Imperial citizenship and the weaponisation of international law

RSC 2023/54
Robert Schuman Centre for Advanced Studies
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WORKING PAPER

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Neha Jain and Rainer Bauböck (Eds.)

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ISSN 1028-3625

Published in September 2023 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)

Italy

With the support of the Erasmus+ Programme of the European Union

Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the European Education and Culture Executive Agency (EACEA). Neither the European Union nor EACEA can be held responsible for them.

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Abstract

Citizenship is generally considered an aspirational status that entitles its holder to a set of rights to be secured and perfected, including through prudent deployment of international law instruments and institutions relating to human rights. But what when citizenship, and its international counterpart, nationality, is wielded not as a shield that protects the dignity and personhood of its bearer but rather as a sword that states can command to harm or to oppress? Nationality attribution can be oppressive for both individuals and states. In the former case, it serves to denude an individual of rights they would have enjoyed but for the attribution. In the latter situation, it functions as a weapon to threaten or destabilise vital interests of other states. Should international law continue to refrain from intervening in a status the attribution of which is regarded as a sovereign prerogative? In her lead essay for this GLOBALCIT forum Neha Jain argues that international law should do more in situations of oppressive nationality. The ten contributors to this debate exploring the "dark side" of citizenship and potential remedies in international law include Jelena Džankić, Eleanor Knott, Lindsey Kingston, Ramesh Ganohariti, Timothy Jacob-Owens, Bronwen Manby, Peter Spiro, Rainer Bauböck, Noora Lori and Lior Erez.

Keywords

weaponised citizenship, oppressive nationality, passportisation, international law, contested territories, multiple citizenship, extraterritorial naturalisation

Imperial citizenship and the weaponisation of international law

Timothy Jacob-Owens*

Neha Jain raises concerns regarding the nefarious uses of citizenship by states – illustrated, *inter alia*, by the Russian "passportisation" tactics in Georgia and Ukraine – arguing that these demonstrate the need for international law to 'restrict oppressive nationality attribution'.[119] More precisely, she suggests that international law should 'pro-actively guide and constrain nationality ascription', including by 'proscribing mass naturalizations outside the state's territory' and 'establish[ing] principles for evaluating what types of conduct would constitute valid individual consent for the purposes of extraterritorial nationality attribution'. While I share Jain's concerns about the specific cases she discusses, I am sceptical that international law offers the most effective means of addressing them. My scepticism stems from the simple observation that, in principle, states may have good reason to offer targeted routes to citizenship acquisition for groups outside their territories. On Jain's view, such practices only become 'oppressive' if they have 'negative consequences for purported beneficiaries' and/or 'threaten or destabilise vital interests of other states'. In order to identify a genuine instance of "weaponised citizenship", international law will therefore need to be able to accurately determine the interests of both the target group(s) and the affected state(s). As Eleanor Knott demonstrates, this requires considerable "empirical nuance".[120]

With this in mind, I argue that it would be very difficult, if not impossible, to formulate a set of globally applicable standards with sufficient precision that they could capture every relevant instance of "oppressive" nationality attribution without simultaneously creating a barrier to legitimate forms of facilitated, extra-territorial naturalization. I illustrate this argument by reference to the unresolved politics of citizenship and decolonization in the United Kingdom (UK). I begin by discussing the historical weaponisation of citizenship (or subjecthood) as a tool of British imperialism. I then turn to contemporary efforts to facilitate access to British citizenship for (formerly) colonized groups, focusing on the case of the Chagos Islanders, before reflecting on how such efforts might be stymied by a "new international law of nationality".

Imperial subjecthood as weaponised citizenship

The core of British subjecthood, as articulated in *Calvin's Case* of 1608, was a reciprocal relation between the subject and sovereign, wherein the former owed an obligation of allegiance and obedience in return for the protection of the latter: *protectio trahit subjectionem, et subjectio protectionem* (protection draws subjection, and subjection protection).[121] On this basis, following the *ius soli* principle, anyone born within the Crown's 'power and protection' was automatically deemed to be a British subject, necessarily owing a concomitant obligation of allegiance and obedience, thereby ensuring that territorial conquest and the subjection of colonized peoples went hand-in-hand. British imperial subjecthood can thus be considered an early form of what Jain calls "long distance nationality": the involuntary attribution of subject status to colonized peoples beyond the metropole served to bolster the image of a unified political community stretching across the territory of the Empire.

While superficially uniform (and unifying), British subjecthood was also, as Devyani Prabhat discusses, substantively "indeterminate", masking an unequal distribution of rights between white colonizers and racialized, colonized populations.[122] For the latter, British subjecthood was in practice often no more than the "zombie citizenship" Jain describes in her kick-off contribution. A relatively recent illustration of this appeared in the late 1960s and early 1970s, as documented

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119 Jain 2022.

120 Knott 2022.

121 *Calvin's case,* The reports of Sir Edward Coke, knt. [1572-1617], #25 - The reports of Sir Edward Coke, knt. [1572-1617]. ... v. 4. - Full View | HathiTrust Digital Library.

122 Prabhat D. (2020), 'Unequal Citizenship and Subjecthood: A rose by any other name..?', *Northern Ireland Legal Quarterly* 71(2), 175-191.

by Ian Sanjay Patel, when British Asians were denied the right to enter the UK as they fled persecution in the former protectorates of Kenya and Uganda.[123] The latent inequalities of British subjecthood were later (partially) formalized under the British Nationality Act 1981, which distinguished between full "British citizenship"[124] and the lesser categories of "British Dependent Territories citizenship"[125] and "British Overseas citizenship",[126] as well as a residual category of "British subjects". [127] Only individuals holding the first of these statuses, predominantly white Britons with ancestral ties to the British Isles, held an unqualified right to enter the UK. Weaponised citizenship – both in the form of "long distance nationality" and "zombie citizenship" – has thus historically been a core tool of empire, allowing Britain to claim supremacy over colonized populations while simultaneously denying them core citizenship rights.

Oppressive nationality or reparative citizenship?

In more recent years, the UK government has taken steps to facilitate access to British citizenship for various (formerly) colonized groups who were previously denied access to the status. These include the historical inhabitants of the Chagos Islands (officially known as the British Indian Ocean Territory or BIOT), an archipelago recently described by Philippe Sands as Britain's "last colony" in Africa,[128] who were forcibly removed in the mid-1960s in order to make room for a US military base. At the time, no plan was made to compensate the Chagos Islanders or to allow them to resettle in the UK, leaving many stranded in Mauritius or the Seychelles. As a consequence, while some members of the Chagossian diaspora have subsequently been able to acquire either full British citizenship or British Dependent Territories citizenship (later renamed "British Overseas Territories citizenship"),[129] others hold citizenship of Mauritius or the Seychelles. In 2002, limited provision was made to allow the children of women born on the Chagos Islands to access full British citizenship.[130] Twenty years later, following sustained campaigning by members of the Chagossian community,[131] a new citizenship registration route has now been created for all "direct descendants" of individuals born on the islands.[132]

These measures can be thought to exemplify what Amanda Frost has called "reparative citizenship", i.e. a form of corrective justice for the members of groups (and their descendants) who have historically been unjustly excluded.[133] This chimes with the views expressed by some of the Chagos Islanders themselves. For instance, in written evidence submitted to the UK parliament, the BIOT People's Empowerment Social Media Platform argued that facilitated access to British citizenship was needed to address 'historical unfairness'[134] and 'to make proper amends for the discrimination that the Ilois [i.e. Chagossians] have suffered' at the hands of the UK government.[135] From this perspective, providing a fast-track, extra-territorial route to acquiring British citizenship, which carries with it a legal right of abode in the UK, would seem to go some way towards remedying the injustices of the past.

There are further empirical nuances to consider, however. Chagossian Voices, another campaign group, has argued in favour of facilitated access to British citizenship on the basis that this would offer a means of escaping the marginalization and discrimination still suffered by those residing in

123 Patel I. (2021), *We're Here Because You Were There: Immigration and the End of Empire*, Verso Books.
124 British Nationality Act 1981, Part I (United Kingdom).
125 *Id.*, part II.
126 *Id.*, part III.
127 *Id.*, part IV.
128 Sands P. (2022), *The Last Colony A Tale of Exile, Justice and Britain's Colonial Legacy*, Blackwell's.
129 British Overseas Territories Act 2002, s.2 (United Kingdom).
130 *Id.*, s.6.
131 Grierson J., 'Chagos Islands descendants can apply to become British nationals', The Guardian, 23 March 2022, Chagos Islands descendants can apply to become British nationals | Chagos Islands | The Guardian.
132 Nationality and Borders Act 2022, s.3 (United Kingdom).
133 Amanda Frost (2022), 'The rise of reparative citizenship', *Citizenship Studies*, 26:4-5, 454-459.
134 Written evidence from BIOT Citizens (NBB0019), UK Parliament, committees.parliament.uk/writtenevidence/38467/pdf/.
135 *Id.*

Mauritius and the Seychelles, where the Chagossians form an Afro-Creole minority.[136] This raises potential issues of consent: if their only other option is marginalization and discrimination in Mauritius or the Seychelles, are the Chagos Islanders and their descendants really in a position to freely consent to acquiring British citizenship? Indeed, the priority for many Chagossian campaigners is not access to British citizenship and the UK mainland, but rather access to their ancestral home, which the UK government continues to deny them. According to Olivier Bancoult, leader of the Chagos Refugees Group, '[w]e are not against giving citizenship to the third and fourth-generation descendants […] but it is most important that the UK government should give us the right to live on the Chagos Islands'.[137] In the absence of this right, for at least some members of the Chagossian diaspora, British citizenship remains no more than a "zombie citizenship".

The measures to facilitate access to British citizenship also do nothing to resolve the UK's ongoing territorial dispute with the former colony of Mauritius, from which the Chagos Islands were unlawfully separated prior to independence.[138] From a Mauritian perspective, as Vishwanath Petkar argues, 'the UK government's move seems like an attempt to retain control over the islands and stem domestic dissent, rather than actually fix the conflict'.[139] In this way, the measures bear a striking resemblance to the passportisation tactics deployed by Russia in Georgia and Ukraine, offering a 'fast-track naturalization' route targeting a specific population resident in a foreign State with whom there is an ongoing territorial dispute. On this basis, and particularly in light of the historical weaponisation of British imperial subjecthood described above, the extension of British citizenship to all Chagossian descendants might be viewed as perpetuating a form of weaponised "long-distance nationality", undermining the interests of both Mauritius and (some of) the Chagos Islanders themselves.

Weaponising international law

Lindsay Kingston argues that Jain's proposed international norms would have no meaningful effect on the citizenship practices of powerful and persistent "outlaw" states, who disregard international legal norms as and when it suits their interests.[140] My concern is that such states might instead strategically deploy these norms to reinforce their imperialist practices. Had these norms been in force at the turn of the 21st century, for example, the UK government might have exploited the ongoing territorial dispute with Mauritius and the divergent interests among the Chagos Islanders to deny calls to facilitate their access to full British citizenship, arguing that this would constitute a prohibited form of nationality attribution and hence a breach of international law.

This risk is by no means limited to the case of the Chagossians, but rather applies to any targeted, facilitated route to citizenship acquisition that seeks to right the wrongs of the past. In the UK context, for example, the same issues might also arise in relation to the registration route for British Nationals (Overseas) who have historical ties with Hong Kong,[141] and the facilitated naturalization scheme for members of the Windrush generation, who came to the UK from its former colonies in the Caribbean.[142] There are also parallels, as Jelena Džankić discusses, with the measures introduced in Spain and Portugal to facilitate access to citizenship for Sephardic Jews.[143] The crux of the issue is the difficulty of distinguishing – in both formal legal and policy terms – between oppressive nationality and reparative citizenship. My claim here is not that these measures necessarily *should* be considered a form of oppressive nationality attribution, merely that they could plausibly be framed as such. In turn,

136 Response To the proposed Nationality and Borders Bill 2021, Chagossian Voices, UK Parliament.
137 Syal R., 'Evicted Chagos Islanders' descendants to get British citizenship', The Guardian, 1 September 2022.
138 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95.
139 Petkar V., 'Mauritius dispatch: UK Chagos citizenship scheme raises concerns for former and current islanders', Jurist, 30 March 2022, Mauritius dispatch: UK Chagos citizenship scheme raises concerns for former and current islanders - JURIST - News.
140 Knott 2022.
141 British Nationality Act 1981, s.4 (United Kingdom).
142 See Windrush Scheme: full eligibility details, Windrush Scheme: full eligibility details - GOV.UK (www.gov.uk).
143 *von Pezold v. Zimbabwe*, ICSID Case No ARB/10/15, https://ic-sid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/10/15.

these ambiguities could allow states to reject reparative citizenship claims as potential violations of international law. In this way, Jain's proposal might have the perverse effect of legitimising oppressive nationality denial, rather than challenging oppressive nationality attribution.

We might imagine that this risk would be averted if the proposed new norms were to be accompanied by a new international adjudicatory body charged with their enforcement. Indeed, Jain makes reference to the establishment of 'fora in which host countries could challenge [extraterritorial nationality] attribution'.[144] However, a cautionary tale might be drawn from the 2015 *Von Pezold* arbitral award, in which an international tribunal found that Zimbabwe's post-independence policy of land expropriation and redistribution was racially discriminatory against white landholders. A seemingly progressive international legal norm – the prohibition of racial discrimination – was thus interpreted as proscribing domestic efforts to meet local demands for land reparations, eliding the wider context of colonial dispossession, as Ntina Tzouvala has shown.[145] This finding does not necessarily mean that a 'new international law of nationality' would hinder (post-)colonial reparative citizenship claims. But the long-standing constitutive relationship between international law and European imperialism – illustrated, as Kanad Bagchi explains,[146] by the "Chagos tragedy" itself – is far from reassuring.

I do not wish to suggest that there is no hope for a more comprehensive set of international norms of the sort Jain envisages, subject to strict conditions along the lines proposed by Ramesh Ganohariti.[147] But it strikes me that there is always a risk that imperialist states would weaponise the international law of citizenship just as easily as they do its domestic counterpart.

144 Jain 2022.

145 Tzouvala N. (2022), 'Invested in Whiteness: Zimbabwe, the von Pezold Arbitration, and the Question of Race in International Law', *Journal of Law and Political Economy* 2(2), 226.

146 Bagchi K., 'Imperialism, international law and the Chagos Islands,' Volkerrechtsblog, 1 March 2019, Imperialism, international law and the Chagos Islands - Völkerrechtsblog (voelkerrechtsblog.org).

147 Ganohariti R. (2022), 'Conditions for regulating the weaponisation of citizenship', GLOBALCIT, Weaponised Citizenship: Should international law restrict oppressive nationality attribution? - Page 5 of 12 - Globalcit (hereinafter 'Ganohariti 2022').