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EXPLORING THE HISTORICAL-LEGAL EVOLUTION OF THE ROLE OF NATIONALITY IN THE EUROPEAN UNION[1]

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La Dichiarazione Universale dei Diritti Umani del 1948 riconobbe il diritto alla nazionalità, riflesso in strumenti internazionali come la Convenzione Americana sui Diritti Umani. Nonostante la tradizionale dipendenza dallo Stato, specifiche convenzioni limitano l'autorità statale per proteggere gli individui da danni e insicurezza legale. Sebbene non sia esplicitamente riconosciuto nei documenti dell'UE, la Corte di Giustizia dell'Unione Europea sovrintende la sovranità degli stati in materia di nazionalità.

The 1948 Universal Declaration of Human Rights recognized the right to nationality, echoed in international instruments such as the American Convention on Human Rights. Despite its traditional state-dependence, specific conventions limit state authority to safeguard individuals from harm and legal insecurity. While not explicitly acknowledged in EU documents, the CJEU oversees states' nationality-related sovereignty.

Parole chiave: Diritti umani, Corte di Giustizia dell'Unione Europea, Corte europea dei diritti dell'uomo.

Key Words: Human Rights, Court of Justice of the European Union, European Court of Human Rights.

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1. *Introduccion*

At the end of the Second World War, a wounded Europe was trying to rebuild its foundations without forgetting those essential rights for its reconstruction[2]. Even today, human rights are receiving increasing attention, being usually used as a benchmark for measuring the democratic quality of states. Nevertheless, some authors warn that recent phenomena such as the 2008 economic crisis or the COVID-19[3], pandemic have undermined the effectiveness of human rights[4].

Of all the human rights, the right to nationality, already established in the Universal Declaration of Human Rights, is even more indispensable in the European context, in so far as it gives rise to a whole series of rights included in Union citizenship that this community, as well as the CJEU, has endeavoured to protect and guarantee.

The most significant milestones in the development of human rights at EU level and the role of jurisprudence and nationality in the definition of European citizens' rights are analysed ahead.

[2] Sobre el contexto de posguerra y la posterior Guerra Fria ver: L. MARTÍNEZ PEÑAS, *Condenadamente mejor que una guerra*: cimientos conceptuales en la teoría de la escalada, en L. DE NARDI, *El Riesgo y el Desastre. Aportes analíticos y descriptivos desde las ciencias humanas y sociales*, Sindéresis, México 2023.

[3] Sobre la legislación del Estado de Alarma como respuesta a una emergencia sanitaria: L. MARTÍNEZ PEÑAS, *Estado de Alarma y otra legislación de urgencia como respuesta a la emergencia sanitaria de 2020*, en *El Derecho como respuesta a situaciones de crisis: perspectivas históricas y contemporáneas*, Dykinson, Madrid 2021; y ID., *The legislation to fight the first wave of the COVID-19 epidemic in Spain, en Società, diritto e religione durante le pandemie. Problemi e prospettive*, Editoriale Scientifica, Roma 2021.

[4] C.R. FERNÁNDEZ LIESA, *Reconquistar los derechos humanos por la Unión Europea*, en *Revista Iberoamericana de Filosofía, Política, Humanidades y Relaciones Internacionales*, n. 22 (2020), p. 43. El autor Martínez Peñas analiza otros elementos disruptores de esta década que amenazan la calidad democrática de los estados europeos en L. MARTÍNEZ PEÑAS, *Características de la teoría de la escalada en contextos de naturaleza jurídica específica: ciberespacio, contrainsurgencia y zona gris*, en E. PRADO RUBIO, Y M. FERNÁNDEZ RODRÍGUEZ, *Teleraña y muro*, Madrid, Dykinson 2023.

2. *Multilevel protection of human rights*[5].

The traditional international law provided greater protection to foreigners since it was understood that the enjoyment and security of the rights of an individual national of a state, depended exclusively on that state, even when it was the offending subject[6]. In the same way, international law at the time did not provide individuals with procedural powers either, so the possibility of them being able to defend their rights against a state that infringed them was unthinkable. Despite the fact that the idea had already been considered by some authors at the beginning of the 20th century, as indicated by Cançado, who attributes it to the work of Léon Duguit, *L'Etat, le droit ebjectif et la loi positive* [The State, objective law and positive law], the relevance of being the first document in which it was asserted that it was individuals were the real subjects international law, justifying that they were the addressees of the rules created in this area. In the same way, international law at the time did not provide individuals with procedural powers either, so the possibility of them being able to defend their rights against a state that infringed them was unthinkable. Despite the fact that the idea had already been considered by some authors at the beginning of the 20th century, as indicated by Cançado, who attributes it to the work of Léon Duguit, *L'Etat, le droit ebjectif et la loi positive* [The State, objective law and positive law], the relevance of being the first document in which it was asserted that it was individuals were the real subjects international law, justifying that they

[5] The term "human rights" is used with lowercase initials, except in those cases where reference is made to proper names, such as conventions or international treaties.

[6] J.A. CARRILLO SALCEDO, *Soberanía de los Estados y Derechos Humanos en Derecho internacional contemporáneo*, Tecnos, Madrid 2001, pp. 30-31. Sobre la evolución de la seguridad y los derechos del ciudadano en el caso estadounidense: L. MARTÍNEZ PEÑAS, *La militarización de la seguridad y los derechos ciudadanos: trayecto histórico-jurídico de la legislación de posse comitatus*, en E. SAN MIGUEL, *Las exigencias del Estado de Derecho contemporáneo: ciudadanía, derechos humanos y migraciones*, Aranzadi, Madrid 2022.

were the addressees of the rules created in this area[7];it would require several decades for a change in conception to take place. Thankfully, nowadays, public international law no longer limits its competence to merely regulating relations between states but is also concerned with how states interact with individuals[8].

In terms of human rights, there currently exist a number of human rights defense systems that force states against abuses suffered by their citizens, including infringements by their own governments, thanks to a democratizing evolution of international law. The historical and substantive evolution that has taken place in each instrument that has created them has given rise to the term "generations of rights"[9]. While it is true that the Letters, Conventions and Declarations in this sense have influenced each other, giving rise to a very similar lists of rights, the effectiveness of these mechanisms will not be homogeneous in all of them. Although the universal character of human rights was already expressed at the World Conference on Human Rights in Vienna in 1993[10],the promotion of human rights remains in the hands of a small group of international organizations and depends to a considerable extent on the will of states. At the international level, the United Nations takes the lead in the dissemination of human rights as universal values; but at the regional level there are other organizations and tribunals that are struggling in their different territorial spheres for the same objectives[11]and in some cases more effectively.

Despite the fact, that the first international systems to recognize the effective international procedural ability of individuals to defend themselves against the actions of their states emerged in the framework

[7] A.A. CANÇADO TRINDADE, *El acceso directo del individuo a los Tribunales Internacionales de Derechos Humanos*, Deusto, Bilbao 2001, p. 23.

[8] R. CANOSA USERA, *La interpretación evolutiva del Convenio Europeo de Derechos Humanos*, en J. GARCÍA ROCA, P. A. FERNÁNDEZ SÁNCHEZ, (Coord.) *Integración europea a través de derechos fundamentales: de un sistema binario a otro integrado,* Centro de Estudios Políticos y Constitucionales, Madrid 2009, p. 81.

[9] A. PIZZORUSSO, *Las generaciones de derechos*, en *Anuario iberoamericano de justicia constitucional*, n. 5 (2001), pp. 291-292.

[10] FERFÁNDEZ LIESA, *Reconquistar los derechos humanos por la Unión Europea*, cit., p. 40.

[11] Ibidem, p. 42.

of the League of Nations and, later, in the United Nations[12], guardianship legal system, nowadays the areas where the defense of the rights of the individual is more categorical have changed. This is because the regional systems and organizations created for this purpose often have arrangements that provide these rights with a certain binding effect[13].

In some areas of Europe there are at least three levels of human rights protection. On the one hand, the domestic laws of each state protect a series of basic rights and freedoms which are included in their respective constitutions, and which are applied by their own courts and magistrates.

On an international level, there are two other instruments through which individuals can assert their rights: on one side, the European Court of Human Rights (ECHR), with international authority to act on disputes subject to jurisdiction of the member states of the Council of Europe; on the other side, the Court of Justice of the European Union (CJEU), only for those who are members of this international political community[14]. Some authors refer to this phenomenon as "constitutional pluralism"[15]. While it is true that, in principle, the nationality or residence of individuals is not a prerequisite for recourse to these courts[16]. It should be pointed out that this multilevel system does not operate in a watertight manner, and there are often interactions be-

[12] CANÇADO TRINDADE, *El acceso directo del individuo, cit.*, p. 36.

[13] M. CANDELA SORIANO, *Los derechos humanos, la democracia y el Estado de derecho en la acción exterior de la Unión Europea. Evolución, actores, instrumentos y ejecución*, Dykinson, Madrid 2006, p. 39.

[14] J.C. FERNÁNDEZ ROZAS, *La compleja adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos y las secuelas del Dictamen 2/2013 del Tribunal de Justicia*, en *La Ley Unión Europea*, n. 23 (2014), p. 41.

[15] R. BUSTOS GISBERT, *Tribunal de justicia y Tribunal Europeo de Derechos Humanos: una relación de enriquecimiento mutuo en la construcción de un sistema europeo para la protección de los derechos*, en GARCÍA ROCA, FERNÁNDEZ SANCHEZ (Coord.) *Integración europea a través de derechos fundamentales*, cit., pp. 147-148.

[16] J. BRAGE CAMAZANO, *Ensayo de una Teoría general sustantiva de los Derechos fundamentales en el Convenio Europeo de Derechos Humanos*, en GARCÍA ROCA, FERNÁNDEZ SÁNCHEZ. (Coord.) *Integración europea a través de derechos fundamentales,* cit., p. 117.

tween courts that give rise to both synergies and contradictions in their interpretations.

In addition to the complicated institutional and jurisdictional framework, the protection mechanisms themselves have changed over time with reforms, both in terms of the ECHR and the CJEU. In the latter specific case, which is the subject of this article, due to its historical debt, the volume of modifications that the European community has undergone has given rise to a large academic and doctrinal production that examines each change that has effected its constituent treaties, as well as its interpretations and decisions within the High Court.

3. *Progress of the protection of human rights by the CJEU*

While the political nature of the European Union today is not in doubt, the different European Communities (hereafter referred to as ECEC) that preceded it and the merely economic nature of their founding Treaties defined broad differences in the role it would assume in the defense and protection of human rights regarding the Council of Europe, beyond the territorial scope of its jurisdiction[17].

Furthermore, some authors interpret the failure to create the European Defense Community in 1952 or, two years later, the European Political Community, as evidence of the European powers' interest in integration that went beyond the economic dimension[18],which was also reflected in the EU Court's late concern for human rights. In fact, there is some agreement that human rights developments and progress in European integration go hand in hand and are largely due to the work of the Court of Justice[19].

At first, the Community Court stood aside, as far as the supervi-

[17] Sobre el pasado de la Europa de las Comunidades: M. FERNÁNDEZ RODRÍGUEZ, *El camino hacia la Europa de las Comunidades: De los precedentes institucionales al impulso francés*, en *Revista de la Inquisición: (intolerancia y derechos humanos)*, n. 21 (2017), págs. 197-218.

[18] M. CASTILLO DAUDÍ, *Los Derechos Humanos en la Unión Europea*, en *Cuadernos de Integración Europea*, n. 4 (2006), p. 16.

[19] ERNÁNDEZ ROZAS, *La compleja adhesión de la Unión Europea*, cit., p. 43.

sion and control of the basic rights recognized by the internal legal systems of each State was concerned, although this consideration has been interpreted as contradictory by some authors on the grounds that part of the essence of the authority of this court responds to the delegation of competences of the members states and they also add that this denial increased the risk of becoming a limit to the reach of citizens'rights[20]. In this context, the ECJ's function was to revise those elements that affected the common market in a broad sense, avoiding those that concerned human rights, which mean that the protection of human rights remained a matter for domestic law[21].

This first stance had its consequences and, to some extent, negatively influenced the most important principles proposed by the European Community: the primacy of Community law and the consequent effectiveness od its acts over national law. As an example, when the constitutional courts of Germany and Italy questioned the legitimacy of Community acts in two rulings that overturned the main pillars of the Community[22].

First of all, the Italian Constitutional Court, in the Frontini judgement (1973), pointed out that the sovereignty given to the Community institutions could not be translated into a power that would violate in any way the main principles of the Italian constitution. A year later, with the Solande I case, the German Constitutional Court went even one step beyond, holding that the absence of a list of basic rights in the Community Treaties justified the legitimacy of constitutional courts to revise the validity of Community rules, to the extent that these could infringe on basic rights[23]. It is generally acknowledged that both judgments were milestones rulings, pushing the ECJ to implement funda-

[20] FERNÁNDEZ LIESA, *Reconquistar los derechos humanos por la Unión Europea*, cit., p. 29.

[21] FERNÁNDEZ ROZAS, *La compleja adhesión de la Unión Europea*, cit., p. 42.

[22] FERNÁNDEZ LIESA, *Reconquistar los derechos humanos por la Unión Europea*, cit., pp. 29-30.

[23] J. SARRION ESTEVE, *El tribunal de justicia de Luxemburgo como garante de los Derechos fundamentales*, Dykinson, Madrid 2013, p. 26.

mental rights protection by way of case law[24]. While it is true that the path to the current configuration of fundamental rights in the framework of the Union has been long one, an increasing number of voices have supported the position of the German Constitutional Court.

To understand the path that brought the European Communities and the ECJ – later the European Union (EU) and the CJEU – to contemplate a more active role in the defense of these rights, it is necessary to consider two aspects: on the one hand, the evolution of the CJEU's substantive interpretations in the field of human rights; on the other hand the amendments to the Treaties of the European Community, which progressively sought to make these rights a reality in their normative bodies. This reality responds to the two natural forms in which these rights emerge: in one case, they emerge from a constitutional text or similar body of law; in the second case, they emerge from legal interpretation[25].

The importance of jurisprudence in the mechanisms for the protection of human rights is based on a pre-trial model, so it will be necessary to have recourse to the system of appeals provided for in the Treaties, which allowed the High Court to pronounce itself on specific rights; as well as to the prejudicial question[26], the tool available to the judiciary of each member state to ask questions on the interpretation of Union law in relation to a specific case before give judgment.

The praetorian model, in the absence of a list of human rights, is based on the general principles of law that are common to the member states, also on those human rights included in their constitutions and on the interpretation of these rights by their national courts, but it is also based on the conventional law to which they are subject, as in the

[24] J.A. DEL VALLE GÁVEZ, G.C. IGLESIAS RODRÍGUEZ, *El derecho comunitario y las relaciones entre el Tribunal de justicia de las Comunidades Europeas, el Tribunal Europeo de Derechos Humanos y los Tribunales Constitucionales nacionales*, en *Revista de Derecho Comunitario Europeo*, n. 1 (1997), pp. 330-331

[25] F. REY MARTÍNEZ, *¿Cómo nacen los derechos? Posibilidades y límites de la creación judicial de derechos*, en GARCÍA ROCA, FERNÁNDEZ SÁNCHEZ (Coord.) *Integración europea a través de derechos fundamentales*, cit., p. 327.

[26] CASTILLO DAUDÍ, *Los Derechos Humanos en la Unión Europea*, cit., p. 20.

case of the European Convention on Human Rights[27]. Therefore, first, the ECJ decided to use international law and the constitutional rights of the member states as a guide to build a protective jurisprudence[28]. As has already been pointed out by the doctrine on a various occasion, the weak point of this model is the legal uncertainty of operating in a context of indeterminacy of these rights, substantially affecting the identification of their reach[29], which is necessary to be able to apply them to the specific case.

The first steps in the intervention of the Community Court in the area of human rights were taken in the sixties[30] with the Stauder judgment, which initiated a protectionist period that was to continue uninterrupted[31], transforming itself into an increasingly protective system. The judgment considered that the subject matter of the dispute did not affect the fundamental rights of the individual, but added a detail that would change the role of the CJEU in human rights matters: "interpreted in this way, the provision at issue has not revealed any factor capable of calling into question the basic rights of the individual underlying the general principles of Community law, the respect for which the Court of Justice guarantees"[32]. With this assertion, the High Court attributes to itself the power to intervene in the protection of those rights which could be included in these general principles of Community law[33].

[27] DEL VALLE GÁVEZ, IGLESIAS RODRÍGUEZ, *El derecho comunitario y las relaciones*, cit., pp. 332-333.

[28] FERNÁNDEZ ROZAS, *La compleja adhesión de la Unión Europea*, cit., p. 44.

[29] J. A. PASTOR RIDRUEJO, *La carta de Derechos fundamentales de la Unión Europea y la adhesión al Convenio europeo según el Tratado de Lisbo*a, en GARCÍA ROCA, FERNÁNDEZ SÁNCHEZ (Coord.) *Integración europea a través de derechos fundamentales*, cit., p. 5.

[30] At the end of the decade, one of the major breakthroughs of European integration would also take place: union customs: M. FERNÁNDEZ RODRÍGUEZ, *1968, una unión aduanera de seis países*, in M. FERNÁNDEZ RODRÍGUEZ, L. MARTÍNEZ PEÑAS, E. PRADO RUBIO, *El año de los doce mayos*, Veritas, Valladolid 2018.

[31] FERNÁNDEZ ROZAS, *La compleja adhesión de la Unión Europea*, cit., pp. 43-44.

[32] STJCE de 12 de noviembre de 1969, Sentencia Stauder, p. 391.

[33] CASTILLO DAUDÍ, *Los Derechos Humanos en la Unión Europea*, cit., p. 18.

[33] Ibidem, pp. 18-19.

The second impulse came in the seventies with the Internationale Handelsgesellschaft judgment, where the Court emphasized its role as a protector with a new nuance[34].

In this case, the High Court reaffirmed the safeguarding of rights which, while finding their inspiration in the constitutions of the member states, are now also guaranteed in the framework of the Community Treaties through their structure and objectives[35]. The leap here, even though at first sight it may seem small, is extremely relevant insofar as these rights are now elevated to the same level as the acquis communautaire, being part of an original law. Lastly, still in the seventies, came the Nold judgment, in which the High Court allowed for the possibility of taking into consideration even those human rights derived from conventions to which the member states concerned had adhered, mentioning in particular in the later cases the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter or the International Covenant on Civil and Political Rights.

As mentioned before, the evolution of human rights in the framework of this international Community would be influenced not only by the case law of the CJEU, but also by the consequent reforms of the constituent treaties, which would progressively reflect the widespread feeling. At the same time as progress was being made on human rights, integration was becoming increasingly political. At the end of the seventies, even the Commission recognized the weaknesses of the Communities' system of rights protection as a consequence of the lack of an explicit body of law dedicated to basic rights[36].

The next milestone came in the eighties, when an effort was made to overcome the weaknesses of an praetorian model of protection by drawing up a separate list of rights for European citizens. It was in this context that the Spinelli Project of 14 February 1984 was born, sug-

[34] In the same decade, attempts were also made to make progress on other aspects of European integration, such as monetary union with the Werner Report: M. FERNÁNDEZ RODRÍGUEZ, *The unaffordable economic and monetary union: The Luxembourg plan (1970)*, in *International Journal of Legal History and Institutions*, n. 5 (2021), pp. 321-344.

[35] CASTILLO DAUDÍ, *Los Derechos Humanos en la Unión Europea*, cit., p. 18.

[36] Ibidem, p. 21.

gesting a list of basic rights within the Draft Treaty on European Union, based on a model of European integration of a federal or constituent type; although it was never approved[37].

In spite of this first stumble, the next attempt, this time successful, was not long in. The next step in the positivization of a list of basic rights became a reality with the Declaration of Fundamental Rights and Freedoms of the European Parliament, which was produced in 1989[38]. This text is born in a favourable contetxt, as indicated in its resolution, as it claims to respond to a series of Draft Treaties and other Community resolutions which reflect the European Community's interest in assuming a leading role in the protection of human rights. In particular, the text produced by the European Parliament mentions the Draft Constitution of the European Union, the Resolution on the European Commission's Memorandum relating to the accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Preamble to the Single Act, among others. Ultimately, all this historical background supports the first declaration of basic rights, which was also elaborated by the European Parliament and includes 28 articles, that cover everything from the right to human dignity to the Community's duty to protect the environment[39].

As far as the treaties are concerned, the reality is that there is no mention of basic rights in the treaties that created the ECSC or the EAEC, and only the preamble to the EC Treaty are they indirectly mentioned with the expression "the defense of peace and freedom", without any other precision from which autonomous rights of their own can be interpreted[40]. It would be necessary to wait until the nineties for this leap to occur.

Finally came the Maastricht Treaty, signed in 1992 and coming in-

[37] M. JIMÉNEZ DE PARGA, *La protección de los Derechos fundamentales en el proyecto de Tratado por el que se instituye una constitución para Europa*, in *Anales de la Real Academia de Ciencias Morales y Políticas*, n. 82 (2005), p. 103.

[38] FERNÁNDEZ ROZAS, *La compleja adhesión de la Unión Europea*, cit., p. 44.

[39] DOCE, Parte II. Texts approved by the Parliament, Declaration of Fundamental Rights and Freedoms, April 12, 1989.

[40] DICTAMEN 2/94 DEL TRIBUNAL DE JUSTICIA, March 28, 1996, p. 1767.

to force in 1993, and with it, the first time that the EC introduced the explicit mention of human rights [41]. This Treaty initiates the process of positivization of a series of rights with obvious intention that the EU should assume a leading role in defending them[42]. It not only affirmed their role in its preamble, as the Single Act did before, but also mentioned them in its articles confirming respect for basic rigths, "as a guaranteed by the ECHR"; referring again to the constitutional tradition of the Member States and their connection with the Council of Europe and its system of protection, which meant a clear and express obligation for the EU to protect these rights judicially too[43].

Despite the leap forward that Maastricht implied, it was not exempt from criticism because, as Fernández Rozas points out, the formula that consolidated the Union's duty to protect basic rights was that of referral or forwarding, reducing the strength of the decision [44]. In any case, what is true is that the Maastricht Treaty initiated a force of change in the trend that would not be turned back, increasing the relevance of human rights, which, from then on, would be reflected in successive treaties.

Furthermore, and in relation to the reforms of the Treaties that led to the evolution of the system for the defense of human rights in the field of competence of Union law, it is worth mentioning once again the role of the CJEU, highlighting the other tool it made use of, which had a huge impact on the subsequent modifications of the Treaties: the opinions. These have a direct effect, both in case law and in the identity of Union law itself. The purpose of these decisions is to resolve conflicts resulting from the collision between international treaties and Community law, but also to define a substantive field of rights and norms with constitutional status that justify the primacy of this

[41] S. SANZ CABALLERO, *La contribución del Consejo de Europa al acervo de la Unión Europea en materia de derechos fundamentales: sinergias y divergencias de ambos sistemas*, in N. FERNÁNDEZ SOLA, *Unión Europea y Derechos fundamentales*, Marcial Pons, Madrid 2003, pp. 3-4.

[42] FERNÁNDEZ LIESA, *Reconquistar los derechos humanos por la Unión Europea*, cit., p. 30.

[43] FERNÁNDEZ ROZAS, *La compleja adhesión de la Unión Europea*, cit., p. 44.

[44] Ibidem, p. 44.

Union law to the detriment of international conventional law, as Sobrino Heredia asserts[45].

In this sense, in 1994 the CJEU decided wheter the formulation of Article 228 of the Community Treaty was compatible with accession to the Convention for the Protection of Human Rights and Basic Freedoms of 4 November 1950. In the opinión, the Court reminds use of the relation between the Communities and human rights throughout its history and warns that the ECJ has handled the basic rights of European citizens insofar as they are integrated into the general principles of Community law which, as mentioned above, are based on common constitutional percepts but are also regulated by international law and the different instruments in this field that protect them[46]. The Court's final decision would be severely criticized as it refuses the possibility of accession, on the grounds that the Community can only act within the framework of the powers granted to it in its Treaties, without in any case exceeding these limits[47].

The next milestone is the Treaty of Amsterdam, signed in 1997 and entering into force in 1999, which already includes penalties for member states that infringe the basic rights of their citizens; although these must be severed and recurrent violations, which is why the first occasion on which its implementation was considered was not finally effective, as it was understood, that the entry into power, by democratic means, of an extreme right-wing party in Austria did not, in itself, suppose an infringement of basic rights, even when it supported a political programme that was openly xenophobic and made use of hate speech[48]. On this point it should be clarified that the Community is searching for an external solution, requesting the ECHR, a judicial body of the Council of Europe, to undertake this task. Candela Soriano also highlights the incorporation of article 6.1 of the Treaty,

[45] J.M. SOBRINO HEREDIA, *La aportación jurisprudencial de los dictámenes del tribunal de justicia de las Comunidades Europeas*, in *Anuario da Facultade de Dereito da Universidade da Coruña*, n. 11 (2007), p. 927.

[46] DICTAMEN 2/94 DEL TRIBUNAL DE JUSTICIA March 28, 1996, pp. 1767-1768.

[47] CASTILLO DAUDÍ, *Los Derechos Humanos en la Unión Europea*, cit., pp. 14-15.

[48] SANZ CABALLERO, *La contribución del Consejo de Europa*, cit., p. 5.

which protects the commitment of the Union and the member states to principals of respect for human rights and fundamental freedoms[49].

Already in the decade of the 2000s, the next push was made by the reform that took place in Nice, with two specific elements[50]. In the first place, the Charter of Fundamental Rights of the European Union is adopted, motivated by the refusal of the CJEU in Opinion 2/1994 commented above, although it remains of limited power as it is of a more political and hence non-binding nature[51]. On the other hand, a new paragraph was added to the preceding article 7, creating a penalty mechanism for member states where there is a risk of infringement of fundamental rights[52]. More specifically, the first paragraph of this article contains the following addition:

> Antes de proceder a esta constatación, el Consejo oír al Estado miembro de que se trate y, con arreglo al mismo procedimiento, podrá solicitar a personalidades independientes que presenten en un plazo razonable un informe sobre la situación en dicho Estado miembro[53].
>
> [Prior to proceeding to such a determination, the Council may hear the Member State concerned and, in compliance with the same procedure, may request independent persons to present a report on the situation in that Member State within a reasonable period of time].

The EU Charter of Fundamental Rights has been criticized for its lack of originality in its articles with respect to the European Conven-

[49] CANDELA SORIANO, *Los derechos humanos, la democracia,* cit., p. 73.

[50] After Nice came another big step in European integration: the European Arrest Warrant.

FERNÁNDEZ RODRÍGUEZ, *The european arrest warrant, as an instrument of the principle of mutual recognition of decisions*, in *International Journal of Legal History and Institutions*, n. 6 (2022), pp. 43-62 y M. FERNÁNDEZ RODRÍGUEZ, *Espacio de libertad, seguridad y justicia: negociaciones de la orden de detención europea*, in *Glossae: European Journal of Legal History*, n. 12 (2015), pp. 262-287.

[51] SARRIÓN ESTEVE, *El tribunal de justicia de Luxemburgo*, cit., p. 59.

[52] SANZ CABALLERO, *La contribución del Consejo de Europa*, cit., p. 6.

[53] DOCE, Treaty of Nice which amends the Treaty on European Union, the Treaties establishing the European Communities and some related acts, March 10, 2001, art. 7.

tion on Human Rights, though it is acknowledged to have created some new rights, even if they are included in a implicitly way[54].

The last step, at least as far as EU treaties are concerned, comes with the well-known Treaty of Lisbon, signed in 2007 and coming into force in 2009. This text included the Charter of Fundamental Rights of the European Union in its second part, a fact that has been interpreted with some agreement as a place of honour and with high political and legal meaning. This significant step contrasts with the refusal of the constitutional text, which has meant a several blow to human rights[55]. Despite this, there is a continuity between the refused Constitutional Treaty and the final Reform Treaty, though conflicting terms such as "Constitution" or "law" were removed[56].

Notwithstanding the half-failure of the Lisbon Treaty, the possibility of the Union's integration into the ECHR was reconsidered in 2010. In June of this year, the Council authorized negotiations again with the Council of Europe, so that it would be up to the Commission to find a way to accession[57]. In the end, despite these efforta, Opinion 2/2013 of the ourt of Justice of 18 December 2014 once again refesud such a possibility, arguing that the ECHR remained, after all, an external body the European Union and that leaving the defense of the basic rights in the hands of this court cast severe doubts on the limits of the Union's own competence [58].

4. *The configuration of nationality as a part of human rights.*

The nationality is configured as a human right already in 1948, in the Universal Declaration of Human Rights, in its article 15.1, express-

[54] REY MARTÍNEZ, *¿Cómo nacen los derechos?*, cit., p. 330.

[55] FERNÁNDEZ LIESA, *Reconquistar los derechos humanos por la Unión Europea*, cit., p. 30.

[56] L. I. GORDILLO PÉREZ, *La jurisprudencia federalizante y humanizadora del tribunal de justicia*, in *Teoría y Realidad Constitucional*, n. 32 (2013), p. 437.

[57] FERNÁNDEZ ROZAS, *La compleja adhesión de la Unión Europea*, cit., p. 47.

[58] Ibidem, p. 41.

ing itself in these terms: "everyone has the right to a nationality"[59]. After this, Conventional law has continued to incorporate the right to nationality in other international instruments such as the American Convention on Human Rights or the Convention on the Rights of the Child, among others.

Nationality has traditionally been understood as a status that depends exclusively on the state and, therefore, the only limits that can be placed on the granting or deprivation of nationality are subject to the state's willingness to give up or limit its authority. Some examples are the 1954 Statute of Statelessness and the 1961 Convention on the Reduction of Statelessness. In both cases, states parties limit their power over their nationality in order to prevent a situation that has been understood to be specially damaging for individuals who may be deprived of their nationality by supervening or from birth, causing legal insecurity that impedes them from the full exercise of the rest of their rights. In specific terms, the 1961 Convention has recently experienced a new impetus, having been adopted by a number of states in the last few years, including Spain in 2018[60].

On the other hand, although the right to nationality is not explicitly recognized in the European sphere, neither in the Charter of Fundamental Rights of the European Union or in the European Convention on Human Rights, the CJEU exercises some control over the sovereignty of states in terms of nationality[61].

[59] Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly in its resolution 217 A (III), 1948.

[60] BOE NUM. 274, of 13 November 2018, pages 110084 to 110101. Instrument of accession to the Convention on the reduction of statelessness, made in New York on 30 August 1961.

[61]Even the ECHR (European Court of Human Rights) recognizes that the absence of a specific article recognizing the right to nationality in the ECHR (European Convention of Human Rights) does not mean that states are entirely free to deprive an individual of that right insofar as it also implies the deprivation of a number of other rights that are expressly included. TEDH [ECHR], *Guía sobre el artículo 8 del Convenio Europeo de Derechos Humanos. Derecho al respecto de la vida privada y familiar*, Estrasburgo 2018, p. 48.

As already mentioned, the case law of the CJEU has a historical and legal value with reference to human rights and in specific those deriving from citizenship of the Union[62].

In this sense, there are four sentences that progressively define the limits on nationality in the sphere of this community and which have become essential for establishing the scope of the rights deriving from the Union's treaties: the Micheletti case, the Rottmann case, the Ruiz Zambrano case and the Lounes case. In the following, each of them is presented in order to analyze the specific cases, the principles and ideas that lead to these frontiers of state sovereignty with respect to nationality.

In relation to the particularity of the Micheletti case, the case combines the legislation of three states, two of which are EU member states. This circumstance offers a great number of details on the legal arguments examined by the court in taking its decision, with those put forward by the Italian and Spanish states being specifically relevant.

Mario Vicente Micheletti, native of Argentina, held dual Argentine and Italian nationality at the time he request a Community resident's license with self- employed work from the Spanish administration, but in 1990 he was declined by the Government Delegation in Cantabria because of a disagreement relation to Mr. Micheletti's dual nationality[63].

The traditional refusal of international law to accept dual nationality tried to be overcome in 1955 on the occasion of the Nottebohm case, which prompted the International Court of Justice to define the standards to be established in the case of a conflict between the interests of two states that consider the same individual as a national. This Court considered that the best solution was that one nationality should prevail over the other, with only the effects of the one with which the

[62] About the historical evolution of this status: M FERNÁNDEZ RODRÍGUEZ, *Los derechos de ciudadanía europea en la historia reciente de la construcción europea*, in R. VELASCO DE CASTRO, M. FERNÁNDEZ RODRÍGUEZ, L. MARTÍNEZ PEÑAS, *Religión, derecho y sociedad en la organización del estado*, Veritas, Valladolid 2016.

[63] Informe para la vista, Asunto C-369/90, p. 4241.

individual had a "real and effective" connection being applicable[64]. Although this decision has been remembered and consolidated in a wide variety of judicial decisions relating to dual nationality issues, the nuances of its scope are still debated today and its impact on Union law has far-reaching consequences for the effective exercise of Union citizenship rights.

In the Micheletti case, both Italy and Spain are sovereign subjects to establish the requirements for the acquisition of nationality of their respective States and also the standards for solving conflicts arising from dual nationality[65]. These include the power of states to recognize the nationality of another as real and effective, which is known in international law as the principle of effectiveness[66]. However, when these standards affect the application and exercise of rights deriving from Union citizenship, such sovereignty is limited, in accordance with the decisions of the CJEU. This means that the principle of effectiveness has a different application at level of the Union, where the objective is a uniform application of Community rights in al Member States.

In the Micheletti case, the Italian authorities justify the application of such a limitation in order to avoid making the exercise of Union citizenship rights contingent on bilateral relations between Member States. The purpose of this is to ensure that national legal systems cannot invalidate articles of the Treaties because of a conflict of dual nationality. However, in this specific case, the exercise of Community rights is not endangered by the relation between two member states, but between a member state and a third state: Argentina. The Italian authorities insist that, where the nationality of the Member State is based on a "serious and real" connection, there can be no place for a different recognition of the effectiveness of Union law, by comparison with the individual's connection with a third State, of which he/she also holds his/ her nationality. It considers that, if a Member State

[64] L. A. VARELA QUIRÓS, *La protección diplomática y la nacionalidad de las personas*, in *Revista Costarricense de Derecho Internacional*, n. 1 (2014), p. 48.

[65] Informe para la vista, Asunto C-369/90, p. 4242.

[66] Ibidem, p. 4245.

recognizes the nationality of an individual, the Treaties also recognize him or her as an EU citizen[67].

The Spanish authorities, for their part, applying the standards of modern international law, interpret that in cases of dual nationality, the civil, political, fiscal or military rights and duties of one must prevail over the other; and the standard used for this application cannot be based on the arbitrary choice of the holder of these nationalities. In this sense, the standard used by Spain to define effective nationality would be that of residence or habitual domicile, as it indicates in its legislation[68]. Furthermore, the refusal to allow such a permit is also combined with a time criteria. The Spanish Government considers that Mr. Micheletti's effective nationality was that of a third State, which was outside the European Communities, at the time when he attempted to invoke Community law. At the same time, it mentions the Convention on nationality between the Argentine Republic and the Italian Republic of 1971, which establishes that such dual nationality status can in no case be interpreted to apply the legislation of both states simultaneously and that the standard for determining the strongest connection will be that of the last residence [69].

Considering that it has already been established that in order to benefit from Community law it is necessary to be a national of a Member State at the time of the invocation of that right [70], the issue that arises is whether a Member State may ignore the nationality of another member state in cases where it is not effective or "active" nationality for an individual, because he or she resides in a third state[71]. Lastly, the Commission understood that, regardless of the manner or circumstances of Mr. Micheletti's acquisition of Italian nationality, his posses-

[67] Ibidem, p. 4245.

[68] Informe para la vista, Asunto C-369/90, p. 4247- 4248. The Spanish Administration's refusal is based on the application of Article 9.9 CC which defines that in cases of dual nationality the criteria for establishing the actually effective nationality shall be the place of habitual residence or the last residence STJUE of 7 July 1992, p. 4261.

[69] Informe para la vista, Asunto C-369/90, pp. 4248-4249.

[70] STJUE de 7 de febrero de 1979, Auer I.

[71] Informe para la vista, Asunto C-369/90, pp. 4251-4252.

sion of Italian nationality automatically subjects him to Union law and, therefore, he is to be considered a community citizen, with the rights which that entails, even if he resides in a third country.

Therefore, the Court asserts that an individual who is a national of a Member State cannot be excluded from the rights conferred on hum by the Treaties on the basis that he is considered to be a national of a third country, if he also holds the nationality of a Member State on the grounds of the principle of effectiveness[72].

In the second case, Janko Rottmann, a native of the Republic of Austria, moved his residence to Munich in 1995 after having testified as a defendant in proceedings before an Austrian court in connection with a serious fraud offence. Despite the fact that the Austrian authorities issue an arrest warrant, Rottmann requests German citizenship without mentioning the ongoing criminal proceedings in Austria. As a consequence of the acquisition of German nationality, he loses his Austrian nationality according to the law of his home state. Mr. Rottmann's situation worsened when an order was issued to retrospectively revoke his German nationality upon learning of the litigation on the grounds that the procedure for obtaining his nationality was fraudulent by concealing the criminal proceedings in the naturalization process. This situation causes the subject to eventually be left in a situation of statelessness[73].

Following the question referred, the possibility arises that Austria may have to restore Rottmann's nationality in order to avoid the case of statelessness, but the CJEU does not give a final answer insofar as it understands that he loss of nationality is not a final decision on the part of the Austrian authorities and the final decision by the German administration was also in course. However, the Grand Chamber declares as under:

> "El Derecho de la Unión, en particular el artículo 17 CE, no se opone a que un Estado miembro le revoque a un ciudadano de la Unión la nacionalidad de dicho Estado miembro adquirida mediante naturalización cuando ésta se ha obtenido de modo fraudulento, a

[72] STJUE de 7 July 1992, p. 4264.
[73] STJUE de 2 March 2010, p. 1481.

condición de que esta decisión revocatoria respete el principio de proporcionalidad" [74].

["Union law, in particular Article 17 EC, does not oppose the revocation by a Member State of the nationality of a citizen of the Union acquired by naturalization of citizen of that Member State where that nationality has been obtained by fraudulent means, on condition that the revocation decision respects the principle of proportionality."]

This judgment warns, therefore, to take into consideration the principle of proportionality, a mention that has been interpreted by some authors as a particular method of interpreting basic rights[75].

The impact of this case, as the Advocate General observes, has a confirmatory value of the principle established in the Micheletti case, on the competence of the state with respect to the acquisition and loss of its nationality, advising that such a power must be exercised in compliance with Union law[76].Furthermore, it is worth warning that, as it is only possible to invoke Union law when one still possesses the nationality of a Member State, there exists a maximalist interpretation that goes so far as to consider that Union citizenship can eventually trigger the protection of Union law.[77].

The third case - the Ruiz Zambrano case - involved a dispute relating to the granting of a right of residence to a minor and the CJEU gave a preliminary ruling. The conflict emerged when Ruiz Zambrano, a Colombian national, requested asylum in Belgium and, after that, his wife, also a Colombian national, also requested asylum in Belgium. These applications were rejected. Afterwards, both are registered in a

[74] Ibidem, p. 1491.

[75] S. IGLESIAS SÁNCHEZ, *TJUE – judgment of 2 March 2010 (gran Sala) [Great Chamber], janko rottmann c. Freistaat bayern, Issue c-135/08 – «ciudadanía de la unión – Article 17 ce – nacionalidad de un estado Miembro adquirida por nacimiento y por Naturalización – pérdida de la nacionalidad De origen – apatridia - pérdida del estatuto De ciudadano de la unión» ¿hacia una nueva relación entre La nacionalidad estatal y la ciudadanía Europea?,* in *Revista de Derecho Comunitario Europeo*, 37 (2010), p. 938.

[76] Conclusiones del Abogado General Sr. M. Szpunar, submitted on 1 July 2021, p. 1.

[77] IGLESIAS SÁNCHEZ, *TJUE — judgment of 2 March 2010 (gran Sala) [Great Chamber]*, cit., p. 941.

Belgian town and Ruiz Zambrano even has a full-time, permanent employment contract despite not having a work permit. A few years later, the couple had their second child on Belgian territory. The Colombian legislation does not allow the transmission of nationality to those who were born outside its territory unless administrative formalities are carried out to claim this effect, so the child becomes a Belgian national. This new circumstance is claimed in order to apply again for a regulation of their stay and a year later they have a third child. Nevertheless, it is again rejected by the Belgian authorities, arguing that the couple has ignored Colombian laws that allowed the children to be nationalised through diplomatic and consular authorities with the intention of obtaining Belgian nationality and regularising their situation at a later stage.[78].

In this situation, the question referred for a preliminary ruling is whether a third-country national can obtain a residence permit if he provides for the maintenance of his under-age descendants who are Union citizens, in which case an exemption from the requirement to have a work permit in the Member State of which his children are nationals would apply. The principle that comes out of this judgment gives priority to the "effective enjoyment of the benefits of the status of citizenship of the Union"[79]. The High Court expresses this in the judgement in the following words: "The Court of Justice has pointed out on several occasions that the purpose of Union citizenship status is to become the basic status of nationals of the Member States"[80]. Therefore, the intention of this judgment is to ensure the homogeneous application of the rights established in this citizenship, refusing an interpretation that undermines guarantees in certain specific cases.

To sum up, national legislation must provide for the full effectiveness of all aspects of European citizenship which, in this specific case, generates obligations for the state even towards the national of a third state who obtains a series of privileges as a consequence of being the

[78] STJUE of 8 March 2011, p. 9.
[79] Conclusions of Advocate General Mr. Szpunar submitted on 1 July 2021, p. 1.
[80] CJEU of 8 March 2011, p. 13.

parent who assumes the maintenance of a minor child who is a national of a member state[81].

Lastly, the CJEU, by order for a preliminary ruling, decides on a matter involving a citizen Toufik Lounes against the United Kingdom for the refusal to grant him a residence permit. Lounes is an Algerian national, but he was residing in the UK, first on a temporary visa and then residing illegally at the end of it. A few years later, he married Mrs. Ormazabal with dual Spanish and British nationality - the last by naturalization - and asked the British Home Secretary for a residence permit for Lounes as a family member of a national of a member state, under the European Economic Area Immigration Regulations 2006[82].Afterwards, she received a decision to deport her for exceeding the time granted in the first temporary visa and, eight days later, another letter reporting the rejection of this permit on the grounds that Ormazabal was not considered a national of the European Economic Area according to the recent modification of a series of regulations, so that she also lost the rights she had been enjoying up to that moment. What emerges from this case is what is known as the "logic of progressive integration"[83]. The court expresses it as following:

"Como señaló en esencia el Abogado General en el punto 86 de sus conclusiones, considerar que ese ciudadano, al que se han conferido derechos en virtud del artículo 21 TFUE, apartado 1, en razón del ejercicio de su libertad de circulación, debe renunciar a tales derechos, especialmente al de mantener una vida familiar en el Estado miembro de acogida, por el hecho de que ha tratado de lograr, mediante la naturalización en ese Estado miembro, una mayor integración en la sociedad de éste, sería contrario a la lógica de integración progresiva que pretende favorecer la citada disposición" [84].

[As the Advocate General pointed out in essence in point 86 of his Opinion, to hold that such a citizen, who has been granted rights under Article 21(1) TFEU by virtue of the exercise of his freedom of movement, must renounce those rights, in particular the right to main-

[81]Conclusions of Advocate General Mr. Szpunar, submitted on 1 July 2021, p. 1.
[82] CJEU of 14 November 2017, p. 5.
[83]Conclusions of Advocate General Mr. Szpunar, submitted on 1 July 2021, p. 1.
[84] CJEU of 14 November 2017, p. 10.

tain a family life in the host Member State, on the ground that he has sought, through naturalization in that Member State, to achieve greater integration into its society, would be contrary to the logic of progressive integration which that provision seeks to promote.]

This matter creates a legal element that considers the social context – in this case the effective and full enjoyment of a family life – and establishes a proper aspiration to the Union, namely the integration of the individual into the Community, with a tendency to extend the guarantees that it recognizes. The impact of these judgments has not only evolved the scope of Union law; even for a right that is not explicitly recognized in the various instruments that contain both human rights and basic rights that are applied – or at least used as a guide – for specific cases. The case law of the CJEU has *erga omnes* effect in the jurisdiction of the Union, as has been acknowledged by the doctrine [85].

In conclusion, these four cases – the Micheletti case, the Rottmann case, the Ruiz Zambrano case and the Lounes case – constitute tools that modulate and nuance the objective elements that are used by states to establish their link with the individual. The competence of the member states to define the acquisition, loss or even recognition of nationality is limited in the jurisdictional sphere of the Union: limiting the principle of effectiveness, and thus providing a special standard different from that common in international law; reaffirming the principle of proportionality, especially in matters of deprivation and loss of nationality; building a principle of homogeneity of Union citizenship rights, which rejects a different application in individual cases in order to prevent national laws from limiting its reach; and by creating the principle of the logic of progressive integration, which facilitates the integration of individuals into the Union system in order to ensure the effectiveness of family life.

[85] P.A. FERNÁNDEZ SÁNCHEZ, *Naturaleza jurídica de las sentencias del Tribunal Europeo de derechos humanos y del Tribunal de Justicia de las Comunidades Europeas*, in GARCÍA ROCA, FERNÁNDEZ SÁNCHEZ, (Coord.) *Integración europea a través de derechos fundamentales*, cit., pp. 195-194.

5. *Concluding observations*

As we have seen, it has been a long way that has led the European Union to become another of the most relevant international systems for the defence of human rights in Europe, thanks in the first place to the CJEU, but also to the successive reforms of the founding Treaties.

However, despite the undoubted progress, it should not be forgotten that the present system of protection of human rights recognized by the European Community continues, even after the latest reform, to have an undeniable weakness that undermines the universal nature of these rights, given that it only considers them insofar as the individual concerned is a subject of Community law and not simply because he or she is a person[86].

Furthermore, democratic regression is another of the latest challenges, not only for its enjoyment, but also for the European institutions, which are increasingly questioned. In this context, illiberal democracy – understood by some authors as a "democracy without rights" – is once again transforming human rights, as well as the legal mechanisms for their defence, but not in the direction of the historical evolution discussed in this study.[87] The misunderstanding, not only of the role of the CJEU, but also of the functioning of the European institutions generates an image of helplessness for the citizen that is taken advantage of by the usual political movements that are more sceptical of the European project and that demand from the Union the competences that have been ceded, according to them, undermining the sovereignty of the member states. Nevertheless, it is necessary to remember that the different systems for the defense of human rights at the international level suffer from their dependence on the will of states,

[86] CASTILLO DAUDÍ, *Los Derechos Humanos en la Unión Europea*, cit., p. 17.

[87] As Fernández Liesa points out, the EU is still grappling with the effect of populism and nationalism that has changed European regimes in some states, such as Poland, pushing back integration among member states and the rule of law. FERNÁNDEZ LIESA, *Reconquistar los derechos humanos por la Unión Europea,* cit., pp. 45-46. To this should be added the use of law as a weapon in the present context: L. MARTÍNEZ PEÑAS, *El derecho como arma: lo iusjurídico en tiempos de guerra híbrida*, en *El escudo del Estado*, Dykinson, Madrid 2022.

which has given rise to the so-called consensual jurisdiction that, on more than one occasion, has relativized the value of human rights, to the detriment of the freedoms of individuals[88].

[88] FERNÁNDEZ LIESA, *Reconquistar los derechos humanos por la Unión Europea*, cit., p. 42.