. Denmark will fully respect all specific rights expressly provided for in the Treaty and applying to nationals of the Member States.[80]

The last paragraph in the unilateral declaration deals with the Maastricht Treaty's Article 8(e) and the possibilities to strengthen and add to Union citizens' rights as established in the treaty. The explanatory memorandum to the Danish Act on ratification of the Maastricht Treaty stressed that Denmark would not participate in any possible development or strengthening that might follow from the Union objective within the areas dealt with in the Edinburgh Declaration.[81] According to the Danish Minister for Foreign Affairs, it would under any circumstances be natural to settle any such question on Danish participation, if raised in the future, by a binding referendum.[82]

In 1997, the Amsterdam Treaty embodied the Danish opt-out on Union citizenship in the Union citizenship provision stating that, "Citizenship of the Union is a supplement to national citizenship and not a replacement."[83] Implicitly, the amendment might suggest that Union citizenship could be misunderstood.[84] Arguably, by the amendment the other EU countries followed the signal sent by Denmark in its formulation of the Danish opt-out

[80] *See* Denmark and the Treaty on European Union, Dec. 31, 1992, 1992 O.J. (C 348).

[81] *Id*.

[82] Stated in the preparatory work to the Danish Act on ratification of the Maastricht Treaty, see Betænkning Mar. 19, 1993 in FT 1992–93 tillæg B 977.

[83] Treaty of Amsterdam Amending the Treaty of The European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) art. 2(9) [hereinafter Treaty of Amsterdam].

[84] *See* Francis G. Jacobs, *Citizenship of the European Union—A Legal Analysis*, 13(5) EUR. L. J. 592 (2007).

with regard to Union citizenship.[85] The Amsterdam Treaty reflects the wording of the Danish opt-out from Union citizenship, and in a sense, the Danish opt-out has become general EU law.[86] Among Danish politicians and officials working with EU matters, it is the general opinion that with the Amsterdam Treaty, the Danish Union citizenship opt-out is without any significance.[87]

This does not mean, though, that there are no misunderstandings in relation to the EU citizenship. Neither does it signify that the Danish citizens are aware of Denmark's position in the EU cooperation as to Union citizenship matters. To give one example, the rating agency Greens Analyseinstitut continuously surveys the Danish population's view on the opt-outs through telephone and web-based surveys.[88] The latest survey covers the period 23–28 August 2013 and a total of 1215 persons participated.[89] The respondents were asked what they would vote if there was a new referendum the next day on Danish participation in the EU-cooperation within the four areas that are covered by the opt-outs.[90] More specifically they were asked whether they would vote "yes" or "no" or "don't know/will not answer" in referenda regarding one or more of the opt-outs or the whole package (all four opt-outs simultaneously).[91]

The problem with the survey is that while it makes sense to ask voters about Danish participation and thus abolishment of the opt outs regarding the Euro, defense or JHA-cooperation, it does not make sense to ask about the abolishment of the Union citizenship opt-out. The first mentioned three opt-outs are highly influential in regard to Danish participation in the EU cooperation, while the Union citizenship opt-out is insignificant. Denmark is bound by the Union citizenship cooperation on equal footing with the other member states. Still, at the opinion poll in August 2013, only 28 % of the respondents wanted to abolish the opt-out on Union citizenship.[92] Among the rest, 53 % rejected Danish participation and 27 % did not know or would not answer the question.[93]

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[85] DANSK INSTITUT FOR INTERNATIONALE STUDIER, *supra* note 73.

[86] *See* DANISH INSTITUTE FOR INTERNATIONAL STUDIES, DE DANSKE FORBEHOLD OVER FOR DEN EUROPÆISKE UNION, UDVIKLINGEN SIDEN 2000, 244–45 (2008).

[87] *Id.*

[88] *See* Opinion Poll (2013), http://img.borsen.dk/img/cms/tuksi4/media/cmsmedia/2273_content_2_2266.pdf.

[89] *Id.*

[90] *Id.*

[91] In total the respondents were asked five questions: one for each opt-out and one for "the whole package."

[92] Opinion Poll, *supra* note 88.

[93] Opinion Poll, *supra* note 88.

It is noteworthy that the share in favor of abolishing the Union citizenship opt-out has decreased by 10 % since the then Danish Prime Minister in 2008 made known that the government considered abolishing the opt-outs.[94] The reason may be that many Danes still see the Union citizenship opt-out as a safety net securing that Union citizenship will not develop into a status comparable to national citizenship or even replace it.

The "history" of the Union citizenship opt-out may be reflected in the Danish results of the 2012/2013 Flash Eurobarometer survey on European Union Citizenship where only 37% of the Danish respondents said that they were familiar with the term "citizen of the European Union" and knew what it meant against an average of 46%.[95]

Still, it is remarkable that a relatively high percentage of the Danes feel that they are citizens of the EU (71% against an average of 62%), know their rights as citizens of the EU (59% against an average of 46), and are interested in knowing more about these rights (67% versus an average of 59%).[96] Additionally, the 2012/2013 survey shows that Denmark has the highest proportion of citizens who feel informed about their rights as citizens of the European Union (49 % against an average of 36 %).[97]

This mixed picture as to the meaning of Union citizenship may be explained by a Danish confusion and/or uncertainty resulting from the Danish opt-out from the Union citizenship. In the official Danish language, the terms "Union citizen" and "Union citizenship" are relatively seldom used.[98] In the surveys mentioned above, the respondents were told that it was about *statsborgerskab i EU*, but they were asked whether they were familiar with the term *borger i EU* and whether they felt informed about their rights as *borger i EU*.[99] The Danish word *borger* may be translated to "citizen," but not in the sense "a person with citizenship," rather in the sense "a resident." Danes use *borger* when referring to inhabitants of a town, state etc. Thus, they may, without consciously identifying themselves as "citizens with an EU citizenship," share the feeling of being citizens/*borgere* in the EU.

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[94] Opinion Poll, *supra* note 88.

[95] *See* EUR. COMM'N, *supra* note 42.

[96] *See* EUR. COMM'N, *supra* note 47.

[97] *See* EUR. COMM'N, *supra* note 42.

[98] *Cf., supra*, the confusion created by the translation of the Spanish memorandum where EU citizenship was translated to EU *statsborgerskab*.

[99] EUR. COMM'N, *supra* note 42, at question 2 in the Danish version, http://ec.europa.eu/public_opinion/flash/fl_365_fact_dk_da.pdf.

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Another important factor may be that Danes have not been taught much about Union citizenship and Union citizenship rights. It follows from the Danish unilateral declaration, associated with the ratification of the Maastricht Treaty, that Denmark will fully respect all specific rights expressly provided for in the Treaty. Still, many important rights are not expressly provided for in the Treaty. Rather, they are developed through the case law of the CJEU, especially during its interpretation of the free movement rights.[100] These rights are not always foreseeable for neither the governments nor the citizens. Moreover, governments may be reluctant as to inform about the rights. By way of illustration, in 2008 the Danish Ombudsman had to criticize the Danish Immigration Service's guidance concerning access to family reunification according to EU law.[101] The Ombudsman criticized that the Immigration Service was not current with the developing EU rights, that there were misunderstandings and that the interpretation of the rights was too restrictive.[102]

E. The Development of EU Citizenship

The turbulence that the introduction of Union citizenship occasioned in Denmark—and consequently also in the rest of the EU—was, as mentioned in part C, mainly explained by the introduction of the Union citizenship concept. The rights attached to Union citizenship did not play a major role, one of the reasons being that foreigners in Denmark had already been granted voting rights in local elections.[103]

In the Maastricht Treaty, the rights reserved exclusively for Union citizens were the free movement rights, the rights to vote and stand as candidate in municipal and European Parliament elections and the right to seek help from consular authorities of other member states.[104] They were limited in numbers and in principle could only be enjoyed by the Union citizens who were outside their own home state. As Advocate General Francis G. Jacobs has stated:

> [T]he specific rights set out in the TEU seemed to add little to the existing rights flowing from the Treaties, the legislation, and the case-law. Indeed the

[100] *See, e.g.*, *infra*, judgments in Section D.

[101] *See* Kirsten Talevski, *God vejledning styrker borgernes retssikkerhed* [*Good Guidance Strengthens the Legal Rights of* Citizens], PARLIAMENTARY OMBUDSMEN REPORT (2009), http://beretning.ombudsmanden.dk/artikler/god_vejledning_styrker_borgernes_retssikkerhed.

[102] *See* Vejledningssagen er slut [The case on guidance is brought to an end], FOLKETINGETS OMBUDSMAND (Nov. 21, 2008), http://www.ombudsmanden.dk/find/nyheder/alle/Vejledningssagen_er_slut/Vejledningssagenerslut.pdf.

[103] Francis G. Jacobs, *Citizenship of the European Union – A Legal Analysis*, 13(5) EURO. L.J. 592 (2007).

[104] *See* Treaty of Maastricht on European Union, Nov. 1, 1993, O.J. (C 191) art. 8(a)-(f).

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> introduction of EU citizenship in the Treaty was regarded in some quarters as a false prospectus. However, the CJEU was able to give the concept a more substantial content than the authors of the Treaty provisions may have envisaged.[105]

Union citizenship has acquired great importance through the right to free movement and the principle of non-discrimination. It follows from the treaty, now TFEU Article 18, that within the scope of the application of the treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.[106]

The CJEU has in several cases established that Union citizenship is intended to be the fundamental status of nationals of the member states.[107] The Court has found it useful to invoke Union citizenship in order to invoke a broad interpretation of the scope of the treaty for the prohibition of discrimination whether *ratione persona* or *ratione materiae*.[108] In this way, the Court has secured the economic and social rights of Union citizens.

Yet the CJEU has maintained that EU law cannot be applied to situations that are wholly internal to a member state. It has maintained the traditional viewpoint that its application is dependent on a "cross-border-element." This element has been softened in so far as the Court has found "cross-border" elements in cases where there has been no physical movement from one member state to another.[109] Still, there must be a link with EU law.[110]

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[105] Jacobs, *supra* note 103, at 592.

[106] Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) art. 18 [hereinafter TFEU) (stating, "[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.").

[107] *See* Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM), CJEU Case C-34/09, 2011 E.C.R. I-01177, para. 41.

[108] *See* Jacobs, *supra* note 103

[109] *See, e.g.*, Kunqian Catherine Zhu and Man Lavette Chen v. Sec'y of State for the Home Dep't, CJEU Case C-200/02, 2004 E.C.R. I-9925; Janko Rottmann v. Freistaat Bayern, CJEU Case C-135/08, 2010 E.C.R. I-1449; *Zambrano*, CJEU Case C-34/09.

[110] *See* Justice Koen Leanaerts, *"*Civis europaeus sum*": From the Cross-Border Link to the Status of Citizen of the Union,* 3 ONLINE J. FREE MOVEMENT OF WORKERS WITHIN THE EUR. UNION 6 (2011).

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Advocate General Jacobs has rightly characterized the case law of the CJEU on Union citizenship as complex, rapidly evolving, and often highly technical.[111] For lawyers who are familiar with EU law, the Court's approach, techniques, and interpretation methods may make sense, but for European citizens who may not be familiar with the techniques, the Court's judgments may appear inconceivable and sometimes even unfair.[112] If citizens in general feel uncertain or lack appreciation of the consequences of EU citizenship, this may explain why a relatively high percentage of them have difficulties seeing themselves as Union citizens or even dissociate themselves from learning more about their Union citizenship rights.[113]

On the one hand, the underlying problem may be the CJEU's interpretative style and, on the other hand, EU law and the way that Union citizenship is constructed. The following focuses on two inherent problems, raising questions on inequality and lack of fairness.

Firstly, it is for each member state to decide in its own legislation whom shall become its nationals and thereby Union citizens.[114] States use different admission criteria that may be both under and over inclusive. For instance, states with restrictive naturalization criteria may exclude large groups of third country nationals from EU citizenship and Union citizenship rights, while states with lenient criteria for acquisition of citizenship by descent may include the remotest descendants of earlier generations of expatriates. These conflicting regulatory practices may create problems of experienced inequality and injustice.

Secondly, in some member states, nationals who have not availed themselves of their free movement rights may experience reverse discrimination when they compare themselves to resident Union citizens from other EU member states or co-nationals who have invoked their freedom of movement rights. In relation to family reunification, for instance, nationals of a country with a very restrictive immigration policy may find themselves prevented from being united with their foreign family, while resident EU citizens *a priori* have a right to reside with their family, because a separation might hamper their free movement within the EU territory.[115] Again, the architecture of Union citizenship and the

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[111] *See* Jacobs, *supra*, note 103.

[112] *See* Jo Shaw, *Concluding Thoughts:* Rottmann *in Context*, EUR. UNIVERSITY INSTITUTE 8 (2011).

[113] *See supra* Part B.

[114] *See* European Convention on Nationality, Nov. 6, 1997, E.T.S. No. 166 art. 3.

[115] *See* Anne Zacho Møller, Network Formation and Sense of Belonging: An Investigation of Social Boundaries and Trifocal Affiliation, 7 (Spring 2009) (unpublished Master's Thesis, Malmö Högskola), http://www.aegteskabudengraenser.dk/uploads/files/thesis_gathered.pdf (explaining how Danish citizens move to Sweden with a foreign spouse with a view to acquire Swedish citizenship after two years' residence—possible for Nordic citizens—in order to move back to Denmark as EU citizens with a TCN spouse (so far, Danish citizenship is lost by the acquisition of a foreign citizenship).

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attached Union citizen rights may lead to situations of experienced discrimination and injustice.

Some CJEU judgments are examined in the following paragraphs and are compared with a few Danish cases, illustrating inequality problems that follow from the interpretation of national law in interaction with EU law. The chosen examples address the two aforementioned problems.

The first problem is the interdependence of member states' nationality law and the fact that states may grant their citizenship and thereby Union citizenship to persons from third countries without a genuine link to any EU member state.[116] By way of example, some member states offer their citizenship to large populations abroad who are of emigrant decent, generation after generation. For immigrants who regardless of their genuine link to a state are excluded from being granted said state's citizenship and thereby Union citizenship and Union citizenship rights, it lies close at hand to feel discriminated.

The other problem is the "reverse discrimination" created by the interaction of EU law with national law. In these situations, a state offers better treatment to mobile EU citizens than it offers to its own "static" citizens.

The examples below illustrate how Union citizenship, once acquired, may provide for extensive rights from which both resident third country nationals and, to a certain extent, nationals in a member state may be excluded.

The first case mentioned is *Micheletti*.[117] Mr. Micheletti was born in Argentina of Italian parents. Since birth he had possessed both an Argentinian and Italian citizenship. As an adult he moved to Spain where he wanted to establish himself as a dentist.[118] He had not before resided in Europe, but as an Italian citizen and thus a citizen of an EU member state, he claimed freedom of establishment. At first, this was refused because Spanish law in force at that time identified the citizenship of a foreign dual citizen as the citizenship corresponding to the habitual residence of that person before his arrival in Spain. The CJEU, though, ruled that it is not permissible for the legislation of a member state to

[116] *See* Costanza Margiotta & Olivier Vonk, *Nationality Law and European Citizenship: The Role of Dual* Nationality 7 (Eur. Univ. Institute, Eur. Union Democracy Observatory on Citizenship, Working Paper No. RSCAS 66, 2010), *available at* http://eudo-citizenship.eu/docs/RSCAS%202010_66.pdf (explaining Italian Citizenship policy that allows Italian citizenship to be passed on after emigration without restrictions, even a person who can prove descent from an Italian who emigrated before the unification of Italy in 1861 is entitled to Italian nationality, provided that the Italian ancestor was alive at the time of the unification).

[117] Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria, CJEU Case C-369/90, 1992 E.C.R. I-04239 (This case was decided before the Maastricht Treaty entered into force.).

[118] *Id*. at paras. 2-4.

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restrict the effects of granting citizenship of another member state by imposing an additional condition for the recognition of that citizenship with a view to the exercise of the fundamental freedoms provided for in the Treaty.[119] Thus, as citizen of an EU member state, Mr. Micheletti could establish himself as a dentist in Spain.

Mr. Micheletti had acquired his Italian citizenship at birth by descent from Italian parents; thus in his case, his Italian citizenship may have had an impact on his social identity and thus have been a means of personal identification, in the same way as did Maltese citizenship in the *Genovese* case.[120] The fact of having parents who have emigrated from Europe to Argentina may also have been a means of personal identification, creating a sense of belonging to the EU. The question, however, is whether the same would have been the case if Mr. Micheletti had not been the child of Italian emigrants, but the grandchild, great-grandchild or great-great-grandchild. He could still have been an EU citizen with free movement rights because Italy belongs to the group of states granting citizenship by descent without any residency qualifications.[121] This potentially creates an endless proliferation of citizenship across generations born abroad, which is problematic insofar as later generations in most cases do not have a genuine link to their ancestors' country of emigration.[122]

The grant of such extensive rights based on a member state's over inclusive citizenship policy seems unfair in comparison with the lack of rights that persons with a genuine link to a member state may experience in a state with an under inclusive citizenship policy. A Danish case is illustrative here. A young woman at the age of 22 fled from the civil war and violence in Syria.[123] Being a dual Danish and Syrian citizen by birth out of a Danish-Syrian marriage, she enters Denmark with a Danish passport, issued to her after her 18th birthday and valid for a ten-year period. In Denmark, though, she discovers that a Danish citizen who is born abroad and has never lived in Denmark nor stayed in Denmark under circumstances indicating some association with Denmark loses Danish citizenship automatically *ex lege* on attaining the age of 22. The Minister for Justice may grant an application for retention of Danish nationality, if submitted before the applicant's 22nd

[119] *Id.* at para. 10.

[120] *See Report from the Commission—Third Report from the Commission on Citizenship of the Union*, at 7, COM (2001) 506 final (Jul. 9, 2001).

[121] *See* Margiotta & Vonk, *supra* note 116.

[122] *See* Rainer Bauböck & Bernhard Perchinig, *Evaluations and Recommendations*, *in* ACQUISITION AND LOSS OF NATIONALITY, VOL. 1: COMPARATIVE ANALYSES 454 (Rainer Bauböck et al. eds., 2006).

[123] Information about the case given during counseling at the Danish Institute for Human Rights in 2013.

birthday.[124] Although, as the woman had turned 22 a few months before she came to Denmark, she could not avail herself of this possibility.

This case has not yet been decided by the Danish Ministry of Justice. In general the Ministry accepts that a foreign-born Danish national has maintained Danish citizenship if said person has stayed in Denmark for a period at 12 months in total. If the association requirement is not fulfilled, and loss of Danish citizenship is assumed to have occurred automatically at the age of 22, the case potentially could be brought before the CJEU. The Court would then have to decide whether the woman's situation falls within the ambit of EU law.[125] The Court arguably would take that position.[126] Even though her situation is different from *Rottmann*, her possible loss of Union citizenship and Union citizenship rights may by reason of its nature and consequences fall within the ambit of EU law. In principle, Danish nationality is lost *ex lege* automatically at the age of 22 if the person concerned has not stayed in Denmark in a way indicating some association with Denmark.[127] If Danish citizenship is lost automatically at the age of 22, the authorities are prevented from applying the principle of proportionality as concerns the consequences the loss entails for the situation of the person concerned in the light of EU law. Such an arrangement may be contrary to EU law.[128] In any event, from an equality perspective, the strongly contrasting Italian and Danish legislation speaks in favor of a common interest in coordinating the member states' citizenship acts.

Another CJEU case, *Zhu and Chen*,[129] illustrates a similar problem. In this case, the CJEU used Union citizenship as an independent legal source.[130] The case concerns a married

[124] *See* Consolidated Act on Danish Nationality, No. 422, July 1, 2004, § 8(1) (stating, "[a]ny person born abroad who has never lived in Denmark nor been staying in Denmark under circumstances indicating some association with Denmark will lose his or her Danish nationality on attaining the age of 22 unless this will make the person concerned stateless. The Minister for Refugee, Immigration and Integration Affairs [now the Minister of Justice] or the person he so authorises may grant an application, submitted before the applicant's 22nd birthday, for retention of Danish nationality.").

[125] *See* Janko Rottmann v Freistaat Bayern, CJEU Case C-135/08, 2010 E.C.R. I-1449, para 42.

[126] *Id.* at paras. 45-46 (regarding the CJEU's possibility to rule on questions concerning the conditions in which a citizen of the Union may, due to loss of citizenship, lose his or her status of citizen of the Union and thereby be deprived of the rights attaching to that status).

[127] *See supra* text accompanying note 123.

[128] *See Rottmann*, CJEU Case C-135/08 at paras. 50-52 (holding it is for the national court to ascertain whether a withdrawal decision observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law).

[129] *See* Zhu and Chen, CJEU Case C-200/02, 2004 E.C.R. I-09925.

[130] *Id.* at para. 26.

couple of Chinese origin, Mrs. Chen and her husband. For the purpose of work, the husband travelled frequently to EU Member States, particularly to the UK. When Mrs. Chen was about six months pregnant, she joined her husband in the UK. Later, she went to Belfast, Northern Ireland, to give birth to her child, who according to Irish law in force at that time acquired Irish nationality at birth based on the *ius soli* principle. Thereby the child became a Union citizen, and based on the child's Union citizenship, Mrs. Chen applied for a British permanent residence permit for the child and herself. After the British Authorities refused her request, the case was brought before the CJEU.[131]

The CJEU reiterated that every person holding the nationality of a member state is a citizen of the Union, and that Union citizenship is destined to be the fundamental status of nationals of the Member States.[132] Because Union citizens have the right to reside in a member state other than their own, subject to certain conditions as to health insurance and sufficient resources that were fulfilled, the child had, as a citizen of Ireland and a Union citizen, the right to reside in the UK.[133] Additionally the mother had a derived residence right because she was the caretaker of the child, and a refusal of allowing her to reside in the UK would deprive the child's residence right of any useful effect.[134]

There is good reason to assume that the Chen child and her mother did not *a priori* have an Irish or British identity—or a European identity for that matter. In their case, neither Irish citizenship nor EU citizenship seems to have been a means of personal identification but rather a means for securing the family's residence within the EU. Thus, it was instrumental. The family had no genuine link to Ireland or the UK. Rather, they took advantage of EU law and the way Union citizenship is constructed. Again, for resident third country nationals who cannot acquire similar residence rights, the differential treatment may appear unfair. For certain other groups, it may appear even more unfair. Among these groups are persons deprived of both residence and citizenship rights. For example, the *Kaur* case concerned the UK's immigration legislation providing for a refusal to grant leave to remain in the UK to a British Overseas Citizen.[135]

Another Danish case may illustrate the problematic differences between the member states' citizenship over and under inclusive policies. A pregnant stateless woman, resident in Denmark, went to Sweden to visit a friend on a one-day trip.[136] Unexpectedly, her labor

[131] *Id.* at paras. 7–14.

[132] *Id.* at para. 25.

[133] *Id.* at paras. 36-41.

[134] *Id.* at para. 45.

[135] *See* The Queen v. Sec'y of State for the Home Dep't, ex parte Manjit Kaur, CJEU Case C-192/99, 2001 E.C.R. I-1237, paras. 19-27.

[136] Information about the case given during counseling at the Danish Institute for Human Rights in 2011-2013.

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pains began and she was brought to a Swedish hospital where she prematurely gave birth to a daughter. The following day she returned to Denmark with the baby. Unlike her siblings, the child born in Sweden could not acquire Danish citizenship according to the Danish provision implementing Article 7 of the Convention on the Rights of the Child.[137] According to Danish law, a stateless child's acquisition of citizenship is conditioned by birth on Danish territory.[138] The child's application for citizenship was refused by different ministers under two governments until eventually she was granted Danish citizenship at the age of 16, after her case had been taken up by politicians in the Parliamentary Naturalisation Committee.[139]

The last illustrative CJEU judgment to be introduced here is *Metock*.[140] In this case, the Court used the non-obstruction test.[141] The case comprised four cases in which the Irish Ministry of Justice had refused to grant a residence card to a national of a non-member state married to a Union citizen from another member state residing in Ireland. One of these four cases concerned Mr. Metock, a national of Cameroon,who had moved to Ireland and applied for asylum. In Ireland he married a woman of Cameroon origin with UK nationality, who worked and resided in Ireland. After his application for asylum in Ireland was refused, he applied for a residence card as spouse of an established Union citizen. This was also refused because he did not satisfy a condition of prior lawful residence in another EU member state.[142] The Irish requirement of prior lawful residence was based on the CJEU's judgment in *Akrich*.[143] However, the CJEU in *Metock* found that the refusal of a host member state to grant rights of entry and residence to the family member of a Union citizen is such as to discourage that citizen from moving to or residing in that member state. Therefore, the requirement of prior lawful residence was not valid.[144]

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[137] Convention on the Rights of the Child art. 7, Nov. 20, 1989 (establishing that the child shall have the right from birth to a name and the right to acquire a nationality).

[138] *See* the Ministry of Justice's Circular Letter No. 9253 of 6 June 2013 on naturalisation, available at https://www.retsinformation.dk/Forms/R0710.aspx?id=152087, § 17, (stating that in accordance with the 1989 Convention on the Rights of the Child, children who are born stateless in Denmark may be listed in a naturalisation bill, regardless of whether they fulfil the ordinary conditions, if they are resident in Denmark.).

[139] *Folketinget underkender Morten Bødskov i sag om statsløs pige [The Parliament does not approve (the Minister of Justice) in case on stateless girl]* , INFORMATION (Apr. 25, 2013), http://www.information.dk/458535.

[140] *See* Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform, CJEU Case C-127/08, 2008 3 C.M.L.R. 39.

[141] *Id.* at paras. 62-65.

[142] The other three cases dealt with applicants who had not been lawfully residing in another member state before moving to Ireland.

[143] *See* Sec'y of State for the Home Dep't v. Hacene Akrich, CJEU Case C-109/01, 2003 E.C.R. I-9607, para.50.

[144] *See Metock*, CJEU Case C-127/08 at para. 80.

The CJEU based its judgment on an interpretation of Directive 2004/38/EC on rights of Union citizens and their family members to move and reside freely in the territory of a Member State. According to the Court, the directive confers on all third country nationals, who are family members of Union citizens within the meaning of the directive and accompany or join the Union citizen in a host member state, rights of entry into and residence in the member state regardless of prior lawful residence. The Court emphasized that even before the adoption of the Directive, the Community legislature recognized the importance of protecting the family life of Union citizens in order to eliminate obstacles to the exercise of among others their right to free movement.[145]

The right of entry and residence is based on the axiom that a state must not refuse entry and/or residence of a Union citizen's spouse because this may seriously obstruct the exercise of free movement by discouraging the Union citizen from exercising his or her right of entry and residence. According to the Court's reasoning, the establishment of an internal market signifies that the right to entry and residence of family members cannot vary from one member state to another because this would influence the right of Union citizens to establish themselves in any of the member states under the same conditions.[146]

It is noteworthy that only Union citizens who have exercised their right of freedom of movement and have established themselves in another member state other than their own can rely on Directive 2004/38EC.[147] In contrast, static citizens who have not availed themselves of their free movement rights may in family reunification cases be subjected to their own state's maybe very restrictive migration control.[148] As mentioned, this may lead to reverse discrimination.

The scholarly literature on this topic argues that analyzing the Court's case law on family reunification through a "non-restriction lens" brings helpful insight. The Court adopted a "non-restriction approach" in cases on free movement of goods and came to apply this logic to free movement of persons as well. It concluded that if Union citizens were not allowed to lead a normal family life in a host member state, the exercise of the freedoms they are granted by the treaties would be seriously obstructed. Anne Staver argues that, from this perspective, reverse discrimination is practically an expected outcome. So called

[145] *Id.* at para. 56.

[146] *Id.* at para. 68.

[147] *See Zambrano*, CJEU Case C-34/09 at para. 39.

[148] *See* Murat Dereci and Others v. Bundesministerium für Inneres, CJEU Case C-256/11, 2011 E.C.R. I-11315, paras. 54, 74.

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static citizens are not restricted from using their free movement rights; rather, the Court's rulings could encourage them to use their free movement rights.[149]

In this context it may be helpful to keep in mind what the rationale is behind free movement rights. The Single Market gives citizens the capacity to travel freely, to settle, and to work where they wish without unjustified restrictions. Mobility is at the heart of European integration and the Single Market. Especially in a time with economic and financial crisis with unemployment at a record level in many member states, it is deplorable that unfilled job vacancies have been rising since mid-2009.[150] Still, citizens who are filling in adequate job positions must not necessarily move, from a Single Market perspective. Rather, it may in some cases be advisable, at least at a particular point in time, that they remain in their position.

Though, in this relation EU law, as interpreted by the CJEU, may be counteracting. For example, two Union citizens established in a member state, in the same environment and with similar work, may consider themselves in the same factual situation with regard to family reunification. Except, if only one of them has migrated within the EU, only that person may be entitled to family reunification, while his companion who has always resided in the member state of which he is a national may be excluded from being united with his close family. In order to be treated equally with the mobile Union citizen, the static Union citizens may feel forced to move abroad. Around Europe, there are several "routes" across borders that can be used in order to acquire such equal treatment. For instance, citizens from Denmark move to Sweden, citizens from the Netherlands move to Belgium and citizens from the UK move to Ireland.[151] One could argue that this is not "free movement."[152] It is movement most often reluctantly initiated by unequal treatment in a member state. As such, it may run counter to the idea behind the internal market, signifying that the right to entry and residence of family members cannot vary, because this would influence the right of Union citizens to reside in any of the member states. Though, reverse discrimination may discourage Union citizens from residing in their own state regardless of whether they discharge their duties here in the most optimal way.

Union citizens should arguably have a right to reside under the same conditions in any state, including their own. Advocate General Sharpston, who in the case *Government of*

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[149] *See* Anne Staver, *Reverse Discrimination in European Family Reunification Policies*, *in* DEMOCRATIC CITIZENSHIP AND THE FREE MOVEMENT OF PEOPLE 57 (Willem Maas ed., 2013).

[150] *See* The Single Market Act II, Together for New Growth (Oct. 3, 2012), http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf.

[151] *See* European Convention on Nationality, Nov. 6, 1997, E.T.S. No. 166 (referring to the Danish-Swedish route).

[152] Staver, *supra* note 149, at 85 (opining that this use of free movement is arguably by no means "free" and that one may go so far as to call it a new type of forced movement).

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the French Community and the Walloon Government, raised the question whether on a proper construction, the "right to move and reside freely within the territory of the Member States" means "freedom to move and then reside" (e.g., freedom to reside derives from/flows from prior exercise of the freedom to move) or whether it means "freedom both to move and to reside" (so that it is possible to exercise the freedom to reside/go on residing without first exercising the freedom to move between Member States).[153]

The right to freedom of movement may also be seen as including both a positive and a negative right: A right to move and a right not to move. By way of comparison, the right to freedom of association includes a positive right to join an association and the negative right to refrain from doing so, such as the right to stay out of a certain trade union. This was established by the ECtHR in *Sørensen and Rasmussen v. Denmark,*[154] where the applicants had complained that the existence of pre-entry closed-shop agreements in Denmark and their application to the applicants violated their right to freedom of association guaranteed by Article 11 ECHR encompassing a negative right to freedom of association on an equal footing with the positive right. In the applicants' view, Danish law violated the (negative) right to freedom of association, because it allowed an employer to require an employee to be a member of a trade union or a specific trade union in order to obtain employment. The Court agreed that Denmark had failed to protect the applicants' negative right to trade union freedom.[155]

A third and final Danish example illustrates the problem in which Union citizens feel obliged by EU law to move across borders. They are not pulled by tempting job offers but pushed by EU law and a wish for family reunion. A case brought before the Danish Supreme Court concerns a Danish citizen of Ghanaian origin who married a Ghanaian woman.[156] The husband had stayed in Denmark for ten years and been a Danish citizen for two years before he married and applied for family reunification. The application was refused because the applicants could not fulfill the Danish attachment requirement stipulating that the couple's "overall attachment" to Denmark must be stronger than the couple's attachment to any other country.[157] The Danish Ministry of Integration found that the husband had some attachment to Ghana, where he had attended school, and his wife had always stayed in Ghana. The wife had come to Denmark on a tourist visa, and when it

[153] *See* Opinion of Advocate General Sharpton at para. 144; Government of the French Community and Walloon Government v. Flemish Government, CJEU Case C-212/06, 2008 E.C.R. I-1683.

[154] *See* Sørensen and Rasmussen v. Denmark, ECHR App. No. 52562/99, 52620/99 (Jan. 11, 2006), http://hudoc.echr.coe.int/.

[155] *Id.* at para. 77.

[156] *See* Biao v. Denmark, ECHR App. No. 10 (Mar. 25, 2014), http://hudoc.echr.coe.int.

[157] *See* Danish Aliens Act, Consolidation Act No. 785, Aug. 10, 2009, § 9(7).

expired, as a last measure the couple moved to Sweden where they settled and had a son. The movement to and residence in Sweden was exclusively motivated by their wish to live a family life together. The husband kept his job in Denmark and commuted between Denmark and Sweden, and later, when he lost the job, he found new positions in Denmark. The Danish Supreme Court found no violation of Denmark's human rights obligations according to Article 8 ECHR, or (by four votes to three) Article 14 in conjunction with Article 8 due to the fact that the attachment requirement applied to the husband who recently had naturalized, but was lifted for sponsors who have held Danish citizenship for at least 28 years.[158] Marts 2014, the European Court of Human Rights hold that there had been no violation of ECHR Article 8 nor (by four votes to three) of Article 14 of the Convention in conjunction with Article 8.[159] In June 2014 the applicant made a request that the case be referred to the Grand Chamber. It will be decided by five judges of the Grand Chamber whether it fulfills the conditions of Article 43(2) of the ECHR.

The reasoning behind the different treatment of mobile and static Union citizens is difficult to reconcile with principles of equality and fairness. It may even be difficult to reconcile this different treatment with internal market thinking. In any case, it is arguable that a Union citizenship concept that may enforce EU citizens to move across borders hardly has the potential to make them feel closer to and heard by the EU.[160]

F. Identity Issues in a National and European Context

On the basis of that presented above, the author contends that there are substantial differences between national citizenship and European citizenship as identity markers. Both may have a formal and informal meaning, but the informal significance of national citizenship may overshadow the informal significance of European citizenship. Rahter, Union citizenship may be about formal Union citizenship rights.

National citizenship may entail a feeling of being accepted by the state or the community, as emphasized by applicants for naturalization.[161] As to Union citizenship, its construction

[158] The refusal of family reunion based on the 28-years rule and the atachment requirement was not invalid, neither the ECHR nor the European Convention on nationality had been violated., Sup Ct. Den., Case No. U.20101035H (Jan. 3, 2010), available at http://eudo-citizenship.eu/databases/citizenship-case-law/#.

[159] *See, e.g.*, *Biao*, ECHR App. No. 10; Eva Ersbøll, Biao v. Denmark – *Discrimination Among Citizens?* (Eur. Univ. Inst., EUDO Citizenship Observatory, Working Paper No. 79, 2014 available at http://www.eudo-citizenship.eu/publications/working-papers).

[160] *See* ELSPETH GUILD, *THE LEGAL ELEMENTS OF EUROPEAN IDENTITY – EU CITIZENSHIP AND MIGRATION LAW* 244 (2004) (stating the fact that EU law prevents some from living together and privileges others is unlikely to command respect from those who suffer from its effects).

[161] *See* Tineke Strike, Anita Böcker, Maaike Luiten, & Ricky van Oers, *Integrations and Naturalisation Tests: The New Way to European Citizenship* (Centre for Migration Law, Radbound Univ. Nijmegen 2010).

makes such effect unlikely, because the EU as such is not in a position and has no competence to "accept" applicants for Union citizenship. National citizenship may bring along identity, self-esteem, and solidarity with the state. As expressed by immigrants in Sweden, it contributes to a feeling of being included and makes it easier to say "this is my country and our *skärgård* [archipelago]." This is symbolic and important for the feeling of belonging.[162]

If this divergence is accepted, and if there still is a desire for a Union citizenship that contributes to the European citizens' feeling of having a genuine European identity, more should be done with a view to secure that citizens experience Union citizenship and the rights attached as equal and fair. Citizens' understanding of and respect for the Union citizenship project seems to be indispensable.

G. European Coordination in Matters of Nationality

This article offers support for the many arguments already existing in the scholarship for a harmonization of the EU member states' nationality law and for the introduction of means to avoid reverse discrimination. Among others, the NATAC research recommends that the EU Commission should clarify in a communication how it expects member states to take into account Community law in their legislation on acquisition and loss of nationality.[163] It recommends applying the open method of coordination to the nationality laws of member states and argues that membership of the EU adds considerable weight to a call for common minimum standards, mutual adaptation, and learning across international borders.[164] Other researchers have suggested the application of the theory of reflexive harmonization, considering the necessity of transnational harmonization of laws, and suggest combining self-regulation with external regulation.[165] More specifically, Rainer Bauböck has suggested a stakeholder principle to guide citizenship policies[166] and a use of "citizenship constellations" as a structure in which individuals are simultaneously linked to several political entities, so that their legal rights and duties are determined not by one political authority but by several.[167]

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[162] *See report on Swedish citizenship:* SLUTBETÄNKANDE AV 1997 ÅRS MEDBORGERSKAPSKOMMITTÉ: SVENSKT MEDBORGARSKAP (SOU 1999:34).

[163] *See* Rainer Bauböck & Bernhard Perchinig, *Evaluations and recommendations*, *in* ACQUISITION AND LOSS OF NATIONALITY, VOL. 1: COMPARATIVE ANALYSES 442 (Rainer Bauböck et. al. eds., 2006).

[164] *Id.*

[165] *See* Karolina Rostek & Gareth Davis, *The Impact of Union Citizenship on National Citizenship Policies*, 22 TUL. EUR. & CIV. L.F. 89-156 (2007).

[166] *See* Rainer Bauböck, *Stakeholder Citizenship: An Idea Whose Time Has Come?* (Migration Policy Institute 2008).

[167] *See* Rainer Bauböck, *Studying Citizenship Constellations*, 36(5) J. ETHNIC & MIGRATION STUD. 847-859 (May 2010).

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Regarding the avoidance of reverse discrimination in cases of family reunification, Anne Walter emphasizes that such discrimination contradicts the prohibition of discrimination under fundamental law.[168] The "gap" under EU law for static Union citizens neglects the human rights dimension.[169] The lack of applicability of EU law alone cannot justify reverse discrimination. Common principles for family reunification are needed.[170]

As to the avoidance of reverse discrimination more generally, Advocate General Sharpston suggests in her opinion in the *Zambrano* case that Article 18 TFEU on non-discrimination should be interpreted as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU on the right to move freely and reside within the EU territory and national law.[171] Such reverse discrimination should entail a violation of a fundamental right protected by EU law, where at least equivalent protection is not available under national law.[172]

This author supports the proposals for harmonization and for the Commission encouraging member states to reform their nationality laws on a common basis. This was successfully done by the Nordic countries for a century, and the Nordic cooperation provided fruitful results.[173] A similar proposal aiming at international law was put forward by the eminent Jurists Weiss and Oppenheim during the League of Nation's preparation of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws.[174]

At that time, the International Law Association had prepared a draft regarding a uniform regulation of questions of nationality, which was adopted by the Thirty-third Conference held in 1924. Its proposal of a "model Statute," however, was rejected as irrational on the basis that nationality law in many countries was of a constitutional nature.[175] Moreover, it was considered doubtful whether such rules would really be uniform, as the practical application and the interpretation would not always be the same in different countries.[176]

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[168] *See* ANNE WALTER, REVERSE DISCRIMINATION AND FAMILY REUNIFICATION 58 (2008).

[169] *Id.*

[170] *Id.*

[171] *See* Opinion of Advocate General Sharpston at para. 144; *Zambrano*, CJEU Case C-34/09.

[172] *Id.* at para. 155.

[173] *See* The Nordic Agreement on Citizenship, Den.-Fin.-Ice.-Nor.-Swed., Sept. 10, 2013.

[174] *See* LEAGUE OF NATIONS: COMMITTEE FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW DOCUMENTS [1925-1928], VOL.TWO 46 (Shabtai Rosenne ed., 1972).

[175] *Id.* at 48.

[176] *Id.*

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It was assumed that the operation of such uniform legislation necessitated the creation of a universal jurisdiction—that was to say, an international court with compulsory jurisdiction and thus a common jurisprudence.[177] Adopting a model statute would undoubtedly be more realistic in an EU context. The EU member states' nationality laws are in many respects based on similar principles, and there is a possibility of bringing questions on acquisition and loss of nationality under the scope of the CJEU's review.

In the mid-twentieth century, with the aim of a Nordic Union, the Danish civil servant Knud Larsen, who negotiated UN conventions in the 1950s, submitted a proposal for the adoption of a Nordic Union Citizenship similar to EU citizenship in a publication *Nordisk Statsborgerret* (Nordic Citizenship law).[178] Larsen's thoughts about not jeopardizing the countries' different values and about the benefits of diversity resembled the thoughts behind the EU citizenship. All the same, Larsen recognized the need for a harmonization of the Nordic countries' different nationality acts in a way acceptable for all (five) countries.[179]

Much evidence indicates that the EU member states from an overall perspective would benefit from acting together and solving the problems created by the interaction between the member states' nationality legislation and EU law; in addition, they may nationally and as members of the EU legislature seek to address the problem of reverse discrimination.[180]

H. Conclusion

Union citizenship is premised on the idea that it can be a source of legitimacy for the European integration process and a fundamental factor in creating among citizens a sense of belonging to the European Union and of having a genuine European identity. Some groups, though, who consider themselves as belonging to the EU, experience discrimination and even injustice stemming from the application of Union citizenship. To that extent, Union citizenship can hardly promote understanding and respect for the sake of the good, not forgetting that discrimination appears incompatible with the inherent principles of equality in EU and human rights law. In brief, the results may counteract the idea of a Union citizenship destined to create a sense of belonging to the EU and/or a sense of having a genuine EU identity.

[177] *Id.*

[178] *See* KNUD LARSEN, NORDISK STATSBORGERRET (1944).

[179] *Id.* at 83.

[180] *See* Leanaerts, *supra*, note 110.

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These problems constitute significant challenges. Although, there are solid proposals as to how the challenges can be met. Surveys on Europeanism indicate that European citizens feel some sense of a European identity. Such feelings may not necessarily relate directly to EU citizenship, and they may go beyond legal rights.

The two European courts have already issued important judgments concerning citizenship that have influenced the member states' nationality laws and practice. By way of example, *Zhu and Chen*, *Rottmann*, *Zambrano*, and *Genovese* have led to changes in member states' legislation and jurisprudence. No doubt, more will follow, possibly allowing the CJEU to touch upon identity issues.

Furthermore, many EU member states legislate with a view to avoid reverse discrimination. Among the further steps to be taken, the EU and the member states should ensure that EU citizens are informed about their Union citizenship status and the benefits following from this status. Decision makers should commit themselves to the Union citizenship idea and take the actions necessary to combat its inherent weaknesses. There is an enormous quantity of knowledge on nationality and Union citizenship issues and numerous suggestions for improvements. As of now, member states could formalize their cooperation on nationality matters with a view to reforming their legislation on a common basis.