Citizenship Deprivation in the Courts: Unveiling States' Constitutional Structures

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Citizenship deprivation on security grounds – Difference in state practices – Underlying citizenship regimes and states' constitutional structures – Constitutional roles attributed to the citizen – Judicial decisions on citizenship deprivation – Comparison with a focus on France and the United Kingdom

INTRODUCTION

It is well known that citizenship deprivation has made a staggering return to the politics and practices of most European states in the post-9/11 era.[1] Citizenship deprivation as a national security measure targets citizens whom the states deem dangerous or disloyal and who virtually always have a foreign connection through birth or heritage. This counter-terrorism tool is reminiscent of ancient practices of banishment and exile,[2] although states have also been using it to foster new recipes for belonging in their national communities. Most of the literature in the field of citizenship stripping has spent considerable energy explaining what has

[1]The return of citizenship deprivation is not confined to Europe and has affected most parts of the world; yet, it is in Europe that citizenship deprivation is obtaining the most traction as a counter-terrorism tool. An excellent report tracing this global trend was published in 2022: *see* 'Instrumentalising Citizenship in the Fight against Terrorism' (Institute on Statelessness and Inclusion and the Global Citizenship Observatory, March 2022) p. 40, https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf, visted 26 September 2023.

[2]A. Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien', 40 *Queen's Law Journal* (2014) p. 54.

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propelled this return and what have been some of the main issues associated with it. As this literature has shown, practices of citizenship deprivation have weakened citizenship not only because they have made it unsecure, qualified, and unequal with racialising effects, but also because they have left individuals in situations of unprecedented vulnerability.[3] This article takes a different turn from the dominant literature on citizenship deprivation in two connected ways. First, it shifts scholarly attention away from the national security-induced roll-back on citizenship rights to a discussion of what seems to trigger *resistance* to citizenship deprivation or differences between state practices more broadly. Why, for example, do the constitutions of Poland, Portugal, or the United States preclude most forms of citizenship deprivation today while the UK government enjoys almost unbridled powers? And why has France failed to introduce citizenship deprivation in its constitution in 2015–16? In this article, I speculate that these differences between states have much to do with their citizenship regime; that is, differences in the processes through which they have conceptualised and institutionalised citizenship over time.[4] This path-dependent approach is of course a perennial theme within comparative political sciences and sociology but it is less common in traditional legal scholarship.[5] Building on this hypothesis, second,

[3]This is only a sample of the broad literature on citizenship deprivation which discusses its vast effects: P. Arnell, 'The Legality of Citizenship Deprivation of UK Foreign Terrorist Fighters', 21 *ERA Forum* (2020) p. 395; M. Beauchamps, 'The Forfeiture of Nationality in France: Discursive Ambiguity, Borders, and Identities', 19(1) *Space and Culture* (2016) p. 31; T. Choudhury, 'The Radicalisation of Citizenship Deprivation', 37 *Critical Social Policy* (2017) p. 225; P.T. Lenard, 'Democracies and the Power to Revoke Citizenship', 30 *Ethics and International Affairs* (2016) p. 73; S. Mantu, '"Terrorist" Citizens and the Human Right to Nationality', 26 *Journal of Contemporary European Studies* (2018) p. 28; L. Zedner, 'Citizenship Deprivation, Security and Human Rights', 18 *European Journal of Migration Law* (2016) p. 222.

[4]I follow Vink's definition of citizenship regimes: M.Vink, 'Comparing Citizenship Refimes', in A. Shachar and R. Baubock (eds.), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) p. 221 at p. 244. Shai Lavi's work is the closest to that hypothesis, although he frames the practices of the United Kingdom, the U.S. and Israel into broader models of citizenship (citizenship as security, citizenship as a social contract, and citizenship as an ethnonational bond). *See* S. Lavi, 'Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel', 13 *New Criminal Law Review: An International and Interdisciplinary Journal* (2010) p. 404.

[5]Some of the most famous accounts in the field of citizenship studies include R. Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992) and A. Favell, *Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain*, 2nd edn. (Palgrave 2001). Yet, these works have also attracted much criticism, mostly for over-emphasising certain historical trajectories and over-simplifying concepts to prove the existence of their models. For example C. Bertossi and J.W. Duvyendak, 'National Models of Immigrant Integration: The Costs for Comparative Research', 10 *Comparative European Politics* (2012) p. 237 or C. Finotelli and I. Michalowski, 'The Heuristic Potential of Models of Citizenship and Immigrant Integration Reviewed', 10 *Journal of Immigrant and Refugee Studies* (2012) p. 231. This article has aimed to

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this article argues that the mechanisms through which a state regulates citizenship deprivation are revelatory of its deeper constitutional structures. By constitutional structures, I refer to the various ways in which power has been organised in a particular state (where power comes from, what legitimises it, what constrains it, etc), and I pay particular attention to the justifications behind this organisation. This link between citizenship deprivation and constitutional structures has been missing from most scholarly works in the fields of citizenship deprivation and constitutional law despite the unprecedented view that it provides over the foundations of our modern societies.

The theoretical premise for this argument is indebted to the work of scholars who have drawn our attention to the historical connections between modern constitutional states and citizenship.[6] Bellamy, for example, has explained how the processes of state-making and the developments of citizenship and constitutionalism have historically gone 'hand in hand', reflecting both external military pressures and internal political struggles.[7] More broadly, this literature has highlighted that what grants legitimacy to most liberal states today does not reside in the pedigree of the ruling family but lies in the citizens (or 'the people', however framed), as well as in the establishment of democratic modes of consent.[8] Citizenship, in a nutshell, has become the unit of liberal constitutional democracies, the benchmark for the legitimacy of state power. This benchmark may of course undergo variations: sometimes political legitimacy is established solely by implicating citizens into self-government, sometimes it is also about recognising the rights of citizens as autonomous individuals, and at other times

bring complexity to these modelled realities, by seeing citizenship as fragmented rather than all-encompassing and adding a constitutional dimension to the study of citizenship regimes.

[6]To name but a few authors: L. Bosniak, 'Persons and Citizens in Constitutional Thought', 8 *International Journal of Constitutional Law* (2010) p. 9; H. Irving, *Citizenship, Alienage, and the Modern Constitutional State* (Cambridge University Press 2016); J. Habermas, 'The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship', 9 *Ratio Juris* (1996) p. 125; M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010); K. Rubenstein and N. Lenagh-Maguire, 'Citizenship and the Boundaries of the Constitution', in T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law* (Edward Elgar 2011); J. Shaw, *The People in Question. Citizens and Constitutions in Uncertain Times* (Bristol University Press 2020); C. Thornhill, 'Citizenship, Democracy and the Transformation of Public Law', 89 *Studies in Law, Politics and Society* (2020) p. 60.

[7]R. Bellamy, 'Constitutive Citizenship Versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act', in T. Campbell et al., *Sceptical Essays on Human Rights* (Oxford University Press 2001) p. 15-40; *see also* D. Gosewinkel, 'The Constitutional State', in H. Pilajamäki et al. (eds.), *The Oxford Handbook of European Legal History* (Oxford University Press 2018).

[8]At least in liberal states, although virtually all constitutional orders today claim to have some connection to 'the people'.

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still it coexists with older hereditary or customary principles of political legitimacy.[9] But the crux of these constitutional arrangements is that the citizens take centre stage; indeed, as another author explained, citizens are 'the *who* that makes the constitution, the *for whom* it is made, and the *to whom* it is addressed'.[10] Therefore, there is a sense that when states engage in citizenship deprivation they are striking at the heart of their constitutional structure and, I suggest, are thus likely to tell us most of the things we need to know about their constitutional underpinnings. (Underpinnings that will not, for that matter, be widely accepted and settled questions but rather prone to change over time and contested by multiple actors). This is precisely what we witnessed happening in the institutional battles that shook the United States in the twentieth century, when the government's attempts to expand citizenship deprivation led a divided Supreme Court to trigger no less than a revolution in the U.S. understanding of sovereignty. In his book, Weil traces how the Supreme Court eventually reversed the traditional concept of sovereignty – which submits citizens to the authority of states in specific territories – by defining the citizens as *possessing sovereignty themselves,* thus submitting the U.S. state to its citizens.[11] Since then, it has become incongruous in the U.S. political narrative for governments temporarily in office to challenge the source of their power by removing the citizenship of other citizens.[12]

Besides re-emphasising that we learn much about the state's constitutional foundations by looking at citizenship deprivation, Weil's approach is also particularly useful for pointing to the courts as a well-placed institution to tell us that story (or indeed, to participate in its formation). This article similarly uses court cases on citizenship deprivation to unveil what propels and legitimises state actions in particular constitutional frameworks. It does so from a comparative perspective by focusing on the citizenship deprivation practices of France and the UK, two European states that have rediscovered their long-enshrined deprivation powers in the post-9/11 era. In doing so, this article adds to the scarce literature on judicial approaches to citizenship deprivation and to the even rarer comparative accounts of such judicial practices.[13] It also contributes to academic

[9] *See* D. Beetham, *The Legitimation of Power*, 2nd edn. (Bloomsbury 2013).

[10] Rosenfeld, *supra* n. 6, p. 211.

[11] P. Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* (University of Pennsylvania Press 2013); *see also* P. Weil, 'From Conditional to Secured and Sovereign: The New Strategic Link between the Citizen and the Nation-state in a Globalized World', 9(3–4) *I.CON* (2011) p. 615.

[12] This was one of the key pronouncements in the case of *Afroyim* v *Rusk*, 387 U.S. 253 (1967). Yet, citizenship deprivation remains possible when birthright citizens are deemed to have 'expatriated' themselves and under broader grounds in the case of naturalised citizens.

[13] Arnell, *supra* n. 3; E. Fargues, 'The Revival of Citizenship Deprivation in France and the UK as an Instance of Citizenship Renationalisation', 21 *Citizenship Studies* (2017) p. 984; E. Fargues,

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discussions over the intimate relationship between citizenship and constitutional structures by combining literature from citizenship studies, public law, constitutional history, and national security, and by highlighting the different constitutional roles attributed to the citizens. This article starts with a brief overview of the ways in which France and the UK manage their powers to strip people of their citizenship, before reconstituting elements of their citizenship regimes. It then moves on to discuss recent citizenship deprivation cases and puts into sharp focus how these unveil the different constitutional foundations of France and the UK.

Regulating citizenship deprivation in France and the UK: convergent but different

In both France and the UK people can lose their citizenship on national security grounds if they have a foreign connection and if they have acted prejudicially to the interests of the state.[14] The decision is taken by an administrative official and there is a right of appeal before the courts. These powers are old and famously fell into disuse in the aftermath of the Second World War, but they again became high on the political agenda of both states in the context of global terrorism post-9/11.[15] For example, the UK's Nationality Immigration and Asylum Act 2002 extended citizenship deprivation to birthright citizens who are dual nationals; this was an unprecedented move given that citizenship deprivation had been possible only for naturalised citizens since the inception of the powers in 1914. In 2006, the standard for depriving people of their British citizenship was lowered from any conduct 'seriously prejudicial to the vital interests of the state' to the Home Secretary's assumption that citizenship deprivation will be 'conducive to the

'Simply a Matter of Compliance with the Rules? The Moralising and Responsibilising Function of Fraud-Based Citizenship Deprivation in France and the UK', 23 *Citizenship Studies* (2019) p. 356; J. Lepoutre, 'Le bannissement des nationaux. Comparaison (France - Royaume-Uni) au regard de la lutte contre le terrorisme', 1 *Revue Critique de Droit International Privé* (2013) p. 107; Z.B. Naqvi, 'Coloniality, Belonging and Citizenship Deprivation in the UK: Exploring Judicial Responses', 31 *Social & Legal Studies* (2022) p. 515; D. Prabhat, 'Political Context and Meaning of British Citizenship: Cancellation as a National Security Measure', 16 *Law, Culture and the Humanities* (2016) p. 294.

[14]British Nationality Act 1981, s 40; Civil Code, Arts. 25 and 25-1.

[15]Some academic works trace the historical evolution of citizenship deprivation. In particular, M.J. Gibney, '"A Very Transcendental Power": Denaturalisation and the Liberalisation of Citizenship in the United Kingdom', 61 *Political Studies* (2013) p. 637; S. Mantu, *The Law and Practice of Citizenship Deprivation in International, European and National Perspectives* (Brill Nijhoff 2015); and S. Pillai and G. Williams, 'Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations', 66 *International and Comparative Law Quarterly* (2017) p. 521.

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public good', and 212 persons lost their citizenship under this ground between 2010 and 2022.[16] (By contrast, no one had lost their citizenship between 1970 and 2000.[17]) Also in 2006 – but on the other side of the Channel – the French government increased the time-frame under which convicted terrorists could be stripped of their citizenship from 10 to 15 years after the acquisition of their citizenship: 16 people have lost their citizenship on this ground since 1996, nine of them post-2010.[18]

These numbers are striking not only because they tell us that the UK has deprived more than 20 times more people than France in the last 10 years, but also because they point to a convergent increase in the state practice of citizenship stripping post-9/11. A direct effect of this has been a rise in court cases and, in fact, over the last 25 years most of the courts with competence to review citizenship deprivation have done so.[19] The bulk of the issues presented in the courts have been about statelessness, procedure, interference with rights under the European Convention on Human Rights (Convention rights), and the application of EU law principles (since the loss of citizenship in the European Union can also lead to the loss of EU citizenship). The cases have also debated more technical matters related to the scope and intensity of judicial scrutiny or the effect of other norms (constitutional or international) on state powers.[20] What is significant about this case law is that the French and UK courts have almost consistently given the government the upper hand. They have quasi-religiously deferred to the executive's claim of superior institutional legitimacy in matters of national security and, when the state's security narrative presented some

[16]I take this figure from the successive reports of the Independent Reviewer of Terrorism Legislation, Jonathan Hall QC. *See* for example: 'HM Government transparency report: disruptive powers 2020' (2022) https://www.gov.uk/government/publications/disruptive-powers-2020/hm-government-transparency-report-disruptive-powers-2020-accessible#disruptive-powers, visited 26 September 2023.

[17]P. Weil and N. Handler, 'Revocation of Citizenship and the Rule of Law: How Judicial Review Defeated Britain's First Denaturalization Regime', 36 *Law and History Review* (2018) p. 296.

[18]ISI report, *supra* n. 1, p. 29.

[19]Respectively, the SIAC, the Court of Appeal of England and Wales (the Court of Appeal), and the Supreme Court in the UK; by the Conseil d'Etat and the Constitutional Council in France; and, in both countries, by the European Court of Human Rights (the ECtHR) in ECtHR 7 February 2017, No. 42387/13, *K2* v *the United Kingdom*; ECtHR 25 June 2020, No. 522273/16, *Ghoumid* v *France*.

[20]In the UK, for example: *Al Jedda* v *Secretary of State for the Home Department* [2013] UKSC 62, [2014] 1 AC 253; *G1* v *Secretary of State for the Home Department* [2012] EWCA Civ 867, [2013] 1 QB 1008; *Pham* v *Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591; *W2 and IA* v *Secretary of State for the Home Department* [2017] EWCA Civ 2146; *Begum* v *Secretary of State for the Home Department* [2021] UKSC 7. In France: Conseil d'État, No. 394348, *M.A*, 8 June 2016.

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loopholes, the courts have not hesitated to draw on (or accept) images of citizenship as allegiance to patch these holes.[21]

Yet, notwithstanding these convergences, the national security context has not erased fundamental differences between France and the UK. As we have seen, the British government has extensively used citizenship deprivation in the last ten years and enjoys much wider powers than the French. Indeed, both naturalised and birthright citizens can be deprived of their citizenship in the UK and, in the case of naturalised citizens, without obligations to prevent statelessness.[22] The standard for depriving people of their citizenship is very broad and there is no need for prior criminal sentencing. The UK has also been regulating contestation against citizenship deprivation powers by issuing orders while individuals were out of the country,[23] and since 2022 the government has no longer been held to an obligation to notify individuals that they have lost their citizenship when their whereabouts are unknown. In France, by contrast, only people who acquired citizenship after birth can be stripped of their citizenship, provided that they will not be left stateless and that they have been convicted of a specific crime. (Birthright citizens can also lose their citizenship when they 'behave as the national of another country' but this ground largely appears to have fallen into disuse.[24]) The government must also ask for the opinion of the Conseil d'Etat before taking a decision and it usually tends to issue deprivation orders when individuals are in France (although there have been many attempts to deport individuals following their citizenship loss).[25] Besides, two time limits further restrict the powers of the government. The French government can 'only' deprive people who acquired their citizenship less than 10 years previously, and it has 10 years to issue an order following the commission of the wrongful acts. As we have seen, both these time limits are extended to 15 years in cases of terrorism but they nevertheless lead to the irrevocability of French citizenship after their expiry. We cannot, in sum, ignore these fundamental differences between the two states. And while there are many potential explanations for the more expansive remit of the UK's framework, in the remainder of this article I suggest that the differences can partly be explained by variations between the French and UK citizenship regimes.

[21]For example, on allegiance in France *M.A* ibid.; in the UK: *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064, [2018] WLR (D) 594.

[22]British Nationality Act 1981, s 40(4A)(b).

[23]For example: *L1 v Secretary of State for the Home Department* [2013] EWCA Civ 906.

[24]Civil Code, Art. 25-4; *see* J. Lepoutre, *Nationalité et Souveraineté* (Dalloz 2020).

[25]The ECtHR has intervened in one instance to preclude the deportation of an individual to the country of his second nationality because there was a risk of mistreatment under Art. 3 (prevention against torture): ECtHR 3 December 2009, No. 19576/08*, Daoudi* v *France*.

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Comparing citizenship regimes

To establish this, let us first come back to what citizenship means and how it tends to be articulated in states in general, and in France and the UK in particular. One famous account of citizenship defines it as 'full membership in a community with all its rights and obligations'.[26] What is useful about this definition is that citizenship is not just understood as the right to carry a passport or legal membership to a state (what international lawyers call 'nationality'), but it is also about being entitled to certain benefits (typically of a civil, political, and socio-economic nature and distributed equally) as well as having to perform certain obligations (such as paying taxes or complying with conscription). To put it more succinctly, modern citizenship is generally seen as comprising three elements: a legal status that grants rights; a political claim to equal participation and equal treatment from the state; and what confers individuals with a sense of identity or belonging to the community of which they are members.[27] But while these three elements are typically merged today, this is not always the case – and I would argue that this is an important distinction to keep in mind. First, it acts as a reminder that the histories of nationality and citizenship may have come about through different processes (whether historical, political, sociological, etc) and may be supported by different philosophies.[28] Second, it encourages us to see citizenship as *fragmented* rather than all-encompassing and thus make sense of more complex histories of inclusion and exclusion.[29] To name but a few (in) famous examples: women, racialised minorities, the insane, the criminal, and the poor were frequently denied core rights despite their formal citizenship. Individuals under colonial domination were often ascribed some sort of membership status without civil equality, whereas stories of peoplehood have worked in many contexts to exclude minorities despite their citizenship (a typical example is that of Native Americans in the U.S.).[30] Conversely, most rights today are attributed to individuals because of their personhood rather than their formal

[26]T.H. Marshall, *Citizenship and Social Class, and Other Essays* (Cambridge University Press 1950) p. 149-150.

[27]J.H. Carens, *Culture, Citizenship, and Community: a Contextual Exploration of Justice as Evenhandedness* (Oxford University Press 2000).

[28]This is an important theme in Dieter Gosewinkel's work: D. Gosewinkel, *Struggles for Belonging. Citizenship in Europe 1900–2020* (Oxford University Press 2022).

[29]Key literature from the 1990s has emphasised this fragmentation. For example, J.L. Cohen, 'Changing Paradigms of Citizenship and the Exclusiveness of the Demos', 14 *International Sociology* (1999) p. 245; B Siim and J Squires, *Contesting Citizenship* (Routledge 2014).

[30]Although Native Americans were only accorded citizenship in 1924 – unless otherwise specified under legal exceptions. On the U.S. producing 'foreigners within' and exclusionary histories of peoplehood, *see* K.M. Parker, *Making Foreigners: Immigration and Citizenship Law in America, 1600–2000* (Cambridge University Press 2015).

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citizenship. Indeed, since the aftermath of the Second World War, it is persons rather than citizens who have been the subjects of most constitutional norms.[31] Understanding citizenship as segmented thus implies that there are uncertainties as to what people actually lose when they lose their citizenship, although –from a purely legal perspective – some of the rights that are typically associated with citizenship status include territorial rights (the right to come and go to your country of citizenship and access other rights) and political rights (the right to vote).

Another aspect to consider is the fact that, in law, the fragmentation of citizenship between substantive and formal elements is likely to generate different legal processes. This aspect is often forgotten in comparative studies when it is central to the comprehension of state practices. For example, the constitution of a state might say something about how citizens should be treated (say, with equality or dignity) but the setting up of the conditions for formal citizenship (citizenship acquisition and loss) might be left to ordinary legislators, which in turn may have left this practical implementation to other authorities (such as the executive or the judiciary).[32] In this example at least three different sets of rules will be triggered (constitutional, administrative, and civil), each the bearer of different legitimational authority, each likely representing different political-legal cultures, and each exerting different pressure over state action. This makes the sorting out of citizenship's various legal dimensions a key site of difference between states' practices and something to keep an eye out for in the rest of this article. Besides, citizenship rules are never in complete isolation from each other and several national or international systems will be expressing views about how states should behave with regard to their citizens. For example, in *Rottmann*, the European Court of Justice argued that every deprivation of citizenship which resulted in the loss of citizenship of the European Union should be subjected to a proportionality assessment from the courts or risk being found in violation of EU law.[33] As for the European Court of Human Rights, the court found that citizenship fell under the 'private life' of individuals (protected under Article 8) because it was a core

[31]This does not mean that certain conditions must not be fulfilled, such as, for example, territorial presence in the country. Yet, let us not forget Yasemin Soysal's proposal, in the mid 1990s, that rights should exist beyond citizenship and be based on universal personhood: Y. Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe* (Chicago University Press 1995) p. 251.

[32]Most constitutions do not regulate the conditions for acquisition and loss of citizenship, but the U.S. and countries in Latin America are significant exceptions. *See* Shaw, *supra* n. 6, p. 54 and p. 133.

[33]ECJ 2 March 2010, Case C-135/08, *Rottmann* v *Freistaat Bayern*, [55]. *See* more broadly, S. Carrera Nunez and G.R. de Groot, *European Citizenship at the Crossroad – the Role of the EU on Loss and Acquisition of Nationality* (Wolf Legal Publisher 2015).

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element of their social identity.[34] In both of these examples we see international institutions jumping in to clarify how states should think about and treat questions related to citizenship for treaty compliance. In sum, citizenship is a multi-dimensional concept that triggers overlapping legal fields and all these different aspects must be broken down if we are to fully evaluate the effect of a state citizenship regime on its practice of citizenship deprivation. The next sections seek to do just that and place the citizenship regimes of France and the UK within a broader historical perspective.

The French modern trilogy: the citizen, the state, and the nation

In modern-day France, holding French citizenship status is a condition to exercise the full extent of citizenship's substantive benefits. Yet this is a relatively new condition, as for many years it did not really matter whether people were French or if they were foreigners if they wanted to access rights or privileges.[35] For example, under the *Ancien régime* (16th century-1789) accessing privileges depended on whether individuals could inherit and which one of the three 'estates' they belonged to (the clergy, the nobility, and the Tiers-Etat). Frenchness was also irrelevant to the revolutionaries in 1789 because their political project was conceived as 'universal'.[36] The crux of this project included a commitment to self-government and an acknowledgment that all men, born free and equal, had rights that needed to be protected by law.[37] These rights were listed in the Declaration of the Rights of Man and the Citizen of 1789 but they mainly exercised pressure at a declaratory level since they remained unenforceable until later in the 20th century. Crucially, sovereignty was taken away from the hands of absolute monarchs and effectively put into the hands of the nation, understood as an abstract political entity composed of citizens. From this moment on, the citizens became entrusted with the running of their lives together, either directly

[34]ECtHR 11 October 2011, No. 53124/09, *Genovese* v *Malta*.

[35]There are many historical reconstructions of French citizenship laws. Some of the most preeminent include: Brubaker, *supra* n. 5; G. Noiriel, *Le Creuset Français : Histoire de l'immigration, XIXe-XXe Siècles* (Seuil 1988); P. Weil, *Qu'est-Ce Qu'un Français ? : Histoire de La Nationalité Française Depuis La Révolution* (Éd rev et augmentée, Gallimard 2004). As for the legal regulation of citizenship as nationality *see* for example, P Lagarde, *La Nationalité Française* (Dalloz 2011) and, more recently, Lepoutre, *supra* n. 24.

[36]The sociologist Abdelmalek Sayad recalls what this 'universalist' thinking had of chauvinism and imperialist: A. Sayad, 'Qu'est Ce Que l'intégration?', 1182 *Hommes et Migrations* (1994) p. 8.

[37]D. Schnapper, *Community of Citizens: On the Modern Idea of the Nation* (Routledge 1998); R. Brubaker, 'The French Revolution and the Invention of Citizenship', 7 *French Politics and Society* (1989) p. 30.

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or through their representatives.[38] This collective operation was expected to happen in a 'public sphere', imagined as a 'neutral' political space that was blind to everything that may distinguish between citizens in society (their class, race, ethnicity, gender, disability, etc). In practice, this meant that citizens had to put their private interests aside to shape the 'general will' (*la volonté générale*). The revolutionaries considered this neutrality to be both a safeguard against discrimination and what secured the collective orientation of the nation (that is, for the general will to be truly *for* the collective).[39]

This new political program was expressed in the constitution of 1791, which separated the community of citizens into two categories of active and passive citizens. Only active citizens could vote and hold representative functions. They were distinguished from the rest of the citizenry on the basis of their age, wealth, criminal convictions, mental capacity, gender, and – at least implicitly – their race, but *not* their French legal status.[40] Rosanvallon argues that the key to the distinction between active and passive citizens boiled down to the question of who could be considered to be an independent and autonomous individual. This was, he observes, an important legacy of the philosophy of the Enlightenment in the post-revolutionary context, with this philosophy's emphasis on freedom, autonomy and reason.[41] Translated into legal terms this meant asking who were the citizens that enjoyed the full extent of their civil and public capacity. In her work, Aynès shows that excluded from active citizenship rights were thus not just the dependants (those persons who were not considered autonomous because they relied on someone else's judgement) but also the criminals, who had lost their citizenship rights as a result of a conviction.[42] That is, the revolutionaries in 1789 effectively established dependants and the unworthy as the citizen's immanent *others*. To put it differently, from 1789 the 'full' citizen (with both active and passive rights) was instituted as someone without self-interest, fully capable of taking decisions for himself (he is independent financially, intellectually and sociologically and, indeed, a 'he' until 1944),[43] and with an unblemished

[38]Constitution of the 5th Republic 1958 and Conseil Constitutionnel No. 76-71 DC, 30 December 1976.

[39]Schnapper, *supra* n. 37. For an excellent criticism of this abstract universalism, *see* I.M. Young, *Inclusion and Democracy* (Oxford University Press 2002).

[40]Arts. 2 and 5 of the Constitution of 1791. Most individuals under French colonial domination were precluded from voting rights until the 20th century.

[41]P. Rosanvallon, *Le sacre du citoyen: histoire du suffrage universel en France* (Gallimard 1992) p. 142. From the Constitution of 1795 the distinction between active/passive citizens was removed from the constitutional texts but, as Rosanvallon shows, the principle lingered on for much longer.

[42]C. Aynès, *La privation des droits civiques et politiques. L'apport du droit pénal à une théorie de la citoyenneté* (Dalloz 2022).

[43]Women were only granted the right to vote in 1944 in France.

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reputation (he has not engaged in criminal activity). Importantly, however, the citizen did not necessarily have to be French.

It was only by the end of the 19th century that 'nationality' was officially added as a condition to exercise the full extent of the rights and privileges associated with French citizenship, mainly for bureaucratic reasons and conscription.[44] French citizenship thus became *nationalised*. It became contingent on proving close links to the state through birth or heritage, although many authors agree that the design of these links in 1889 remained inclusive of foreigners.[45] The 19th century also brought about the strengthening of the rights conferred on those who were already holders of French citizenship status. For example, administrative law was developing to secure procedural guarantees for individuals against arbitrary decisions from the government, and by 1872, the Conseil d'Etat could cancel decisions from the administration that violated the procedural rights of individuals.[46] This logic of *subjectivisation* of French citizens was expanded in the aftermath of the Second World War and it was reflected in deeper constitutional transformations. Indeed, these constitutional transformations became visible, first, with the institution of an organ of constitutional review (now called the Constitutional Council) which was gradually granted the powers to override legislation. (Favoreu talks about the institution of constitutional review in France as the moment when the law 'grabbed' politics since the constitution was conferred with supreme legal authority.[47]) Second, since the 'juridical *coup d'état*' operated by the Constitutional Council in 1971, when the Council assumed the right to exercise constitutional review against the preamble of the constitution which included, amongst other texts, the Declaration of the Rights of Man and the Citizen and the preamble of the constitution of the 4th Republic.[48] And third, from the time individuals were granted direct access to the Council to vindicate their constitutional rights during any legal process in 2008.[49] Moreover, France joined many international

[44]Yet, from 1795 the constitutions establish the 'quality of being French' as a condition to exercise political rights but other rights could still be enjoyed by foreigners. *See* Aynès, *supra* n. 42.

[45]Weil, *supra* n. 35, p. 53, although Weil acknowledges in his analysis that the law answered specific contextual cues.

[46]Lepoutre, *supra* n. 24, p 426 and p. 613; J. Chevallier, 'Le Droit Administratif Entre Science Administrative et Droit Constitutionnel', *Le droit administratif en mutation* (Presses Universitaires de France 1993).

[47]L.Favoreu, *La Politique Saisie Par Le Droit : Alternances, Cohabitation et Conseil Constitutionnel* (Economica 1988).

[48]Conseil Constitutionnel, Décision No. 71-44 DC, 16 juillet 1971, *Liberté d'association.* Yet, this possibility had been expressly ruled out by the framers of the Constitution of the 5th Republic in 1958. *See* A.S. Sweet, 'The Politics of Constitutional Review in France and in Europe', 5 *I.CON* (2007) p. 69.

[49]Albeit under the filters of Supreme Courts (Conseil d'Etat and the Cour de Cassation): D. Rousseau, 'La QPC, Une Nouvelle Culture Constitutionnelle, Une Nouvelle Justice Constitutionnelle', 27 *Jus Politicum* (2022) p. 323; G Carcassone, 'Le Parlement et La QPC', 137 *Pouvoirs* (2011) p. 73.

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organisations and treaties throughout the 20th century whose provisions were deemed superior to domestic legislation (though not to the constitution).[50]

These constitutional reconfigurations are fundamental because they recognised the citizen as a rights holder whose subjectivity could limit state action. Put differently (since this image had existed for a long time), they gave it much stronger constitutional credentials. As a result, the legitimacy of the exercise of state power in France today comes not only from its proximity to the law as an expression of popular sovereignty, but is also based on the protection of the subjective qualities of the citizens as passive recipients of rights. These two images of the citizen thus now evolve in constitutional tension with each other.

Subjecthood and the missing 'citizen' in the UK constitutional framework

Yet, while some aspects of the French citizenship regime appear to be confusing – notably who the citizens are and how they are being positioned in the state's constitutional architecture (as that which simultaneously grants and limits state power) – the evolution of citizenship in the UK is far more perplexing. A good place to start is with the first statutory mention of citizenship in the British Nationality Act 1948.[51] This had caused much anger within parliament at the time because many parliamentarians considered 'citizenship' to be a profoundly inadequate term to describe the relationship between individuals and the state. For example, the Conservative MP Maxwell Fyfe preferred the language of 'subjecthood' which, he contended, did not suggest any tendency towards assimilation or civil equality and kept the fundamental notion of allegiance to the sovereign intact.[52] And from a historical perspective at least, Fyfe was not too far from the truth. For many years, subjecthood had defined membership of Britain by the fact of owing allegiance to the Crown. This was the main finding of Calvin's case in 1609 which specified that such allegiance was expected from anyone born within the Crown's dominion.[53] Price explains that the constitutional significance

[50]Art. 55 of the Constitution of the 5th Republic. The principle of the superiority of treaties over ordinary legislation was received by the Supreme Courts in the following decisions: Cour de Cassation, Chambre mixte, 24 May 1975, *Société des Cafés Jacques Vabre* (Dalloz 1975) p. 497, and Conseil d'Etat Ass Pleniere, 20 October 1989, *Nicolo*, recueil p. 190.

[51]Here, too, there is a vast literature on the UK history of citizenship laws. Some of the most important works include: A. Dummett and A. Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Weidenfeld and Nicolson 1990); L. Fransman, *Fransman's British Nationality Law*, 3rd edn. (Bloomsbury Professional 2011). On the concept of citizenship itself *see* Marshall, *supra* n. 26.

[52]*Hansard* HC Deb, vol 453, col 410, 7 July 1948, https://api.parliament.uk/historic-hansard/commons/1948/jul/07/british-nationality-bill-lords#column_410, visited 27 September 2023.

[53]*Calvin's* case [1608] 7 Co Rep 1a, 77 ER 377.

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of this case lay in its establishment of a transcendental view of allegiance as an organic status that was superior to any other form of positive law.[54] What this meant in practice is that the place of birth of the subjects *within* territories under the Crown's control was irrelevant for allegiance and subjecthood (a principle that would come in handy at a time of imperial expansion), as was any expectation of consent from the subjects to this relationship with the Crown. Allegiance existed beyond any form of political association. But in return for this allegiance, the subjects could nevertheless expect certain privileges, including protection from the Crown as well as some claim to equality (at least in so far as they were all in a similar relationship vis-à-vis the Crown).[55]

Crucially, Fyfe was right to point to the continuing relevance of subjecthood in 1947, more than 300 years after Calvin's case, because no fundamental rupture from the past had linked subject status to a claim of self-government. Indeed, when Parliament attained political dominance over the Crown in 1689 the locus of sovereignty was *not* vested in the subjects as 'the people' but it was granted to an institution that already existed : Parliament.[56] This does not mean that the concept of popular sovereignty was absent from English constitutional thought – indeed most constitutional thinkers at the time accepted that Parliament's sovereign legitimacy derived from the consent of the people.[57] But there was a sense that while Parliament spoke and governed *for the people*, Parliament itself was not government *by the people*; consent once given could not be taken away. This fact notwithstanding (which effectively submitted British subjects to the whims of a new absolute sovereign), there was an expectation that 'good government' implied the preservation of the 'natural liberties' of the subjects.[58] These liberties were considered pre-political and not instituted by law. Tasked with their preservation were the common law courts, although the common law itself was not imagined as taking the lead over parliamentary legislation.

[54]P. Price, 'Natural Law and Birthright Citizenship in Calvin's Case (1608)', 9 *Yale Journal of Law & the Humanities* (1997) p. 73.

[55]Muller explains that subjecthood remained a powerful site for claims-making, as subjects used their shared status to ask for economic, political and legal concessions throughout the Empire: H. Weiss Muller, *Bonds of Belonging: Subjecthood and the British Empire* (Cambridge University Press 2014). *See also* on subjecthood and allegiance: J.W. Salmond, 'Citizenship and Allegiance', 67 *The Law Quarterly Review* (1901) p. 270; and more recently H. Irving, *Allegiance, Citizenship and the Law. The Enigma of Belonging* (Edward Elgar 2022).

[56]Albeit the Crown kept residual power: A. Tomkins, *Public Law* (Oxford University Press 2003) p. 39-60.

[57]This is a point stressed by Martin Loughlin: M. Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice', in M. Loughlin and N. Walker, *The Paradox of Constitutionalism* (Oxford University Press 2007).

[58]One would have recognised here some of the key precepts of Blackstone: W. Blackstone, *Commentaries on the Laws of England* (1765).

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This constitutional settlement had many implications. First, as Dicey later wrote, the sovereignty of Parliament meant that Parliament could 'make or unmake any law whatever' and that no superior body could 'override the properly enacted legislation of Parliament'. Second, the existence of the common law implied that there was no perceived need to expressly enshrine the 'natural liberties' of the subjects in law or bills of rights.[59] And third, as is becoming clear, British subjects did not feature in the formative period of 17th-century English constitutional law. They were not *integrated* within this constitutional settlement which focused on the repartition of powers between the Crown and Parliament (the Commons and the House of Lords). This was, of course, a very long time ago and British citizens today have a more active role, as they can expect to be represented within Parliament (and Parliament, by convention, must make sure that its laws are in tune with their will), and their rights protection is more comprehensive.[60] But while *represented*, British citizens have still not been fully incorporated within the structures of the UK constitutional framework, and as we will see this has strong effects on their rights and duties.[61]

In this regard, the British Nationality Act 1948 and the British Nationality Act 1981 constitute missed opportunities for the UK to clarify the relationship between the citizens and the state. These Acts effectively discussed belonging rather than a conceptually coherent conception of citizenship over which the state would base its legitimacy. Indeed, the British Nationality Act 1948 created two citizenship statuses that applied to different people according to where they were born in the Empire, and which entailed the promise of the enjoyment of rights protected in the UK as they conferred a right of abode.[62] However, the legal description of British citizenship *as* citizenship in the British Nationality Act 1948 was deceptive. Citizenship in this context was still subjecthood and the ability of Parliament to extend or reduce the rights of citizens-subjects was confirmed. Besides, Parliament eventually curtailed the right of abode for those colonial citizens-subjects who did not have prior connections with the UK in the form of birth or parentage, thereby making 'belonging' to the UK contingent on racialised

[59]A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund 1915).

[60]Dicey, ibid., writes that those constitutional conventions have as their ultimate object to 'give effect to the will of that power which in modern England is the true political sovereign of the state – the majority of the electors', although Dicey also assumed that Parliament's role was to 'shape' the electors.

[61]Everson explains this brilliantly in her work: M. Everson, '"Subjects", or "Citizens of Erewhon"? Law and Non-Law in the Development of a "British Citizenship"', 7(1) *Citizenship Studies* (2003) p. 57-83.

[62]The 'Citizens of the United Kingdom and the Colonies' and 'Citizens of Independent Commonwealth Countries'. *See* R. Hansen, 'The Politics of Citizenship in the 1940s Britain: The British Nationality Act', 10 *Twentieth Century British History* (1999) p. 67.

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conditions.[63] These changes were later codified in the British Nationality Act 1981 and marked the *nationalisation* of British citizenship – its boundedness to the British Isles.

The post-Second World War period introduced key changes to the UK constitutional structure, some of which led to giving citizens a more central role in the legitimisation of state power. Most of these changes were linked to the UK's joining of international organisations, while others reflected deeper institutional suspicions towards the ability of Parliament to preserve the rights of individuals in the UK.[64] For example, administrative law developed in the 1960s to recognise specific forms of protection for individuals that did not directly derive from Parliament's will (although they remained exposed to Parliamentary sovereignty).[65] Furthermore, the courts came to play a more active role in the protection of individual rights, and by the 1990s they had devised an interpretative rule that allowed them to *presume* that Parliament intended to protect the fundamental liberties of people unless it explicitly said otherwise.[66] Meanwhile, the Human Rights Act 1998 granted individuals in the UK wider and easier access to the rights protected under the European Convention on Human Rights, as well as more powers to the courts. With these changes, the UK was described as enacting a third model of constitutionalism, one that enshrines relatively flexible limits on state power but makes sure that the ultimate decision-making power rests within Parliament.[67] However, these major constitutional changes are currently in retreat following Brexit and recent government proposals to repeal the Human Rights Act. In light of these constitutional elements we can thus expect the UK courts to be more constrained than their French counterparts in articulating a judicial defence of citizenship which, as we shall see in the remainder of this article, is indeed visible in the case law on citizenship cancellation.

Adjudicating citizenship deprivation

(In)equality and the sanction of failed integration in the French courts

Most of the French cases on citizenship deprivation have similar factual patterns, with dual-national French citizens losing their citizenship whilst they are in

[63] N. El-Enany, *(B)Ordering Britain. Law, Race and Empire* (Manchester University Press 2020).

[64] A. Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape, 9(1) *I.CON* (2001) p. 172.

[65] P. Cane, 'The English System of Government', in *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press 2016).

[66] *R v Secretary of State for the Home Department, ex p Simms* [1999] UKHL 33.

[67] S. Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge University Press 2012).

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France following terrorism-related convictions. The main issues in the cases have been about procedural aspects and the disproportionality of the removal of citizenship (which is typically evaluated under both domestic and European law), as well as potential violations of the principle of *non bis in idem* and the discriminatory aspects of the legal framework.[68]

This last issue was central to the case of Ahmed Sahouni, a Franco-Moroccan who had acquired his French citizenship by marriage in 2002. Dubbed one of the 'brains of Al Qaida in Morroco', Sahouni was arrested in 2010 and convicted for participating in an association with terrorist motives in 2013. His citizenship was revoked the following year. In the Conseil d'Etat, Sahouni's lawyers challenged the inequality of the French framework which reserves citizenship deprivation to citizens who acquired citizenship after birth. They contended that this different treatment violated the constitutional protection of equality as well as the provisions of equality and non-discrimination under European legislation (EU law and the European Convention on Human Rights). These European arguments were rejected by the Conseil d'Etat but the constitutional issue was referred to the Constitutional Council for a full assessment.[69] The constitutional protection of equality in France is complex but its most common expression states that 'like cases should be treated alike' or, to put it in citizenship terms, that French citizens similarly positioned in law should be treated in the same way.[70] Read in this light, how could the state justify subjecting some citizens to citizenship loss but not others? A group of MPs and Senators posed this exact question to the Constitutional Council in 1996, when terrorism was added as a ground for citizenship deprivation. The Council replied that while discriminatory, the protection of national security in these cases could justify differential treatment of the citizens for a limited time.[71] It reiterated this finding in 2015.[72]

[68]For example: Conseil d'État, 2/7 ssr, 11 mai 2015, No. 383.664, (*M.Q*), inédit; Conseil d'État, No. 394348, *M.A*, 8 juin 2016; Conseil d'État, 2/7ssr, 31 décembre 2020, No. 436368 (*M.B*); Conseil d'État, 2/7ssr, 6 octobre 2021, No. 446945 (*M.D*).

[69]On the European points, the Conseil d'Etat followed the conclusions of its rapporteur, who argued that nothing under EU law precluded states from distinguishing between individuals for the purposes of deprivation and that the French framework was proportionate because it did not leave individuals stateless and it is temporary. With regard to the ECHR, the rapporteur argued that no other right had been invoked in conjunction with Art. 14 and that the argument was inadmissible as a result. The Art. 14 issue had similarly been decided in Conseil d'Etat, 2/1 SSR, 18 juin 2003, No. 251299, *M.X* (Mr Omar Saïki), *Lebon tables.* The decision regarding both European arguments was confirmed Conseil d'Etat, 2/7ssr, 22 juin 2022, No. 455395, *M Abzouzi*.

[70]F. Mélin-Soucramanien, 'Le Principe d'égalité Dans La Jurisprudence Du Conseil Constitutionnel. Quelles Perspectives Pour La Question Prioritaire de Constitutionnalité?', 29 *Les Nouveaux Cahiers du Conseil Constitutionnel* (2010).

[71]Conseil Constitutionnel, No. 96-377 DC, 16 juillet 1996, paras. 22 and 23.

[72]Conseil Constitutionnel, No. 2014-439 QPC, 23 janvier 2015, paras. 13-16.

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There are many aspects of these two decisions that are constitutionally significant. First, the Council did not see any difference between French citizens who were born French and those who acquired French citizenship after birth. In other words, according to the Council, the fact that some citizens had to go an extra mile to be recognised as French was irrelevant in law: all were citizens the same. Second, in both decisions Council members fell short of explaining *why*, despite this apparent equality, the law could construe French citizens with foreign heritage as presenting a heightened security risk. They did not clarify why the protection of national security could reasonably consider foreignness to be a relevant factor. And third, there is a sense when reading the 1996 and 2015 decisions together that the Constitutional Council only tolerates the discrimination instituted by deprivation laws because they are limited in time. There were even strong hints in 2015 that 15 years constituted the maximum limit: in the words of the Council, 'this 15-year period … which *could not be extended* without creating a disproportionate interference with the equality of [French citizens]' (emphasis added).[73]

The recent opening of the archives of the 1996 decision also shed a more complex light on the motivations of the Council.[74] Most members were opposed to what was effectively the turning of citizenship deprivation into a security measure. Alain Lancelot saw it as a 'shocking' measure that was reminiscent of darker times when naturalised 'compatriots' were handed over to 'enemy forces'.[75] Others were 'hurt' by the text, which created a whole category of second-class citizens based on their heritage and the practical effect of which in the protection of national security was nil.[76] But Council members were about to remove another provision of the 1996 Bill and some feared that removing the paragraph on citizenship deprivation as well would be too much.[77] They also felt that censuring this provision should lead them to cancel the *entire legal framework* of citizenship deprivation, since the other grounds also distinguish between citizens according to their foreignness. This move, they argued, fell beyond what was

[73]Ibid., para. 15.

[74]As published on the website of the Constitutional Council. These accounts of the Council's deliberations, which highlight individual positions, are made accessible every 25 years. In the present case, the Compte rendu can be accessed at https://www.conseil-constitutionnel.fr/node/26082, visited 27 September 2023.

[75]Ibid. Conseil Constitutionnel, Compte rendu de séance (archives), 16 July 1996, p. 27. The Vichy government 'withdrew' the citizenship of 15,000 individuals during the Second World War, including 7,000 Jews, and deprived 132 individuals, including General De Gaulle, for lack of loyalty.

[76]Ibid. *See* notably the opposition of Monsieur Lancelot (p. 26 and 28), Madame Lenoir (p. 27), and Monsieur Abadie (p. 28)

[77]This is the only time that the Constitutional Council removed a provision in a counter-terrorism bill on the ground that it constitutes a disproportionate sanction. The provision in this case criminalised helping illegal migrants to come and stay in France: Compte rendu, *supra* n. 74, Monsieur Faure p. 27.

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being asked of them in this case; they were 'constricted and constrained' (*'nous sommes contrits et contraints*').[78] It was thus eventually institutional restraint that played in the favour of the government in 1996 (and possibly in 2015 too), deference to the ability of Parliament acting as the representative of the citizens to define the contours of the political community.

Another set of issues that has received important scrutiny from the French courts has been connected to the proportionality of the cancellation decision when balanced against interference with Convention rights. The approach taken by the Conseil d'Etat on this issue was laid out in the case of *M.A*.[79] There were five individuals in this case who had all been convicted of a terrorist offence by the Court of Appeal of Paris in 2007 and who had all acquired their French citizenship through different gateways. They were all deprived of their citizenship in 2015 in the aftermath of the Paris attacks. Under the pressure of its rapporteur, the Conseil d'Etat agreed that their Article 8 ECHR right was engaged insofar as it affected their 'social identity', which is protected under private life.[80] But soon the court was faced with a corresponding issue: how does one measure, in law, the strength of this 'social identity', the importance of a person's citizenship in their personal development? For Xavier Domino, the rapporteur, the court had to look at the mode of entry into the citizenry (naturalisation, registration, etc) as well as the length of time since acquiring citizenship.[81] He also implicitly referred to the degree of allegiance of that person to French dominant values –or, to put it more crudely, their degree of *integration* – which he measured by looking at the crime committed. He concluded that while three out of the five individuals in this case had a strong claim under Article 8 (because they were born in France):

> . . . the actions for which they have been convicted [terrorism] reveal [different] allegiances as well as the little role that their allegiance to France and its values played in the development of their personal identity.[82]

In other words, their integration had failed. France and its values had not played an important role in the development of their personal identity. But rather than this being France's failure, the failure was interpreted as theirs and theirs alone: they had failed in their test of becoming good citizens by acting in ways that were

[78]Compte rendu, *supra* n. 74, Monsieur Abadie p .28.

[79]M.A, *supra* n. 20.

[80]The argument that family life was engaged was refused, however. For a criticism *see* J. Lepoutre, 'Déchéance de Nationalité: Après Le Débat Constitutionnel, Le Temps Contentieux', *Revue Française de Droit Administratif* (2016) p. 1188.

[81]Most of these conditions had been laid down by the ECJ in *Rottmann*, *supra* n. 33.

[82]Conclusions du rapporteur public Mr Xavier Domino CE, 2/7 ssr, 8 juin 2016, No. 394348 (*M.A*), p. 11.

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considered to be fundamentally 'un-French'.[83] This reasoning partly echoes the deprivation sanctions that we saw emerging during the revolution, when citizens' rights were contingent on their 'worthy' conduct and good virtues. But there is also much today that departs from this context. Indeed, unlike the time of the revolution, present-day citizenship deprivation is not just about losing citizenship rights (civic, political, etc) but it is also about losing nationality and the protection that this status confers. Yet, nationality has been traditionally indifferent to expressions of allegiance to France. In his work, Lepoutre shows how losing one's nationality (or its former equivalent, the 'quality of being French') on the grounds of disallegiance was not historically placed in a value framework: it was about cutting territorial links or expatriating oneself.[84] Today the logic of both citizenship ('worthiness' and values attached to the status) and nationality (connection to the territory of the state and, increasingly, national understandings of togertherness) have been mixed in French laws in ways which imply that being a national is also about being a good citizen.[85] This does not mean, however, that one cannot be critical of this mixing, not least for its far-reaching effects on people's rights in the context of citizenship deprivation. This merging is equally upsetting because it entrenches racialised expectations of good conduct on the part of 'new' French citizens. Indeed, the 15-year period during which French citizens can potentially be subjected to citizenship deprivation works as a reminder that they need to behave better than birthright citizens, that they need to prove worthy of the 'favour' that the state conferred upon them or else risk losing their citizenship.[86] One of the common arguments advanced to sustain this position is that the state must be able to double-check that new citizens 'stick by their words' (i.e that they know and accept French dominant histories and values); indeed, in the archives of the decision from 1996, Council member Mr Dailly refers to people who had voluntarily 'solicited the honour of being French' and must thus behave accordingly.[87] Yet, some of these 'new' citizens may have been

[83]Putting the duty to integrate on the individuals rather than on the state is a common feature of discourses on integration: Sayad, *supra* n. 36.

[84]J. Lepoutre, 'Entre territoires et valeurs : les origines conflictuelles de la déchéance de nationalité', in A. Dionisi-Peyrusse et al. (eds.), *La nationalité, enjeux et perspectives* (LGDJ 2019) p. 315.

[85]Especially since the law of 1927, when grants of formal citizenship were turned into a 'bet' on the future integration of the individuals, and citizenship deprivation was imagined as one of the safeguards to double-check that the state had not made any mistake in naturalising people who turned out to be 'bad' citizens. *See* for example Weil, *supra* n. 35, p. 63-70.

[86]French citizenship attribution is often depicted as a 'favour' granted by the state in public discourses: D. Fassin and S.Mazouz, 'Qu'est ce que devenir français ? La naturalisation comme rite d'institution républicain', 48 *Revue française de sociologie* (2007) p. 723.

[87]Compte rendu, *supra* n. 74, p. 26. Christian Joppke presents elements of this argument in C. Joppke, 'Terror and the Loss of Citizenship', 20 *Citizenship Studies* (2016) p. 728 at p. 742.

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naturalised as French whilst others may have been born in France to foreign parents. In this latter case, which applied to at least two people in the *M.A*, individuals are not held to any *proof of integration* or *assimilation* to France to acquire French citizenship. Their citizenship is a right that is only subjected to a condition of residence. That is, they never had to demonstrate their knowledge and commitment to France and its values. If we follow the reasoning of the argument pre-cited, it becomes unclear on what basis registered citizens could be held to heightened expectations of 'good citizenship', to a duty to integrate or expectations of proofs of allegiance, when birthright citizens without a foreign heritage could not.[88] And, in fact, there is no basis. As Mazouz writes, this discrimination forms part of a broader process of delegitimisation of the citizenship of racialised minorities since the 1980s and it is a discrimination that had been acknowledged by most Council members in 1996 in their comments.[89] The Conseil d'Etat thus did well to steer clear of the rapporteur's language of allegiance in the wording of its final decision, although this language was reproduced by the European Court of Human Rights in *Ghoumid*.[90]

The UK: judicial deference and 'subjecthood-lite'

Considerations of lack of allegiance were also central to the case of *Pham* in the UK. Pham was a Vietnamese-born citizen who acquired British citizenship in 1995 and was later deprived of his citizenship in 2011 on terrorist grounds. His case was heard by multiple courts and raised various issues but the discussion over allegiance came through in 2018 before the Court of Appeal.[91] The main argument of Pham's lawyers was that Pham was no longer a threat to the security of the UK since he was serving 40 years' imprisonment in a high-security prison in the U.S. They argued that since citizenship deprivation under UK law was primarily about safeguarding the security of the state, there was no longer any need to deprive him of his citizenship. The Court of Appeal took a different stance and agreed with the government that Pham's conduct constituted 'a situation in which the state is justified in seeking to be relieved of any further obligation to protect the appellant'. The key element here was a breach of loyalty or allegiance. As Lady Justice Arden explained, while the 'right to nationality … is properly described as the right to have other rights, such as the right to reside in the country of residence and to consular protection … it is a right which carries

[88] Yet, this is not to suggest that the argument holds for naturalised citizens either.

[89] S. Mazouz, 'Politiques de La Délégitimation : De La Remise En Cause de La Double Nationalité Au Project d'extension de La Déchéance de Nationalité', 88 *Mouvements* (2016) p. 159.

[90] *Ghoumid*, *supra* n. 19.

[91] *Pham* 2018, *supra* n. 21.

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obligations: it derives from feudal law where the obligation of the liege was to protect, and the obligation of the subject was to be faithful'.[92]

In this definition of British citizenship, there is much that echoes the common definition of nationality under international law (the right to reside etc) as well as a significant nod to old common law precedents dating back to Calvin's case. More fundamentally, *Pham* is a reminder that despite some conceptual clarification as to the rights held by British citizens since the 1990s, British citizenship is still subjecthood. It is a status that talks to the vertical relationship between the sovereign and the individual, one of allegiance against protection, rather than one of horizontal equality between the citizens and their representatives. And, in fact, the absence of a clear conceptual framing around British citizenship has been felt in much of the case law on citizenship deprivation. Indeed, most deprivation cases have triggered technical discussions over relevant legal standards, jurisdiction, access to courts, and statelessness, rather than a detailed examination of the facts and merits of the case (or, at least, not in jurisdictions other than in the Special Immigration Appeals Commission).[93] Prabhat explains this focus on narrow legal issues as legal formalism, where judicial discussions are headed on the statutory framework rather than rights issues – a process which, she argues, is heightened by national security concerns.[94] Such legal formalism was flagrant in the Supreme Court decision in the high-profile case of Shamima Begum, the schoolgirl who was deprived of her British citizenship in 2019 for joining Da'esh in Syria. This case is still ongoing and the legal issues discussed by the Supreme Court differed from those recently decided in the Special Immigration Appeals Commission, although they resonated heavily with the Commission's decision,[95] and they have been conditioning the court's more recent treatment of deprivation cases. At the time, Begum's lawyers had been primarily focusing on securing her return to the UK, since the follow-up of her citizenship deprivation was that she had been conducting her appeal from a camp in North-East Syria. They were arguing that because section 40(2) of the British Nationality Act 1981 granted individuals a full right of appeal, any appeal that did

[92]Ibid., paras. 49-51.

[93]Recent cases are really aiming to challenge the boundaries of the law, however. The strength of the arguments put forward by legal counsel was noted repeatedly by the Commission in the recent decision in *Shamima Begum* v *Secretary of State for the Home Department* SC/163/2019 (SIAC, 22 February 2023).

[94]Prabhat, *supra* n. 13.

[95]*Shamima Begum* v *Secretary of State for the Home Department*, *supra* n. 93. This case in part discussed whether Begum had been a victim of trafficking, whether state authorities had failed in their duty to protect her, and whether she had been left *de facto* statelessness. Yet these issues were considered to be not directly relevant when assessing the legality of the decision to strip her of her citizenship: *see* for example, in paras. 252-260.

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not meet the standard expectations of fairness should result in the cancelling of the deprivation order. Yet, this argument was not followed by the first and second instance courts, the Commission and the Court of Appeal. Although both courts agreed that her appeal was unfair, they differed on how to mitigate the consequences of this unfairness.[96] The Commission was of the view that Begum's appeal should be stayed. The Court of Appeal wanted to remedy the unfairness by supporting the grant of a temporary 'Leave to Enter' that would allow Begum to conduct her appeal from the UK.[97] The Supreme Court decided in favour of the Commission and added that the Court of Appeal had fundamentally 'erred' in its decision, as no legal basis allowed it to call for Begum's return.[98] But the central pronouncement of the Supreme Court's decision lay elsewhere, in what it said about the scope of the court's review powers in deprivation cases. This scope was considered to be very narrow. Indeed, through scrutiny of the legal framework the Supreme Court found that UK judges did not have the power to second-guess or even question the expediency of a deprivation order, save for matters involving rights issues.[99] In other words, it was not for the Commission to put itself in the shoes of the decision maker; the only thing the Commission could do was to apply traditional UK public law grounds and evaluate whether the decision maker was *reasonable* in thinking that all the conditions were met and/or had not made any material error by failing to taking relevant factors into account (or taking irrelevant factors into account). In cases involving human rights issues – which, as we have seen, the Supreme Court said the judges must decide for themselves – the upshot of *Begum* has been that successive courts have decided against substituting their evaluation of the national security interests.[100] As a result, at least one side of the 'balance' in rights assessments remains closed to the courts and judicial deference endures as the watchword of deprivation cases.

But there is also a more discreet element in the Supreme Court's *Begum* decision which has not been picked up by commentators and which echoes the legacy of subjecthood in modern-day British citizenship. Indeed, the third-party organisation 'JUSTICE' had submitted to the Supreme Court that the ancient common law bonds between the Crown and its subjects, the bonds of subjecthood, could provide the protective elements that were missing in the legal framework to repatriate Begum. JUSTICE considered that these bonds of

[96] *Begum* v *Secretary of State for the Home Department* SC/163/2019 (SIAC, 7 February 2020).

[97] *Begum* v *Special Immigration Appeals Commission* [2020] EWCA Civ 918, [2020] 1 WLR 4267.

[98] *Begum* Supreme Court 2021, *supra* n. 20.

[99] Ibid., paras. 66-71; on deference: paras. 69 and 70.

[100] *P3* v *Secretary of State for the Home Department* [2021] EWCA Civ 1642, paras. 95-106. An extreme example of this application is *U3* v *Secretary of State for the Home Department*, SC/153/2018 & SC/153/2021 (SIAC, 4 March 2022).

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allegiance-against-protection were constitutional in character and, therefore, had not been displaced by parliamentary legislation.[101] They argued that Begum's subjecthood was still active, since the Home Secretary had not made any comment about her loss of allegiance and that it provided a 'discreet pathway to the *protection* of the laws of the United Kingdom and, in particular, access to the nation's courts and tribunals'.[102] Yet, while this proposition received 'careful consideration' by the Supreme Court, it was not taken up in the decision.[103] In fact, there is a strong sense when reading both *Begum* and *Pham* together that, to the extent that subjecthood provides some constitutional thinking about citizenship in the UK, it only operates as 'subjecthood-lite'. The protective, permanent, and equal elements of subjecthood have been lost and only allegiance remains. Or as Shaw nicely put it, the decisions on citizenship deprivation in the UK reveal that 'so far as citizenship does have constitutional heft … it does so only in the hands of the state, not in the hands of the citizen'.[104]

Conclusion: unveiling different constitutional philosophies

This article unveiled the different constitutional thinking about citizenship in France and the UK through the scrutiny of judicial encounters with deprivation cases. Examining court cases in the UK, we are told that the centuries old image of British subjecthood based on a reciprocal relationship of allegiance against protection has not been erased but re-wrapped as citizenship. Yet, even this subjecthood emerges in diminished form. As the case law made clear, we have now been left with a form of 'subjecthood-lite' that asks for the allegiance of the subjects without guarantees of protection in return. More fundamentally, the chief takeaway of the UK courts has been to reveal that while the UK understands nationality (who belongs to the UK and who does not) and set it out during decolonisation, it is a democracy in which the citizens are not the source of political authority and legitimacy in the state; a democracy without a coherent concept of citizenship. The courts tend to treat citizenship in the deprivation case law as a fundamentally procedural question rather than a constitutional one. They remain focused on the presence or absence of a statutory basis for the exercise of state power, on the *vires* of the case, because they understand their supervisory role

[101] Intervener submission by JUSTICE, Shamima Begum v Secretary of State for the Home Department, UKSC 2020/0156, 26 October 2020, Libertas Chambers; *see* para. 2.

[102] Ibid., para. 13.

[103] *Begum*, *supra* n. 20, para. 14.

[104] Jo Shaw was speaking about the case of Shamima Begum: 'GLOBALCIT Review Symposium of The People in Question: Citizens and Constitutions in Uncertain Times, Jo Shaw, A Response to Reviewers' p. 7, https://globalcit.eu/globalcit-review-symposium-of-the-people-in-question-citizens-and-constitutions-in-uncertain-times-jo-shaw/7/, visited 27 September 2023.

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as primarily geared toward the implementation of Parliamentary sovereignty. In addition, these cases remind us that there is no normative benchmark to constrain Parliament's omnipotence in the UK. Or, as some would rightly argue, if such benchmarks *do* exist, their lack of entrenchment in the current political and security context gives them only a dispensable secondary role.

This signals an important difference from France. The cases on citizenship deprivation in France reveal that there has been more judicial engagement with the content of citizenship and citizens' rights and that one central reason for this is that French citizenship has more constitutional purchase. The French modern trilogy – the integration of the citizen, the state, and the nation together – implies that all three bodies are interconnected in webs of legitimation and power. In France, the primary constitutional roles attributed to the citizen are to legitimise state power by being implicated in the creation of legal norms *and*, increasingly, by being recognised as a passive recipient of rights. In other words, the citizens are put simultaneously at the *beginning* and the *end* of laws, which creates important constitutional tensions that affect state practices. This is what we saw when analysing the discriminatory framework of citizenship deprivation, where constitutional guarantees of equality were put face-to-face with the will of the majority of the electors in the state in the case law. And while these confrontations have been settled in favour of the latter, they have nonetheless fostered debates around the value of citizenship in the French legal framework which, at least for now, has participated in the limitation of the further expansion of citizenship deprivation powers.[105]

Eventually, however, the story that this article has told is not a happy one for those of us who deem citizenship (understood to have both active and passive elements) to be a central concept in our modern democracies. While there are differences between states in how far they have gone down the citizenship deprivation route, the examples taken from this article remind us that citizenship is still at the mercy of poorly drafted legislation and poorly minded legislators (as well as poor institutional practices more broadly), and that this fact is especially visible in the context of national security. The cases analysed have highlighted that, in contrast to the example of the U.S. discussed in the introduction to this article, the citizens in France and the UK have not *themselves* or *individually* been recognised as holders of sovereignty; their citizenship remains contingent and unsecured.

This leads me to some brief concluding thoughts. First, if we consider constitutional democracy to be indeed about state institutions 'sifting', 'refining'

[105]This is what we saw happening in some ways in the constitutional debates in 2015–16, when the National Assembly and the Senate could not agree on a similar text. The National Assembly favoured a phrasing that did not distinguish between French citizens while the Senate preferred to safeguard statelessness and explicitly reserve the application of citizenship deprivation to multiple nationality holders. The proposal eventually failed, partly because of this failure to agree on the same text.

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and 'converting' popular opinion into 'effective policy and action',[106] we may want to ensure that these institutions are functioning well, including before claims of national security protection. Second, in the context of citizenship deprivation the international legal framework has proved to be a poor ally in the protection of citizenship, but this fact does not mean that we should discard international law's provisions altogether.[107] Third, giving a more important constitutional footing to citizens' subjective qualities may be part of the solution (including, for example, concerns about equality) – albeit with the two caveats: (a) that this does not lead to the depoliticisation of citizenship itself; and (b) that these qualities are not framed as *citizens'* qualities but as qualities attributed to individuals as autonomous beings.[108] These caveats irremediably qualify this submission by making it very difficult indeed to implement and, in any case, not a hard and fast rule. But the key point is that having some constitutional tension between different legitimacy principles might be a good thing, at least in so far as it ensures some form of democratic dialogue between and within state institutions. In a field like that of national security, which typically erases most forms of political disagreement, this might temper the most politically expedient state practices. And fourth, these elements will be more effective if they come as one package; that is, with well-functioning institutions, an operative international framework, and a re-centring of the citizen at the core of constitutional norms, with both active and subjective qualities. Together, they may be an easier gateway to secure citizenship than expecting a full reversal of conceptions of state sovereignty.

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[106]M. Loughlin, *Against Constitutionalism* (Harvard University Press 2022).

[107]Although, in France, the expansion of the scope and standard of review was a direct consequence of the reception of European jurisprudence (*see* the Conclusions of the rapporteur Xavier Domino in *M.A*, *supra* n. 82). And statelessness has been an important part of the debates in both countries.

[108]L. Bosniak, 'Constitutional Citizenship through the Prism of Alienage', 63 *Ohio State Law Journal* (2002) p. 1285.

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