Citizenship without Identity

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ABSTRACT

The author refutes the common notion that citizenship law is a reflection of a state's national identity. Qua law the former simply does not have the requisite variety to help the latter into existence. Instead, a revisionist view of 'citizenship without identity' is suggested. It holds that the main variation is across time, not countries – before WWII all Western states had citizenship laws that were ethnically or racially exclusive, while thereafter the trend has been toward more inclusive, civic-territorial laws of citizenship. This trend is illustrated by examples drawn from Western Europe (especially Germany).

It has become a commonplace to look at a country's formal laws of citizenship as a reflection of its national 'identity' (most sophisticated and agenda-setting Brubaker 1992). This linkage rests on two problematic assumptions. The first is that the concept of identity can be extended from its home domain, the individual person, to collectivities. The second is that, should this extension turn out to be possible, citizenship law constitutes a suitable ground for the expression of collective identity. With respect to the first assumption, a prominent theory of 'collective identity' (Eisenstadt and Giesen 1995) perceptively noted that the place of identity is 'in between' the binary distinctions that structure our access to the world (such as 'left and right', 'past and future' or 'sacred and profane'): "The… focus of identity (is the) 'here,' 'now' and 'I'" (p.75). However perceptive this observation may be, it is also self-defeating. Because, if this is 'identity,' how can it *not* refer to an *individual* experiencing the world?

But let us bracket such principled concerns and, following convention, assume that the notion of identity *can* be extended from the individual to collectivities. Then the task remains to further explicate what 'identity' is. I suggest that identity refers to one *aspect* of a unit (be it an individual or a collectivity) locating itself within a context of other, like-constituted units. In a classic discussion, Georg Simmel (1908: ch.10) argued that a sense of self (or individuality) comprises two opposite components, 'autonomy' and 'difference'.[1] Autonomy is the sense of self that individuals share with all other individuals (at least from a certain historical point on, the European Enlightenment). In establishing sameness with others, autonomy is inherently universalistic. By contrast, difference (born in the Romantic counter-movement to the Enlightenment) refers to the ways in which an individual must perceive him- or herself as distinct from all others; it is thus inherently particularistic. While Simmel does not use the notion of identity, the way it is commonly applied today clearly locates identity more on the particularistic difference than on the universalistic autonomy side of the self. An example is the meaning of identity in the contemporary 'politics of identity', which revolves around (usually ascriptive) markers that make individuals or groups *different* from others, and which tacitly rests upon, but notionally repudiates, a shared humanity.

Turning to our topic of citizenship, if national identity refers to the ways in which a collectivity is different from all other collectivities, how can the – always generic and standardized – *law* of citizenship ever be an appropriate medium for this? Qua law it simply does not have the requisite variety to bring this difference into existence. In a recent history of French citizenship law, undoubtedly one of the most symbolically loaded citizenship laws in the world, Patrick Weil (2002:13) argued that jurists copying each other's inventions across borders, rather than national identities, have been the driving force of modern citizenship laws. In line with Weil's suggestion, I hold that the wheel has to be turned back before Rogers Brubaker's (1992) all-too-close association between citizenship laws and national identities (dubbed by the latter 'cultural idioms' of nationhood).

Brubaker had argued that the German tradition of 'ethnic' nationhood has enduringly shaped a citizenship law based on descent from German parents (jus sanguinis), whereas the French tradition of 'civic' nationhood has favoured a citizenship law based on birth in the territory (jus soli). While not without plausibility in these particular cases, the close association of citizenship law and national identity becomes questionable when other cases are considered. For instance, Australia and the United States, like all post-British settler states, have equally adhered to jus soli citizenship; how then is it possible that, well until the early 1970s, Australia had conceived of itself in ethno-racial terms as 'white' and 'British'? And, debunking the complacently civic self-definition of the United States, why until the 1950s had Asians been formally excluded from naturalization?

A revisionist account of citizenship without identity would move to the fore what all states, in a given region and period, have in common rather than what makes them different from one another. From this angle, the main variation is over time, not across countries. Let us illustrate this in the case of Germany. Prussia's adoption of jus sanguinis in 1842 was not home-grown but borrowed from France, whose switch from the originally feudal jus soli to the more contemporary

jus sanguinis in the Napoleonic Civil Code was copied in the first half of the 19th century across continental Europe. Jus sanguinis was the quintessentially modern mode of attributing citizenship at birth, because it made citizenship an inalienable 'right of the person' (Weil, 2002:12), to be transmitted to one's offspring like one's family name, through filiation.

Conversely, individuals were no longer perceived of, as in feudal times, as attachments to the soil and belonging to the overlord – this had been the original meaning of jus soli citizenship that was instantly discarded in the wake of the French Revolution. Accordingly, the question for Germany cannot be why she adopted jus sanguinis citizenship in the mid-19th century; all continental European states of the period did. Rather, the question must be why Germany refused to add elements of jus soli to its strict jus sanguinis citizenship, especially in the momentous Citizenship Law of 1913 that remained the law of the land throughout the 20th century? For the moment of the crafting of the 1913 Citizenship Law, an answer must refer to the intended exclusion of ethnically undesired Jews and Poles at the eastern flank of the *Reich* (while the law's prolongation after World War II, as I shall show shortly, requires a different explanation). However, a penchant for ethnic purity was no specialty of the Germans; rather it was the general norm in the early 20th century, and through ethno-racially selective naturalization rules and immigration policies the United States, Canada, Australia, or France achieved much the same result (see Joppke 2004a).

The ethnic uses of jus sanguinis do not vitiate the fact that, as long as the possibility of naturalization existed (as it always did in Germany, in pre-WWI colonial times even for African natives), the 'blood' in the principle of jus sanguinis was formal and instrumental, not substantial, as a historian of German citizenship succinctly put it (Gosewinkel 2001:326). In a nutshell, jus sanguinis did neither prejudge nor as such express an 'ethnic' or even 'racial' sense of national self. Conversely, some civic-political principles had always held in check the ethnic bias of the 1913 Citizenship Law – witness that Germans abroad could be stripped of their German citizenship if they evaded the military draft.

A revisionist history of citizenship without identity would stress that before WWII *all* states had citizenship laws or policies that were ethnically or even racially exclusive, and that after the Holocaust watershed the entire 'vision and division' (P. Bourdieu) of the world according to ethnic and racial principles fell into disrepute. In the process, throughout the states that came to be called 'Western,' citizenship laws became more inclusive. In continental Europe, this went along with a reinterpretation of jus soli citizenship from feudal relict to prerequisite of democracy, because only in this way could European states' rapidly growing immigrant (or guestworker) populations be speedily and lastingly brought into the citizenry. Accordingly, while practically extinguished in continental Europe by 1900, jus soli was successively reintroduced toward century's end. Most European Union states today grant as-of-right citizenship to second-generation immigrants, either *jure soli* at birth or – in a kind of jus domicile – optionally at a later stage (see Weil 2001). As is visible in strong European opposition to disturbingly ethnic citizenship laws in some post-communist states in eastern Europe, civic-territorial conceptions of nationality have now become the norm in Europe. As one international lawyer explicates the nexus: "(S)tates owe human rights obligations to individuals who are vulnerable to their exercise of sovereign power." (Orentlicher 1998: 322, fn.117)

However, the pan-European trend has not been from purely ethnic to purely civic-territorial citizenship, but toward *mixed* regimes that combine jus sanguinis and jus soli elements. Accordingly, the territorial attribution of citizenship has been made contingent on a threshold of legal residence time on part of a parent or (in what amounts to a jus domicili) of the citizenship candidate herself. This reflects that an unconditional jus soli regime (as in Canada or the United States) is as much at odds with the exigencies of liberal democracy in an age of international migration as is a pure jus sanguinis regime, being as over-inclusive as the latter is under-inclusive. Since the famous Nottebohm case of the International Court of Justice of 1955, international law prescribes that citizenship expresses a genuine link between an individual and a state. Both pure jus soli and pure jus sanguinis regimes fall short of this, because next to the random fact of birth no further attachment to the state is required in both. It is therefore no contradiction that some formerly pure jus soli states, such as Portugal and Britain, added elements of jus sanguinis to their citizenship laws in the early 1980s, while some jus sanguinis states, such as Belgium and most spectacularly Germany, moved in the opposite direction of incorporating jus soli elements at about the same time – instead of being conditioned by alleged 'national identity' changes (either contractive or liberalizing), both movements are part of the same trend toward mixed citizenship regimes that approximate the 'genuine link' requirement in an age of migration cum liberal democracy.

Germany had long resisted the trend toward incorporating jus soli elements in its citizenship law. This requires an explanation sharply different from standard accounts that centre on Germany's 'ethnic' national identity. If Germany's ethnic identity was responsible for this, how could the sharp turn-around in the great citizenship reform of 1999 have ever happened? After all, it is unlikely that a nation changes its identity overnight. Instead, the lack of congruence between state and nation before the post-communist revolutions of 1989 is responsible for Germany trailing behind in the European trend toward more inclusive citizenship.

Before 1989, Germany was a bit like its unacknowledged sister republic, Israel, in perceiving itself as homeland of all Germans who were repressed under communism and even faced retaliation there for the crimes of Nazism. A blood-based citizenship law was perceived as the bridge to national unity and it allowed retaining the links with the besieged diasporas further to the east. If an 'identity' had backed up this law, it was one that was geared to be abolished once the geopolitical situation had changed. Accordingly, a first cautious liberalization of access to citizenship, in terms of eased naturalization rules for long-settled guestworkers and their offspring, occurred in the very year of national unification, 1990, and by the end of

the decade Germany adopted a conditional jus soli regime that is now fully within the European norm.

However, one might object, if the *attribution* of citizenship at birth leaves little space for the expression of national identities, maybe their grip is firmer on the post-birth *acquisition* of citizenship, in terms of naturalization procedures that are everywhere more coloured by national particularisms and where state discretion has generally been stronger? This possible objection is invalidated by the fact that the liberalization of citizenship has not stopped short of naturalization. Most states now grant a right to naturalization if certain prerequisites (such as schooling and residence time) are fulfilled, and they abstain from making assimilation to a *particular* national culture an individually tested condition of citizenship acquisition. Accordingly, an individual rights logic has entered into a domain that had previously been a prime reserve of the sovereign state. Incidentally this change has been especially drastic in Germany, where naturalization had traditionally been an always-exceptional act of grace by the state, commanded by 'public interest' only, and excluding any consideration of the interest of the citizenship applicant. Since 1992, there is as-of-right naturalization for long-settled foreigners and their children, and the demanding, individually applied cultural 'assimilation' test has been replaced by a weaker, generic 'integration' requirement, which now consists of proved German language competence and a declared commitment to the liberal-democratic order.

The case of Germany represents a larger European trend toward curtailing state discretion in the post-birth acquisition of citizenship. Belgium, for instance, first mellowed its integration requirement from factual to intentional integration (i.e., from *idonéité* to *volunté d'integration*) in 1985, and more recently even abandoned any 'integration' requirement. Only French nationality law still officially asks for the assimilation of her citizenship applicants. One must fathom that France gets away with this anomalous identity constraint because it happily resonates with the universalistic creed of liberal democracy – as one 'Republican' intellectual put it in almost comical pathos, the French 'particularism' is 'universalism' (Todd, 1994: 227f). However, the Conseil d'État, France's highest administrative court, has narrowly interpreted assimilation in terms of 'sufficient knowledge' of the French language (and further made the determination of 'sufficient' dependent on a person's education and social standing), and it has repeatedly reined in on overshooting magistrates who had refused citizenship requests by Muslim immigrants on capricious grounds, such as wearing a veil.

In general, abstaining from a cultural assimilation requirement in citizenship acquisition reflects a dissociation between state and nation in the contemporary liberal state (see Joppke 2004b). Adhering to the principles of nondiscrimination and public neutrality in the context of an increasingly pluralistic society, this is a state that has lost both the intention and the capacity of forging culturally homogenous citizenries in light of a particular national identity.[2]

However, even if reduced to proved language competence and procedural commitments, the continued existence of vaguely defined 'societal integration' requirements for naturalization contradicts what a classic study of nationality law had called the 'abstract character' of citizenship, that is, its being a formal status devoid of a specific content or identity (Makarov 1947: 32). Note that, by contrast, the old communist states had gone further than this, loading state membership with a certain identity and behavior expected on part of the citizen, namely to be a virtuous socialist citizen. In case of violating this expectation, communist 'citizens' could be expelled. By contrast, the impossibility to expel citizens in today's liberal states proves the abstract character of state membership, which is notionally decoupled from any specific behavior or identity on part of the citizen.

The prevailing societal integration provisos in contemporary states' naturalization regimes admittedly fly in the face of this, pushing liberal citizenship precariously close to the virtuous citizenship of the ex-communist states. It is therefore apposite to argue, with a prominent Dutch nationality lawyer, that "(f)rom the point of view of a modern citizenship conception it is not justified to ask new citizens to be better and more virtuous than many persons who have acquired their citizenship through birth" (de Groot, 1989: 258). Further minimizing or even abolishing the societal integration requirement for citizenship acquisition marks the inevitable end-point of a citizenship without identity.

Endnotes

[1] This resembles Charles Taylor's (1992) distinction between 'dignity' and 'authenticity' as the two pillars of modern individualism, which find expression in a 'politics of universalism' and a 'politics of difference', respectively.

[2] For a vivid picture of the 'high modernist state' that *was* intent on and capable of forging nationally streamlined citizenries, see Scott 1998.

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