

BOOK REVIEW SYMPOSIUM

CITIZENSHIP, CONSTITUTIONS AND PEOPLES ON THE MARGINS

JULIJA SARDELIĆ*

It was a pleasure to read Jo Shaw's new thought-provoking book entitled *The People in Question: Citizens and Constitutions in Uncertain Times*¹ and it is a privilege to be in dialogue with her ground-breaking work in this symposium. This comment will be focusing on the book's key concepts from a particular angle: it discusses citizenship, constitutions and 'the people' from the perspective of 'the margins'. The aim is to understand what Shaw's contemplation on the relations between these concepts could mean for marginalised minorities, who might (or might not) be citizens in Europe and around the globe. While these comments can be placed in the domain of socio-legal analysis (such as Shaw's book itself), they lean towards the 'socio' side of analysis, given that they are written by a political sociologist.

I would like to begin this comment with two illustrative examples that, in my view, fit very well within Shaw's two overarching arguments on constitutional citizens and the (re-)constitution of the people in the turbulent times of the last decade. The first example touches upon the position of Romani minorities in Slovenia and their access to rights as citizens. Slovenia, which has often been cited as a 'wunderkind' of post-socialist transition, has amended the *Slovenian Constitution* in 2016 to include an article against privatisation of water sources and to ensure 'the right to drinking water' for the entire population of Slovenia:

Everyone has the right to drinking water. Water resources shall be a public good managed by the state. As a priority and in a sustainable manner, water resources shall be used to supply the population with drinking water and water for household use and in this respect shall not be a market commodity. The supply of the population with drinking water and water for household use shall be ensured by the state directly through self-governing local communities and on a not-for-profit basis.²

The first questions that might appear in this regard concern what is meant by everyone in the *Slovenian Constitution*: is it only in reference to citizens? Can the

* Dr Julija Sardelić is a Lecturer in Political Science and International Relations at Victoria University of Wellington where she (co-)teaches courses on human rights, politics of (migration) and nationalism. Her research is within the scope of citizenship and migration studies and she focuses on the position of marginalised minorities (Roma in particular) and forced migrants as citizens. Before her current post, she was a Marie Skłodowska-Curie Postdoctoral Fellow at the University of Leuven (Belgium), Postdoctoral Researcher at University of Liverpool (United Kingdom), Max Weber Fellow at the European University Institute and Research Fellow at the University of Edinburgh. Her book entitled *The Fringes of Citizenship: Romani Minorities in Europe and Civic Marginalization* will be published in 2021 with Manchester University Press.

¹ Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press 2020).

² *Constitution of the Republic of Slovenia*, Official Gazette of the Republic of Slovenia, No 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13 and 75/16 (Slovenia) art 70a.

term be extended to residents? However, going further empirically, the question is actually whether all citizens have access to drinking water. In the midst of the COVID-19 pandemic, the European Court of Human Rights ('ECtHR') decided on the case of *Hudorović v Slovenia* ('*Hudorović*'), where two Romani communities were suing Slovenia for not granting them access to drinking water.³ As previous reports from nongovernmental organisations ('NGOs') have shown, a great number of Romani communities in Europe (including Slovenia) have no access to drinking water.⁴ The individuals from the Romani communities in *Hudorović* demanded their constitutional right as citizens from the Slovenian government. However, the government replied that they had done their utmost to provide access to drinking water for the two communities and that connecting an informal Romani settlement (that they claimed was built without permits) to the water system would represent discrimination against the majority of citizens in Slovenia:

The Government pointed out that illegally constructed buildings were not allowed to be connected to public utility infrastructure facilities such as drinking-water supply and the discharge of wastewater, emphasising in this regard that the applicable laws applied uniformly to everyone and further arguing that any provisions to the contrary would amount to discrimination against the majority vis-à-vis the Roma community.⁵

While the ECtHR decided that there had been no violation of the right to private life under art 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*,⁶ the NGOs representing the two communities have argued that the decision further discriminated an already marginalised group of citizens, especially in context of the global pandemic: how can a minority population stay safe from COVID-19 when they have no facilities to wash their hands?⁷

The argument of the Slovenian Government — that providing equal rights to a minority would be discriminatory towards the majority — was not the first time a government has argued in such a manner. Similar arguments have been previously made in other contexts. For example, in 2007 the United Nations passed the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*').⁸ There were four countries that initially voted against *UNDRIP*: Australia, New Zealand, Canada and the United States of America, all of them settler-colonial states. Among the principles that *UNDRIP* introduced was an obligation for governments to gain the informed consent of indigenous people in matters that concern them

³ *Hudorović v Slovenia* (European Court of Human Rights, Second Section, Application Nos 24816/14 and 25140/14, 10 March 2020) ('*Hudorović*').

⁴ *Thirsting for Justice: Europe's Roma Denied Access to Clean Water and Sanitation* (Report, European Roma Rights Centre 2017) 8; Marek Szilvasi, 'Parallel Claims to the Human Rights to Water: The Case of Roma in Slovenia' in Daniele Archibugi and Ali Emre Benli (eds), *Claiming Citizenship Rights in Europe: Emerging Challenges and Political Agents* (Routledge 2017) 148.

⁵ *Hudorović* (n 3) [127].

⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No.005 (entered into force 3 September 1953).

⁷ Julija Sardelić, "'Protecting Our Own People" in the Pandemic Politics?', *Discover Society* (Blog Post, 17 April 2020) <<https://discoversociety.org/2020/04/17/protecting-our-own-people-in-the-pandemic-politics/>>.

⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295 (2 October 2007) ('*UNDRIP*').

and the redress of land ownership and rights.⁹ Australia's objections were to the veto power of indigenous people (coming from informed consent) as it would allegedly undermine the processes of a democratically elected government in the country.¹⁰ Similarly, New Zealand initially opposed *UNDRIP*. The New Zealand representative expressed its opposition in the following way:

In terms of land and resources, New Zealand commented that the declaration's provisions simply cannot be practically implemented, and it would produce inequality between Maori and other citizens. ... Concerning the principle of informed consent as an alleged 'right of veto' by Indigenous citizens over a democratic legislature, New Zealand insisted that Maori are actually well represented in government institutions, including parliament, and that the declaration text would create 'different classes of citizens, where indigenous people have a right of veto that other groups of individuals do not have'.¹¹

While all four countries that initially opposed *UNDRIP* later on supported it, Sheryl Lightfoot commented that their support was done as a 'selective endorsement', only backing the *Declaration* so long as it would not interfere with the current legislative orders of the respective countries.¹²

Paraphrasing loosely literary theorist Roland Barthes and his now classical work *S/Z*,¹³ the above examples illustrate my reception process as a reader of Shaw's profound book. Contemplating Barthes' theory made me think that in scholarly writing we could find three types of books. The first type of academic book leaves the reader unimpressed after they have finished reading it and does not affect their own thinking. The second type of book affects the reader after they were done reading it: this type of book makes the reader think what did they learned from the material just read. Yet, the best kind of scholarly books are, in my view, the ones that are like a journey for the reader. Such books challenge the reader at every step to be in dialogue with the material just read. The two examples I have presented in the paragraphs above are excerpts from the dialogue I had with the book *The People in Question* while reading it.

Shaw's book masterfully points to ambivalences around her new concept of constitutional citizenship. As she shows with her vast empirical analysis, it is not often that constitutions explain what citizenship means in each individual country, as if governments avoid fully defining the meaning of such a monumental and common state building block in a binding manner.¹⁴ Yet perhaps paradoxically, at the same time, what is defined in constitutions gives a certain direction to what it means to be a citizen in any certain state:

Together the chapters show that even though detailed regulation of citizenship within constitutions is rare, leaving key matters to be decided by legislatures, these texts none the less proved the discursive framework within which the ethics and often the practices of citizenship are debated at the national level.¹⁵

⁹ *UNDRIP* (n 8) arts 10, 11.

¹⁰ Sheryl R Lightfoot, 'Selective Endorsement without Intent to Implement: Indigenous Rights and the Anglosphere' (2012) 16(1) *The International Journal of Human Rights* 107.

¹¹ *ibid* 109–10.

¹² *ibid*.

¹³ Roland Barthes, *S/Z* (Editions du Seuil 1970).

¹⁴ Shaw (n 1) 8.

¹⁵ *ibid*.

It is on the basis of Shaw's powerful conceptual analysis that I can talk about the case of Slovenia — where (as in other European Union Member States) most Roma have limited access to drinking water — and draw parallels to how governments of settler-colonial states approach their indigenous citizens. Both cases cannot be fully understood without looking at the broader historical picture; Shaw argues for more of the empirical material analysed in her book:

If words from constitutions are cited, then it should be remembered that these are precisely what they are: just words. Context is indeed everything, and both small changes and the bigger picture could be missed with such a static approach.¹⁶

Indeed, taking the governments' interpretations at face value — that giving certain rights to minorities would discriminate against the majority — ignores the broader context, both in the case of Roma in Europe and in the indigenous populations of settler-colonial states. It ignores past discriminatory legislation and policies that meant Roma were often not able or allowed to buy land, leading them to live in informal settlements.¹⁷ It ignores that, in settler-colonial states, land has been historically stolen from indigenous peoples (taken based on the *terra nullius* principle) or that indigenous peoples were made to sign trading agreements that could very easily be nullified. And it is precisely without these contexts that we would not understand the dynamics in which constitutional citizenship operates. Without these contexts, it would be difficult to understand why the *Slovenian Constitution*, like the one of Poland that Shaw refers to,¹⁸ mentions the Slovenian nation and its right to self-determination in the preamble and only later in the text talks about all citizens. Without the context in which constitutional legal documents were drafted or that in which they operate — even in cases where the state does not have a written constitution, such as the UK but also Aotearoa/New Zealand — we cannot fully comprehend how they constitute the foundation of citizenship. And that is where Shaw masterfully brings not only multi-layered specialities of citizenship, but also multi-layered histories; be it those of how colonialism or EU integration (and the backlash against it) shaped citizenship. They show how the dynamic of constitutional citizenship can enhance the equality and dignity of all human beings (in connection to human rights), but also undermine it.

The two examples remained in my mind while reading Shaw's discussion on how the notion of 'the people' is constituted in populist politics.¹⁹ The allegedly 'discriminated majority' is evoked in populist politics. While this has been highlighted to a greater extent in recent years, Shaw rightfully shows how the populist definition of the people has much deeper roots. The reinterpretation of who the people are can lead, ultimately, to exclusions, as seen in the cases of the Rohingya in Myanmar, Dominicans of Haitian descent in the Dominican Republic

¹⁶ *ibid* 33.

¹⁷ Julija Sardelić, *The Fringes of Citizenship: Romani Minorities in Europe and Civic Marginalization* (Manchester University Press 2021).

¹⁸ Shaw (n 1) 88, citing *Constitution of the Republic of Poland of 2nd April 1997*, Dziennik Ustaw No 78, item 483 (Poland) preamble. For more on populism see Kriszta Kovács. 'People, Sovereignty and Citizenship: The Ethnonational Populists' Constitutional Vocabulary' (2020) 2(2) *Statelessness & Citizenship Review* 389.

¹⁹ *ibid*.

and Roma in former Yugoslav states.²⁰ All these cases of statelessness have their origins in crucial moments when a new definition of ‘people’ has become dominant in different contexts.

Among the many powerful moments included in Shaw’s book, I was particularly struck by her re-centring of certain debates around citizenship. She shows that the Windrush scandal in the United Kingdom should be discussed in the domain of citizenship, rather than migration studies.²¹ Presenting people from the Windrush generation primarily as migrants masks the real context of how British citizenship transformed from a concept that initially included the subject/citizen dichotomy.²² Similarly, this principle is discussed in regards to the cases of *Thoms and Love v the Commonwealth of Australia*, where the question properly revolved around citizenship rather than migration.²³ Such a shift is extremely important for the future of citizenship studies. It is too often that marginalised minorities are excluded from the definition of ‘the people’: their position is not primarily discussed as one of citizens but rather as minorities or, in many cases, migrants.

With the central concept of the constitutional citizen and its interrelation with the definition of people in turbulent times, Shaw’s incredible book not only presented empirically rich material from a vast variety of contexts, but also developed a powerful analytical apparatus that will keep on inspiring many future generations of citizenship scholars (be they lawyers, political scientists, sociologist or historians) in their analysis of citizenship amidst the unsettled conditions we have been witnessing since 2020. Nonetheless, the concept of constitutional citizens can prove to be a powerful tool used in international courts, such as the ECtHR and Inter-American Court of Human Rights, especially when considering the position of marginalised minorities and indigenous peoples.

²⁰ Julija Sardelić, ‘Romani Minorities and Uneven Citizenship Access in the Post-Yugoslav Space’ (2015) 14(2) *Ethnopolitics* 159. For more on statelessness see Natalie Baird, ‘Constitutions, Citizenship and the Shadow of Statelessness’ (2020) 2(2) *Statelessness & Citizenship Review* 377.

²¹ Fiona Bawdon, ‘Remember When Windrush Was Still Just the Name of a Ship?’ in Devyani Prabhat (ed), *Citizenship in Times of Turmoil: Theory, Practice and Policy* (Edward Elgar 2019) 173.

²² Shaw (n 1).

²³ *Thoms and Love v Commonwealth of Australia* [2020] HCA 3 (High Court of Australia).