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CITIZENSHIP IN THE AGE OF CONCRETE HUMAN RIGHTS

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Abstract

The core contradictions this article dwells on are two. The first contradiction promoted by the concept of citizenship arises between an abstract claim of equality among those who 'belong' and citizenship's consequential nature in terms of the unequal distribution of rights and liabilities in the world, as citizenships vary radically in quality. More still, in a world where inequalities are spacialised and borders signify exclusion from opportunity and – as long as these are policed by citizenship – blood-based segregation between the haves and have nots, citizenship emerges as the core tool of exclusion of the racialized 'other', not belonging to the global aristocracy of the former colonizers, the 'super citizens'. The abstractness of citizenship is at the centre of the second contradiction that comes to light with renewed force today. This contradiction arises between citizenship and rights, which, in the age of human rights ideology, are, precisely, concrete and individualisable.

Indice Contributo

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Keywords

Citizenship – Membership – Inequalities – Super citizens – Borders

1. Two contradictions at the heart of contemporary citizenship

Citizenship – whenever the concept is used – is taken to be part of our 'natural world':[1] living without it is unthinkable for many, no matter how many contradictions this legally-driven social construct actually entails. The core contradictions this article dwells on are two. The first contradiction promoted by the concept of citizenship arises between an abstract claim of equality among those who 'belong' and citizenship's consequential nature in terms of the unequal distribution of rights and liabilities in the world, as citizenships vary radically in quality.[2] More still, in a world where inequalities are spacialised and borders signify exclusion from opportunity[3] and – as long as these are policed by citizenship – blood-based segregation between the haves and have nots, citizenship emerges as the core tool of exclusion of the racialized 'other',[4] not belonging to the global aristocracy of the former colonizers, the 'super citizens'.[5] Citizenship is, thus, the defining element of the global (to a large

[1] John R Searle, *The Construction of Social Reality* (Free Press 1997).

[2] Dimitry Kochenov and Justin Lindeboom, 'Empirical Assessment of the Quality of Nationalities' (2017) 4 *European Journal of Law and Governance* 314; Dimitry Kochenov and Justin Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index* (Hart Publishing 2020).

[3] Branko Milanović, *Global Inequality* (Harvard University Press 2016).

[4] Dimitry Kochenov, *Citizenship* (MIT Press 2019).

[5] Manuela Boatcă, 'Unequal Institutions in the Longue-durée: Citizenship through a Southern Lens', in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press, 2022); Manuela Boatcă, 'Citizenship' in Olaf Kaltmeier, Anne

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extent race-based) segregation, the system, which I characterized elsewhere as 'passport apartheid'.[6] Not only is citizenship incompatible with equality. It is designed to deliver strict segregation.

While inherently rooted in a nation state, a 'citizen' is an abstraction defined by the status: a 'Pakistani' cannot be compared to a 'Frenchman'. The abstractness of citizenship is at the centre of the second contradiction that comes to light with renewed force today. This contradiction arises between citizenship and rights, which, in the age of human rights ideology,[7] are, precisely, concrete and individualisable. The deep cleavage between citizenship and human rights is thus an almost natural and clearly identifiable phenomenon, which is reinforced, as we shall see, by both the universalist claims of human rights, which are made through the vehicle of a 'person' – a relative newcomer to constitutional thought[8] – and through the jurisprudence of some international courts, most notably the European Court of Human Rights,[9] as

Tittor, Daniel Hawkins & Eleonora Rohland (eds), *Routledge Handbook to the Political Economy and Governance of the Americas* (Routledge 2020) 284.

[6] Dimitry Kochenov, 'Ending the Passport Apartheid' (2020) 18(4) *International Journal of Constitutional law* 1525.

[7] Günter Frankenberg, 'Human Rights and the Belief in a Just World' (201) 12 *International Journal of Constitutional Law* 35.

[8] Linda Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 *International Journal of Constitutional Law* 9.

[9] In particular, the rise of Art. 8 ECHR jurisprudence prohibiting, in numerous cases, deportations to the country of citizenship, has created something akin to a *de facto* 'personhood' nationality, altering the legal reality of 'citizenship' to a great degree. For one of the first notable examples, see the Concurring Opinion of Judge Martens in *Beldjoudi* (*Beldjoudi v France* No. 12083/86 (ECtHR Chamber, 26 March 1993); *Jeunesse v Netherlands* No. 12738/10 (ECtHR Grand Chamber, 3 October 2016). This trend, although markedly counter-orthodox in citizenship matters, and deeply empowering at the individual level, has been criticised in the literature (*e.g.* Daniel Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?' (2008) 57 International & Comparative Law Quarterly 87) and is not yet a mainstream position of the European Court of Justice: Stanislas Adam and Peter Van Elsuwege, 'EU Citizenship and the European Federal Challenge through the Prism of Family Reunification' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017). The trend definitely adds to the picture of the ongoing contestation of the normative foundations of citizenship and is observable also in the practice of the UN Committee on Human Rights (UNCHR), which is in tune with ECtHR practice: *Stewart v Canada*, UN Doc CCPR/C/58/D/538/1993 (1 November 1996) ('no one shall be arbitrarily deprived of the right to enter his own country' (quoting Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR), GA Res 2200A (XXI), UN Doc

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well as, to a lesser extent, the European Court of Justice.10 These do not always accept an argument 'they are not a citizen' as a sufficient ground for dehumanization and exclusion from dignity, which this argument, by design, entails in the unequal racialized world where borders are militarized and passport apartheid is omnipresent.11 Not only is citizenship inherently at odds with human rights. It is designed to undermine human rights claims by the racialized barbarian (read 'foreign') 'others' – and the advent of the 'person' has little chance to change this, as we shall see.

2. Citizenship is a harsh caste enforcement tool to render equality moot

Distributed like prizes in a lottery where four-fifths of the world's population loses,[12] citizenship is clothed in the language of self-determination and freedom, elevating hypocrisy as one of the status's core features. Indeed, citizenship's connection to "freedom" and "self-determination" usually stops making any sense at the boundaries of the most affluent Western states. Citizenship, for most of the world's population, is thus an empty rhetorical shell deployed to perpetuate abuse, dispossession, and exclusion. All are divided by *ius sanguinis* and *ius soli* – essentially down bloodlines[13] –

A/6316 (December 16, 1966)). *See also* UNCHR, General Comment 27, Freedom of Movement (Article 12), UN Doc CCPR/C/21/Rev.1/Add.9 (November 2, 1999). According to the Committee, the scope of 'his own country' in the sense of Art 12 ICCPR is broader than 'his country of nationality' (at para 20).

10 Unlike its Strasbourg interlocutor, the Court of Justice seems to be building a case-law, which turns the human rights-inspired attention to the actual situation of the individual as a way to dismiss necessarily abstract, citizenship-based claims to rights. For an analysis, see, Dimitry Kochenov, 'Neo-Mediaeval Permutations of Personhood in the European Union' in Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds.), 'Constructing the Person: Rights, Roles, Identities in EU Law' (Oxford: Hart Publishing, 2016), 133.

11 Cf. Mahmoud Keshavarz, *The Design Politics of the Passport: Materiality, Immobility, and Dissent* (New York: Bloomsbury Visual Arts, 2019).

12 Ayelet Shachar, *The Birthright Lottery* (Harvard University Press 2009).

13 In the absolute majority of cases at least one parent of any '*ius soli* kid' is a citizen, which means that both *ius soli* and *ius sanguinis* come down to a shorthand for bloodline transmission of privilege: the preservation of the aristocracy of the high born in this global world where the majority of the population remain rightless plebs: Dimitry Kochenov, 'Policing the Genuine Purity of Blood: The

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into super-citizens,[14] i.e. a happy minority for whom the world is a friendly and open globalised playground – and citizenship's victims,[15] i.e. those miserable many who are caged within steep visa walls in 'their' blood spaces of no opportunity. In-between spaces are also possible, and the welcoming Dubai, where anyone can settle but not naturalise, comes to mind.[16] The story is thus not black and white: a whole spectrum of shades and hues of status quality emerges, as I have described elsewhere in detail together with Justin Lindeboom.[17]

This perspective on citizenship allows questioning the deeply unfounded harmful presumptions of what citizenship is, which are held by the UNHCR and many scholars.[18] This is particularly true of the premise that *any* citizenship is better than statelessness. In a context where the quality of citizenships varies to such a significant degree as we observe now across the world, it is often better to be stateless in a particular space of opportunity, i.e. Germany or France, rather than a victim of a particular citizenship.[19] In other words, presenting statelessness as the main problem in contemporary international citizenship law,[20] as opposed to the existence of the citizenship statuses which fail their bearers in every respect, is a mistaken perspective,

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EU Commission's Assault on Citizenship and Residence by Investment and the Future of Citizenship in the European Union' (2021) 25(1) *Studies in European Affairs* 33.

[14] Dimitry Kochenov, *Citizenship* (MIT Press 2019), 239.

[15] For the full version of this argument, please see my Oxford COMPAS Working Paper No 156 'Victims of Citizenship' (2021), on which these contribution entirely relies.

[16] Branko Milanović, *Global Inequality* (Harvard University Press 2016), 152.

[17] Dimitry Kochenov and Justin Lindeboom, 'Part I: Laying down the Base', in Kochenov and Lindeboom (eds) *Quality of Nationalities Index* (Hart Publishing, 2020).

[18] For a crucial exception, see Katja Swider, '*A Rights-Based Approach to Statelessness*' (PhD thesis, University of Amsterdam 2018).

[19] Katja Swider, 'The Quality of Statelessness' in Dimitry Kochenov and Justin Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index* (Hart Publishing 2020).

[20] This approach reflects the dominant paradigm in international citizenship law and citizenship studies: Paul Weis, *Nationality and Statelessness in International Law* (Stevens and Sons 1956); Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

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bound to trigger erroneous policy and personal tragedies.[21] By fighting statelessness and making no distinction between a super-citizenship and the status of a victim of citizenship, pretending, quite absurdly, that being a Kyrgyz and being Swiss is roughly the same, contemporary international law reinforces the inequitable realities of cast segregation of the world population into the super-citizens and the rest. Pretending that assignment to a caste as such, rather than *which particular* caste one is assigned to is the crucial element in rooting out basic injustices related to contemporary citizenship or the lack thereof is as untenable as it is accepted by the UNHCR and UNHCR-friendly scholars.

Moreover, international law reinforces a reality where once imposed, this caste assignment is extremely difficult to object to: where statelessness as such rather that a sub-standard status of a victim of citizenship, is viewed as a problem, a sub-standard status becomes very difficult to get rid of as a result, no matter the circumstances. This development is relatively new, as before the Second World War, citizenship could be disposed of without acquiring a new one, benefiting plenty of people, from Nietzsche and Einstein, to countless others[22] for whom statelessness – sometimes only intermittent, but still – was a choice and a reflection of their deeply-held convictions and personal preferences. The international world-wide fight against statelessness thus oppresses the holders of second-rate citizenships deeply, undermining their position even further than the national legal systems do. In doing so, it amplifies the role of citizenship, globally, as an obligatory cast assignment against the interests of the majority of individuals and in direct contradiction with the idea that citizenship should be connected with rights, as a large share of citizenship's is not. The only consequence of holding them is to be turned into a deportable 'migrant' and render human rights claims less persuasive, if not dismissible.

The majority of the academic literature has seemingly taken upon itself to justify the *status quo*, if not actively to engage in co-creating the rightless victims of citizenship. As a result, it has laboured under an overwhelmingly Western – i.e. super-citizens' –

[21] Katja Swider, 'The Quality of Statelessness' in Dimitry Kochenov and Justin Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index* (Hart Publishing 2020).

[22] Abraham Pais, *Subtle Is the Lord: The Life and Science of Albert Einstein* (Oxford University Press 1982) 41, 45; Sue Prideaux, *I am Dynamite! A Life of Friedrich Nietzsche* (Faber & Faber 2018) 46.

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perspective,[23] which is also, to agree with Linda Bosniak,[24] purely nationalist in essence, even if presented as seemingly neutral or even critical.[25] Given that, once again, the core *loci* of exclusion are the borders to the spaces in the world to which the victims of citizenship are assigned – as Branko Milanović convincingly teaches us[26] – addressing the plight of those who are already 'in' is not enough to prevent citizenship from shrinking the horizon of opportunities of its victims. Elimination of a large chunk of the resident victims of citizenship does not affect the normative inconsistencies at the status's core: a status of rights and liberty writ on a constitutional parchment, citizenship has emerged as a blood-based global tool for the distribution of inequalities and exclusion.

3. Citizenship is antithetical to the very idea of human rights

Citizenship sometimes comes with rights, one of which is for dominant: the right to enter the country of one's nationality and stay there. These rights include, but are not limited in the majority of jurisdictions to, the right to remain and work in the territory under the jurisdiction of the authority in question, the right not to be deported,[27] political rights (in the minority of jurisdictions in the world where there is a

[23] Cf. Kamal Sadiq, 'Postcolonial Citizenship' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 178.

[24] Linda Bosniak, *The Citizen and the Alien* (Princeton University Press 2006) 5–9; and further James Tully (ed), *On Global Citizenship: James Tully in Dialogue* (Bloomsbury 2014). See also crucially Christian Joppke's work, virtually all of which could stand as an illustration of this point.

[25] To promote a peculiar Western perspective as the only acceptable take on personhood in law, while ignoring its negative effects on innumerable populations worldwide has been one of the citizenship's signature features as a colonial project: James Tully (ed), *On Global Citizenship: James Tully in Dialogue* (Bloomsbury 2014); Willem Schinkel, 'Against "Immigrant Integration": for an End to Neocolonial Knowledge Production' (2018) 6(1) *Comparative Migration Studies* 1; Manuela Boatcă, *Global Inequalities beyond Occidentalism* (Ashgate 2015).

[26] Branko Milanović, *Global Inequality* (Harvard University Press 2016).

[27] Bridget Anderson, Matthew J Gibney and Emanuela Paoletti, 'Citizenship, Deportation and the Boundaries of Belonging' (2011) 15 *Citizenship Studies* 547.

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democracy[28]), and the entitlement to non-discrimination among citizens. One should not be mislead by such usual lists. In a world that is territorial, pretty much *all* rights depend on the authorities in charge of the place, where one happens to be. Against this background the absence of a human right to enter the *loci* where such rights are protected, meaning where they exist in practice amount to the denial of human rights. Given that citizenship is the most important tool of localizing the world population in space, making human rights inaccessible to the majority of the population of the world is citizenship's key feature as a concept. Citizenship is the enemy of the very idea of human rights *par exellence*.

Belonging, a legal fiction established by the sovereign (unrelated to your subjective feelings) is often cited among the elements of citizenship assumed to engender some justifying force – reinforce the concept of citizenship. In essence, it is entirely unnecessary, however, and on closer scrutiny, the recognition of belonging is a process strikingly similar to the one regulating the assignment of the status in the first place, however objective the sovereign pretends such belonging to be. No matter how much you think you belong, a change in the law can always make you an outcast and a foreigner, as so many experienced in Germany in 1935,[29] in Latvia and

Estonia in 1991,[30] in post-Yugoslav Slovenia[31] and, most recently, in the UK following Brexit:[32] demonstrating the exclusionary core of citizenship in action – shunting aside all the popular rhetoric of 'I am proud and I belong'. Those who are

[28] The Economist, 'The Economist Intelligence Unit's Democracy Index' (updated annually).

[29] Kristin Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust' (2009) 59 *University of Toronto Law Journal* 65, 69–76.

[30] Richard C Visek, 'Creating Ethnic Electorate through Legal Restorationism: Citizenship Rights in Estonia' (1997) 38 *Harvard International Law Journal* 315.

[31] Jelka Zorn, 'Non-citizens in Slovenia: Erasure from the Register of Permanent Residents' in Caroline Sawyer and Brad K Blitz (eds), *Statelessness in the European Union: Displaced, Undocumented, Unwanted* (Cambridge University Press 2011) 195.

[32] Dimitry Kochenov, 'EU Citizenship and withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?' in Carlos Closa (ed), *Troubled Membership: Dealing with Secession from a Member State and Withdrawal from the Union* (Cambridge University Press 2017); Martijn van den Brink and Dimitry Kochenov, 'Against Associate European Citizenship' (2019) 57 *Journal of Common Market Studies* 1366.

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proclaimed 'not to belong' are excluded from the territory controlled by the authority issuing citizenship regardless of what they themselves think: they cannot live and work there, unless a specific authorisation is granted. Near-total immunity to individual self-determination is what underpins citizenship's abstract totalitarian nature and helps it in its principled war against equality and human rights.

The absence of the non-citizens' automatic right to enter aside,[33] the interpenetration of citizenship rights and human rights has led to the relative – and necessarily welcome – trivialisation of the status of citizenship and growing attempts to theorise a more faithful correspondence between the actual society under the authority in question and the citizenry recognised under the same authority.[34] Once the rigidity of the citizens–non-citizens divide is questioned in terms of the corresponding rights and entitlements, abuses of power relying on this divide as their chief legal tool and only justification are made difficult. Of course, history knows plentiful examples of such unfortunate deployment of the status of citizenship. Think, for instance, of the Nurnberg laws inspired by the US racism of the day,[35] which excluded Germany's Jewry from the full status of citizenship as a way to justify their formal exclusion from its key rights.[36] South-African *apartheid* 'homelands', designed to distribute citizenships of non-recognised all-black puppet states, like Bophuthatswana and Transkei,[37] to grant minorities 'full rights abroad'[38] are equally good examples. More recently, the Latvian and Estonian policies of humiliating Russian, Ukrainian and Jewish

[33] But see: Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 *Review of Politics* 251.

[34] Christian Joppke, 'Citizenship by Investment as Instrumental Citizenship', in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press, 2022).

[35] James Q Whitman, *Hitler's American Model* (Princeton University Press 2017).

[36] Ingo Müller, *Hitler's Justice* (Harvard University Press 1991).

[37] At some point the hive mind of Wikipedia un-ironically included Nelson Mandela among the 'notable citizens' of this 'state', which is not legalistically incorrect, *per se*.

[38] See e.g. South African, Bantu Homelands Citizenship Act, 1970, which instituted the denaturalisation of the black majority during *apartheid*. Cf. John Dugard, 'South Africa's Independent Homelands: An Exercise in Denationalization' (1980) 10 *Denver Journal of International Law and Policy* 11.

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minorities, based precisely on the same strategy of denying citizenship to supply a justification for the exclusion of people from key rights did not work as well: under pressure from the international institutions, the majority of former 'citizenship' rights were extended to the minorities as 'human' rights.[39] These examples were efforts *de facto* to turn 'non-citizenship' statuses into racist second-rate citizenships reserved for minority members only.[40] That they are challenged by human rights-based reasoning is to be welcomed. In other words, 'they are not citizens' is no longer an automatically accepted pretext to abuse settled resident populations – it works everywhere, but at least it does not come unquestioned.

The proclamation of equal rights at the inception of citizenship was precisely the ideological tool that facilitated the *de facto* socioeconomic exclusion and legitimation of the authority in charge of the preservation of the *status quo*, solidifying inequalities and paralysing social change as TH Marshall explained.[41] The same applied to political, sexual and racial exclusion, which were core aims of citizenship at its inception, ensuring that it worked as an efficient governing tool without producing any significant risks of challenging the elites.[42] Classical modern citizenship thus did not even remotely overlap with the actual reality on the ground, as James Tully has wonderfully described:[43] it endowed with rights as opposed to empty proclamations only a radical minority in any society – usually white males able to pass the property census. Women counted for so little that their very legal being as citizens could be retained only as long as they did not marry a foreigner or a stateless person.[44] Passing on citizenship to their own kids was out of reach for them: granting citizenship was a

[39] Pritt Järve, 'Sovetskoje nasledije i sovremennaja ètnopolitika stran Baltii' in Vadim Poleshchuk and Vladimir Stepanov (eds), *Ètnopolitika stran Baltii* (Nauka 2013).

[40] Dimitry Kochenov and Aleksejs Dimitrovs, 'EU Citizenship for Latvian Non-Citizens: A Concrete Proposal' (2016) 38 *Houston Journal of International Law* 1.

[41] Thomas H Marshall, 'Citizenship and Social Class' in Thomas H Marshall, *Citizenship and Social Class* (Pluto Press 1992).

[42] Dimitry Kochenov, *Citizenship* (MIT Press 2019).

[43] James Tully (ed), *On Global Citizenship: James Tully in Dialogue* (Bloomsbury 2014).

[44] Cf. e.g. Patrick Weil, *The Sovereign Citizen* (University of Pennsylvania Press 2012).

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male-only affair.[45] The gradual extension of human rights brought the reality on the ground closer to the initial rhetorical ideal, also empowering further contestations of exclusions within the ambit of citizenship: consider for instance the sexual citizenship story,[46] queer citizenship[47] or the ongoing animal citizenship debate.[48] This resulted, ultimately, in the gradual disappearance of the rigid divide between citizenship rights and human rights for those in the territory of the authority. The same did not apply to those who were kicked out or remained outside, since entry to a territory – the most sacred right of citizenship – alongside its double – the right not to be deported from the territory – remained the direct offspring of citizenship status par excellence, largely unaffected by human rights thinking. Indeed, there is no human right to enter any state of your choosing, we are told[49] – even if the arguments to support the contrary position are attractive and sound, as Joseph Carens has demonstrated.[50] Moreover, the dismissal of such sound arguments in international law is very new, as Sir Richard Plender's research shows.[51]The residue of pre-human rights thinking, predating the tectonic shifts in the understanding and practice of citizenship, still

[45] Jamie R Abrams, 'Examining Entrenched Masculinities in the Republican Government Tradition' (2011) 114 *Virginia Law Review* 165.

[46] Ŭladzislau Belavusaŭ, 'EU Sexual Citizenship: Sex Beyond the Internal Market' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) (and the literature cited therein).

[47] Dimitry Kochenov, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism' (2009) 33 *Fordham International Law Journal* 156; Uladzisłaŭ Belavusaŭ and Dimitry Kochenov, 'Federalizing Legal Opportunities for LGBT Movements in the Growing EU' in Koen Slootmaeckers, Heleen Tourquet and Peter Vermeersch (eds), *The EU Enlargement and Gay Politics: The Impact of Eastern Enlargement on Rights, Activism and Prejudice* (Palgrave Macmillan 2016) 69.

[48] Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2011); William A Edmundson, 'Do Animals Need Citizenship?' (2015) 13 *International Journal of Constitutional Law* 749.

[49] Which fact renders the proclaimed right to leave entirely ephemeral too: Dimitry Kochenov, 'The Right to Leave Any Country' (2012) 28 *Connecticut Journal of International Law* 43.

[50] See, for a magisterial treatment: Joseph Carens, *The Ethics of Immigration* (Oxford University Press 2013).

[51] Sir Richard Plender's seminal work: *International Migration Law* (Leiden: A.W. Sijthoff, 1972 and Kluwer, 1988 (2nd ed.)).

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persist and could explain, *inter alia*, the backlash apparent in the regulation of access to the status of citizenship.

Naturalisations are increasingly made dependent on elaborate *rites de passage* in the form of 'culture' and 'values' tests, which settled foreigners are required to pass to acquire the formal status of citizenship, however absurd the 'neutral' premise of this approach might be, as Willem Schinkel and Adrian Favell explain.[52] This 'integration' rationale is now deployed in novel contexts, sometimes to increase the othering of citizens with immigrant backgrounds and of the poor, as well as to undermine the functioning of European citizenship as a status based on non-discrimination on the basis of nationality, as Sarah Ganty has shown.[53]

The assumption behind such tests is as problematic as it is commonplace: cultures located beyond our borders are a barbarian non-equivalent of our own.[54] Implementing this assumption in practice is even more difficult than embracing it rationally, as the proclaimed core legal value of any liberal democracy today is tolerance.[55] Tolerance is what all the 'specificity testing' is necessarily bound to come down to.[56] In this sense testing the specificity of the highly unique Danish culture and of an even more unique Swiss one amounts, in fact, to testing one and the same thing.

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[52] Willem Schinkel, 'Against "Immigrant Integration": for an End to Neocolonial Knowledge Production' (2018) 6(1) *Comparative Migration Studies* 1; Willem Schinkel, 'The imagination of "society" in measurements of immigrant integration' (2013) 36(7) *Ethnic and Racial Studies*; Adrian Favell, 'Integration: Twelve Propositions after Schinkel' (2019) 7 *Comparative Migration Studies* (Art No 12); See also Dimitry Kochenov, '*Mevrouw de Jong gaat eten*: EU Citizenship and the Culture of Prejudice' [2011] EUI Working Paper RSCAS 2011/06.

[53] Sarah Ganty, *L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'UE* (Larcier 2021).

[54] However nasty, this assumption seems to be 'natural': Melvin J Lerner, 'The Justice Motive: Some Hypotheses As to Its Origins and Forms' (1977) 45 *Journal of Personality* 1, 29. For the whole picture, see, Melvin J Lerner and Susan Clayton, *Justice and Self-Interest* (Cambridge University Press 2011).

[55] Dimitry Kochenov, *Citizenship* (MIT Press 2019), 196. Contrast the mantras of tolerance with the virtually official Islamophobia practiced in Europe today: Christian Joppke, *Citizenship and Immigration* (Cambridge University Press 2010).

[56] This presents traditional accounts of citizenship in a radically new light: Linda Bosniak, 'Citizenship Denationalized' (2000) 7 *Indiana Journal of Global Legal Studies* 447. See also Mikko Kuisma, 'Rights or Privileges? The Challenge of Globalization to the Values of Citizenship' (2008) 12 *Citizenship Studies* 613; Kim Rubinstein and Daniel Adler, 'International Citizenship: The Future of Nationality in a

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Officially, however, citizenship stands to promote the idea of a 'good citizen', someone who fully respects the local law and is loyal to whatever state or political system he or she was born into: a much glorified meekness ideal, aiming to make

the society most governable and frowning both at the indifferent and those who want to overturn the regime or introduce deep changes into the core aspects of the legal system/ society in question.[57] Being a 'good citizen', i.e. approving of all the official mantras underpinning the public authority claiming that person at any given moment, is thus the core duty of citizenship today – just as it was a hundred years ago.[58] The concept of a 'good citizen' is agnostic to human rights.

4. Bringing in the 'person' does not redeem citizenship

In the light of the considerations above, it is possible, very broadly, to outline the core functions of citizenship as a legal-political concept which the normative core of the notion seeks to achieve. As is clear from the outset these do not overlap in any way with the objectives, which the idea of human rights aims to reach. In this sense a 'person' – the creature of individual safeguards of human rights – is in direct opposition to the idea of a 'citizen'. This is so, since the core functions of citizenship amount, chiefly, to three elements:

1. Providing legalistic reasons for exclusion viewed as desirable and expedient by the public authority at a given moment;
2. Ensuring complacency, societal uniformity and popular legitimation of the powers that be – regardless whether they are democratic and no matter who is in power;

Globalised World' (2000) 7 Indiana Journal of Global Legal Studies 519; Ronnie D Lipschutz, 'Members Only? Citizenship and Civic Virtue in a Time of Globalization' (1999) 36 *International Politics* 203.

[57] Dimitry Kochenov, *Citizenship* (MIT Press 2019), 159–196.

[58] ibid.

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3. Inter-generational perpetuation of the *status quo* between the affluent and the poor societies globally, by locking the victims of citizenship out of the spaces of opportunity.

All the three are obviously and clearly antithetical to human rights.

Quite naturally, the successful operation of citizenship today means one thing: a thoroughgoing exclusion of the racialized victims of citizenship from the world. Should they wish to escape such exclusion, then naturalisation into a super-citizen – the acquisition of an elite status in one of the richest democracies in the world – is

an absolute must. Again, just as in antiquity, when a slave could buy freedom, a victim of citizenship must invest time, talent and money to acquire a 'compensatory citizenship', as Yossi Harpaz explains in detail in his scholarship.[59] This is where selling citizenship to its victims comes to the fore.

The most fundamental normative evolution which has been unfolding in the world of citizenship over the last decades is a direct consequence of the key developments briefly described above: the extension of meaningful rights to those not in possession of the formal status of citizenship. That is, the 'citizen' is being gradually replaced by a '*person*' in the global constitutional parlance and theorising, as Linda Bosniak has also underlined.[60] This is no small feat: changing a single word signals a radical rethinking of the basics of modern constitutional systems marked by the intense penetration of the social facts in the legal realities, overturning established constitutional underpinnings. This fundamental transformation draws entirely on the unsustainability – in the context of the human rights-aware democratic constitutionalism – of the traditional core normative assumptions informing citizenship, which are unsurprisingly being rethought. Analysed together, the above considerations have thus very far-reaching effects on citizenship's role in the context of legitimising the governing authority: that is, its key tasks and its key normative predestination. Its role in the narrative of self-governance and democracy is thus not

[59] Yossi Harpaz, 'Citizenship and Residence Rights as Vehicles of Global Inequality', Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press, 2022).

[60] Linda Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 *International Journal of Constitutional Law* 9.

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the same as it had been previously. What remains unchanged, however, is its ability to produce the victims of citizenship and ignore their plight.

The core issue here is very basic and has to do with the traditional approaches to the core aspects of legitimacy in a political community: the justification of violence and of the obligation to submit to violence inflicted by the authority in charge, as a necessary element of being 'free,' which harks back to Jean Bodin[61] and is rooted in the Christian soteriology of the day.[62] If only citizens and no one else are counted as the constituents of the community from whom legitimacy officially emanates – call it the *demos*, the nation or the political community – then the picture of what the state and necessarily the law is about is quite different to a situation where all humans under the same authority are counted, non-citizens included. Indeed, why not establish humans as the basis of the *demos*, the nation or the political community? While legal and social truths are bound to overlap for the law to be effective[63] – and knowing the bio-power of the contemporary state in shaping life itself to the whims of the fashion of the day[64] – making citizens is still much easier than acknowledging humans.

Making a citizen is an ideology-inspired legal exercise, implying a choice among the available bodies capable of being useful, or not, to the achievement of the authority's goals at any given time, whatever those might be. Those bodies which are perceived less useful are simply excluded from rights bearing status, inexistent in the eyes of the law. Exclusions can be on any basis. They can be on geographic place of origin, race, religion, education, language, time – you name it and a legal-historical example will be found. Citizenship's capacity to exclude is its core function, which means that in the 'golden days' of citizenship – the mythical days of the concept's unquestioned

[61] Cf. Julian H Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History* (Columbia University Press 1963), discussed in detail in Keechang Kim, *Aliens in Mediaeval Law: The Origins of Modern Citizenship* (Cambridge University Press 2000) 193.

[62] Keechang Kim, *Aliens in Mediaeval Law: The Origins of Modern Citizenship* (Cambridge University Press 2000) 193.

[63] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805, 814.

[64] Mark L Flear, 'Developing Bio-Citizens through Migration for Healthcare Services' (2007) 14 *Maastricht Journal of European & Comparative Law* 239.

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authority – exclusion at the level of the *legal status* could only rarely be questioned, if at all: equality is *among* citizens, remember? As a consequence, the authority that works with 'citizens' enjoys an almost universal *carte blanche*: you create ethnic electorates,[65] you assign the status of those who are not white enough to suit your preference to the 'ancestral homelands' referred to above,[66] and you declare those you send away as ideologically[67] or racially deficient and therefore, non-citizens.[68] The long history of fragrant discrimination is rich and diverse. Under this paradigm, the core question before looking at rights, entitlements, duties and equality claims is *who* is a citizen in this society? Those who are not citizens are entitled to nothing and this is legally and politically right, even if frequently also morally unjust.

Such reasoning cannot hold with persons: recognising the person as the figure of importance for the purposes of constitutional law, as a component part of the *demos*, however humble this relative innovation can seem, actually revolutionises the legal understanding of our society, because it exposes for criticism and legal contestation the status assignment decisions which cannot, in the majority of cases, be contested under the citizenship paradigm. Moreover, it also flips the sequence of status-rights interactions. The core question here is *why* this person is not entitled to a particular right. A simple 'she is not a citizen' response will no longer suffice under the personhood paradigm: a substantive analysis will clearly be required. It goes without saying that the distinction between the 'status' and 'rights' taken for granted by lawyers is artificial and is not justifiable on all occasions. This development is in line with a

[65] Richard C Visek, 'Creating Ethnic Electorate through Legal Restorationism: Citizenship Rights in Estonia' (1997) 38 *Harvard International Law Journal* 315.

[66] John Dugard, 'South Africa's Independent Homelands: An Exercise in Denationalization' (1980) 10 *Denver Journal of International Law and Policy* 11.

[67] Lesley Chamberlain, *The Philosophy Steamer: Lenin and the Exile of the Intelligentsia* (Atlantic Books 2006).

[68] Kristen Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust' (2009) 59 *University of Toronto Law Journal* 65.

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broader shift in constitutionalism, marking a departure from what Cohen-Eliya and Porat branded 'the culture of authority' in favour of the 'culture of justification'.[69]

Once humanity and personhood, not the formal legal status of citizenship, emerges as the key factor behind rights assignment, the relevance of the formal status of citizenship as such is fundamentally reinvented, if not outright diminished, as can already be seen in the Article 8 ECHR jurisprudence of the European Court of Human Rights. Those who are French *in fact* on the basis of how their lives are lived and their social world is constructed – even if not recognised *de jure* as French, and even those bearing foreign citizenships – will remain in France protected by the ECHR.[70] Under this logic, a place in the nation is not 'deserved' through a random act of birth in particular circumstances or by passing humiliating tests of knowledge of the non-existent cultural uniqueness of their place of residence, but by *being part of a society* – Bauböck's stakes. The threat of the loss of rights, then, assessed in the context of a concrete life project, becomes the key factor of importance for the courts to consider, not the legal status of citizenship. Moreover, the harsh consequences of the loss of rights can even prevent the state from denaturalising a person:[71] a blending of legal and social reality unheard of before the twenty-first century.[72]

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[69] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press 2013).

[70] See also the discussion in note 9 *supra* of ECtHR *Beldjoudi v France* No. 12083/86 (ECtHR Chamber, 26 March 1993); *Jeunesse v Netherlands* No. 12738/10 (ECtHR Grand Chamber, 3 October 2016).

[71] The European Court of Justice case of *Rottmann* is the best example, probably: Case C-135/08 *Janko Rottman v Freistaat Bayern* ECLI:EU:C:2010:104. The absolute majority of commentators have ignored the fundamental point granting this case overwhelming importance: it is a decision about the status which is based on the rights this status is associated with, an impossibility in the classical citizenship world, as the border line between the legal and social reality, which is the fundamental starting point of pretty much all citizenship theorising, simply disappeared in the court's reasoning, illustrating the shift we are discussing very well. Cf. Dimitry Kochenov, 'The Right to Have *What* Rights? EU Citizenship in Need of Clarification' (2013) 19 *European Law Journal* 502.

[72] Betty de Hart, 'Regulating Mixed Marriages through Acquisition and Loss of Citizenship' (2015) 662 The Annals of the American Academy of Political and Social Science 170; Betty de Hart, 'The Morality of Maria Toet: Gender, Citizenship and the Construction of the Nation-State' (2006) 32 Journal of Ethnic and Migration Studies 49.

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These two logics are in stark contradiction, but help the victims of citizenship equally little, as we shall see. Their cleavage separates reasoning which starts from legal facts, from that which starts with social facts. The result is the legal recognition of social facts in a growing array of contexts which pushes personhood as such, not necessarily connected to the formal status of citizenship, to prominence, with far-reaching implications for the relevance of the classical normative picture of citizenship which we know from political theory textbooks.

How far can personhood help address the plight of the victims of citizenship who are not 'here' and who will never be permitted to build any 'stakes' in 'our society' – the majority of those punished by citizenship? The critiques of stakeholder approaches to citizenship show that personhood, which is directly connected to the stakeholder approaches, is no panacea. In fact, if it is accepted as a starting point for the distribution of rights in a jurisdiction, it permits the rights and dignity of all the victims of citizenship whom the status of citizenship effectively keeps at bay to be swept away. Ultimately it appears that whether personhood or citizenship are taken as a starting point makes little difference, from the perspective of those victims of citizenship who are *outside* of the jurisdiction in question. Personhood thus potentially emerges as a counterpart of citizenship –traditionally the key legal tool for sanctioning the erection of a border dividing 'us' from 'them' based on entirely contingent considerations of political convenience,[73] while also creating legally and socially meaningful racial, cultural and linguistic groups – what Bourdieu characterised as the 'practical activity of "worldmaking"'.[74]

5. Citizenship's continued prestige in the world of human rights

Citizenship is at a crossroads now: the sub-standard dominant narrative that the global equality of human beings can be assured within states is in reality eroding. Different

[73] On the invention of the foreigner as a legally-meaningful concept see, Keechang Kim, *Aliens in Mediaeval Law: The Origins of Modern Citizenship* (Cambridge University Press 2000).

[74] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805, 838.

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citizenships are not equal, and the allocation of citizenship rights worldwide is neither logical nor clear.

At the macro level, citizenship enables the perpetuation of rigid pre-modern caste structures. The son of an American is an American, and the son of a brahman is a brahman. We do not ask ourselves whether this is just. The idea of citizenship is under tremendous pressure, which could in theory endanger the concept's very survival. Contemporary law and politics are built on the ethical base of equal human worth and the idea of deserving and achievement: The world has officially moved far away from the caste structures of the past. Children in every school are taught to realize their potential by studying hard and taking control of their future into their own hands. The core idea of fairness informing the contemporary understanding of law and politics is inspired by Enlightenment reason and is centered on the belief that the individual is in charge and the authority is able and willing to back its decisions with recourse to valid reasons and clear arguments.

Tragically for citizenship, any appeal to this concept is nothing but shorthand for the denial of all such foundational positions. Worse still, adapting its essence so that contemporary fairness can be incorporated into the story of citizenship is absolutely impossible. Citizenship *is precisely about* mass caste assignments in a context where individual agency and all the personal characteristics of the bearers are dismissed by definition. It is an abstract totalitarian status struggling to survive in a world where all it has ever cherished and promoted is untenable in principle even if it survives in practice, once it is taken beyond the context of a particular group endowed with the same status. As the realization of this simple fact grows, the prestige of citizenship is bound to diminish very steeply: in the battle between citizenship and human rights the latter is more likely to harness sufficient appeal to question significantly the continued prestige of the former.

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