



Dignity, Democracy, Diversity

29th World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR)

University of Lucerne, 11 July 2019, 14.00-16.00, Löwengraben 304

SW85: Boundaries of Citizenship

Modern democracies are centered on the concept of citizenship. Membership in the citizenry, in the demos, is the crucial prerequisite for formal legal standing and access to rights in our nation state system. While the law in democratic states formally seems to base criteria of membership on principles of equality and rule of law, a look at the margins of citizenship reveals that membership in the national community remains a central marker of inclusion and exclusion to this day. State sovereignty in governing access to and loss of citizenship remains strong despite a growing international legal framework reinforcing the right to citizenship. Mechanisms of exclusion can also be observed within the democratic constitutional state. Despite being formally gender-blind, objective and 'unmarked', mechanisms of participation and representation in the political process still contribute to the exclusion following the lines of markers of identity. Citizenship must therefore be understood as a constitutional moment of political intelligibility.

The workshop aims to critically reflect on the boundaries of citizenship and discuss from a legal theoretical as well as an interdisciplinary perspective recent practices of inclusion and exclusion in the governing of membership and political participation. It invites for a discussion of questions such as

- How is citizenship linked to the nation state?
- What are the underlying concepts of an objective, reasonable citizen?
- How does the law work as a mechanism for exclusion from citizenship? How can the law function as a mechanism of inclusion into the citizenry?
- To what extent can the constitutional state and citizenship serve as a framework for the participation of all?

Presentations: Each 15 minutes, 5 minutes for questions at the end of every contribution: 40 minutes collective discussion at the end of the workshop

Chair: Prof. Dr. Michelle Cottier, University of Geneva

Participants/Contributions:

1. **Barbara von Rütte (University of Bern, National Centre of Competence in Research NCCR – *on the move*): The Human Right to Citizenship. From State Privilege to Individual Right**

The right to citizenship finds increasing support in international human rights law. There is a growing international legal framework acknowledging and protecting citizenship as a fundamental human right. Moreover, it is recognized that citizenship, including the rights tied to such membership in a state, forms part of a person's social identity and is thus to be protected. Nevertheless, the regulation of citizenship is still often referred to as one of the last bastions of state sovereignty – acquisition to citizenship remains characterized by a large degree of discretion, while an increasing securitization of deprivation of nationality can be observed. Citizenship continues to be a powerful marker of exclusion which often follows the

lines of established categories of discrimination. The dichotomy between the recognition of the right to citizenship in theory and the weak position of individuals when claiming the right *vis-à-vis* a particular state in practice remains striking.

Discussing a recent case of the Swiss Federal Court of a single mother who was refused Swiss citizenship due to welfare dependency, my contribution will assess how the current international legal framework on the right to citizenship can offer effective protection for individuals in the face of states' claim to sovereignty and political tendencies of exclusion. Applying a rights-based approach, the contribution discusses a more inclusive understanding of the right to citizenship. Moreover, it proposes a re-interpretation of the right to citizenship on the basis of the principle of *jus nexi* (Ayelet Shachar), i.e. membership attribution on the basis of a genuine connection to a society, in order to challenge the boundaries of citizenship.

2. Manuela Hugentobler (University of Berne): Has Something Gone Wrong in an Otherwise Perfect System? Citizenship and the Impossibility of Political Participation: Discriminatory Structures and Exclusion in Switzerland

Swiss (constitutional) law relies on defined concepts that constitute the democratic state: The citizen and citizenship as the cornerstones of proverbial Swiss democracy are both the starting point for understanding the organization of political rights as well as, at the same time, the crux of the system.

Although the regulation of political rights in Switzerland today is formally gender-blind, the CEDAW Committee regularly expresses concern about the under-representation of women and recommends temporary special measures, such as quotas, and criticizes the Federal Court for qualifying women's quotas in popular elections as incompatible with electoral freedom.

Why is that? The (Swiss) nation state has historically emerged as a "nation of men"; women, Jews, welfare dependents and prisoners were not seen as a part of the citizenry. In the meantime, – since 1991 – the regulation of political rights in Switzerland has become formally neutral. Since 1848, however, the constitution and legal system have hardly undergone any revolutionary changes, and discriminatory structures still exist. It remains unclear to what extent the legal conditions interact with the factual conditions, i.e. whether the law can compensate for the *de facto* discriminatory conditions, or whether it is the law that produces them in the first place. Furthermore, there is still great reluctance in Switzerland to implement effective anti-discrimination legislation, especially with regard to the democratic system.

Feminist theory revealed to what extent citizenship is a constitutional moment of political intelligibility. In the liberal constitutional state not all human beings, all bodies and all sexes are readable as citizens. In order to participate in decision-making, you must fulfil certain criteria. Christine Klapeer has worked this out comprehensibly in relation to citizenship and lesbian existence. She describes, among other things, how the disembodied universalization of the masculine as the general political subject represents an indispensable basis for the state that exists today.

These considerations inevitably lead to the question of the extent to which the once institutionalized constitutional state can serve as a basis for the equal participation of all. My contribution examines the question of whether and how the law today contributes to the exclusion of persons from political participation according to established categories of

discrimination (Art. 8 para. 3 BV) - such as gender - and thus undermines itself as well as the democratic constitutional state.

3. Prof. Chao-Ju Chen (National Taiwan University College of Law): Diversity at the Cost of Equality? The Case of Indigenous Citizenship and Cross-border Motherhood

Indigenous peoples's right to self-determination is recognized by the United Nations Declaration on the Rights of Indigenous Peoples, and the pursuit for self-governance is widely considered a necessary step toward equality as well as a celebration of multiculturalism. However, neither a tribe's self-governance system nor national equality law necessarily guarantees both gender equality and racial equality. Historically and transnationally, national indigenous laws were designed and functioned to facilitate the supremacy of the dominant race and the paternal line, and some tribes' self-governance had also functioned to deny indigenous mothers – who might have also suffered from the legal denial of their indigenous identity – the capability to pass on indigenous status to children. Seen in this light, indigenous citizenship was defined by a man or the Man, and a woman who mothered across racialized boundaries produced members of his tribe or his nation, but not hers.

Informed by scholarship on multiculturalism and feminism, this paper is an endeavor to explore the possibility of intersectional equality of cross-border motherhood by investigating the case of Taiwan, where indigenous mothers' entitlement to transmit the indigenous status to children was first deprived by law and then recognized by law by enacting a special form of legislation, which requires that, in the case of interracial parents, the child be named after the indigenous parent so as to obtain the indigenous status, making the choice of the child's legal name simultaneously the choice of his/her legal racial identity. It will demonstrate that choices and constraints have coexisted in the determination of indigenous citizenship, and that the transformation from privileging the paternal line to gender neutrality seems to update rather than abolish the inequality of cross-border motherhood. Two legal reform proposals – national equality law and self-governance – will be examined and evaluated from the perspective that sees culture as a construction and compatible with feminism.

4. Leora Dahan Katz: Citizenship, Exclusion and Worrying Trends in Criminal Law Theory

This paper interrogates the intersection of citizenship studies and criminal law. While some attention has been paid to the intersection of these fields (generally, in two specific contexts: crimmigration and punitive denationalization), this paper contends that contemporary trends in criminal theory should be extremely worrying to those concerned with the exclusive aspects of citizenship. While criminal theory has long proceeded without reference to citizenship, there has been a growing push for accounts of criminal law to transcend moral debates (between retributive and deterrence based justifications), and take on a political or "public law" focus, which addresses the institutional and political aspects of criminal justice. Yet given the failure to reflect on the implications of such transition, this push has resulted in the reification of the category of citizen in the criminal law context. Whereas moral theories were largely concerned with the "person" as the basic unit of concern, on public law accounts it is the "citizen" who takes central stage, resulting in the potential justification of criminal law protections and obligations in terms of citizenship and membership in the political community.

This paper brings the insights of citizenship studies to bear on these developments. Part I elucidates the exclusionary nature of citizenship and the problems associated with grounding rights in citizenship. Part II reviews contemporary criminal theories that posit citizenship as

central to the justification of criminal law and punishment, including republican,¹ public law² and communitarian conceptions of criminal law.³ Part III delineates the distinctive problems with awarding citizenship a central role in the criminal law context, exploring the deficiencies inherent in addressing either offenders or victims as citizens rather than persons, even where these are used not to exclude non-citizens from said rights but merely to grant citizens primacy (whether theoretical or practical). Part IV then explores whether these deficiencies can be remedied by merely adopting an expansive notion of citizenship (in its inclusive mode), or whether the primacy of the citizen is an unremediable feature of such accounts, which we should therefore abandon.

¹ JOHN BRAITHWAITE & PHILIP PETTIT, *Not Just Deserts: A Republican Theory of Criminal Justice* (1992); EKOW N. YANKAH, Republican Responsibility in Criminal Law, 9 *Crim. Law Philos.* 457–475 (2015).

² MALCOLM THORBURN, Criminal Law as Public Law, in *The Philosophical Foundations of Criminal Law* (R A Duff & Stuart Green eds., 2011); VINCENT CHIAO, *Criminal Law in the Age of the Administrative State* (2018).

³ See e.g. ANTONY DUFF, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007).