

## BOOK REVIEW SYMPOSIUM

# THE CONSTITUTIONAL CITIZEN IN NARRATIVES OF PEOPLEHOOD

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## I INTRODUCTION

The central contribution that Jo Shaw makes in her impressive *The People in Question* is the proposition of the concept ‘constitutional citizenship’.<sup>1</sup> She suggests that it encompasses ‘those aspects of the membership relation that go to the very heart of a polity and some of the conditions for its existence’.<sup>2</sup> One of these conditions is a convincing narrative of peoplehood, a story that makes sense of a polity’s past and present, and that projects its future. The characters in such narratives reveal who belongs to ‘the people’ and who does not.<sup>3</sup> From this perspective, the constitutional citizen as ‘a central figure for understanding many dimensions of and tensions within modern citizenship as well for understanding modern constitution-based polities’<sup>4</sup> can be the main character, even the hero, in narratives of peoplehood in some contexts. Consequently, changes to the overall narrative of peoplehood may imply changes to the character of the constitutional citizen. Building on such a reading of constitutional citizenship, this contribution makes two points: first, it highlights how Shaw’s notion of constitutional citizenship helps to understand the relation between constitutional discourse and citizenship. Second, it questions where the limits of this relation lie and when constitutional discourse is beyond the realm of the constitutional citizen. But to start off, the contribution takes a step back and notes some of the narrative features in Jo Shaw’s fascinating *The People in Question* itself.

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

<sup>2</sup> *ibid* 57.

<sup>3</sup> *ibid* 26–27; Rogers Smith, *Stories of Peoplehood* (Cambridge University Press 2003). See Natalie Baird’s contribution about how stateless people per definition do not play a role in such narratives: Natalie Baird, ‘Constitutions, Citizenship and the Shadow of Statelessness’ 2(2) *Statelessness & Citizenship Review* 377.

<sup>4</sup> Shaw (n 1) 44 (emphasis omitted).

II THE NARRATIVE IN *THE PEOPLE IN QUESTION*

Scholars are storytellers. As Barbara Czarniawska has argued, social scientists recount the events and phenomena that they observe, and theorise by connecting them with a plot.<sup>5</sup> From this perspective, Shaw's book not only speaks to the character of the constitutional citizen in narratives of peoplehood, but tells a narrative about the concept of constitutional citizenship itself. This Part highlights some of its notable features. First, it is extraordinarily rich in nested narratives. Telling countless stories-within-the-story, Shaw illustrates the development of constitutional citizenship using concrete cases. In a captivating way, she describes developments as diverse as the definition of the franchises for referendums in post-communist Eastern and Southern Europe,<sup>6</sup> Brexit,<sup>7</sup> the situation of Haitian migrants and their descendants in the Dominican Republic,<sup>8</sup> the suffrage of prisoners in South Africa<sup>9</sup> and many more. As is her objective, Shaw thus includes events linked to (post-) colonialism that too often go untold in the Western narrative of citizenship.<sup>10</sup> Second, she recognises that even academic narratives are told from certain perspectives, as articles and monographs include some events while excluding others, and as scholars (sometimes unconsciously) choose to represent matters in a certain way, with certain words. She repeatedly alerts the reader to the fact that her interpretation and her personal voice underly the book.<sup>11</sup> However, she refrains from explicitly advancing her normative stance about what kind of constitutional citizenship is the most desirable. On the contrary, she distances herself from this simple way of posing the question. Instead, she asks, with more nuance: 'what are the elements that shape the development of the discursive space within which the citizenship/constitution interaction plays out?'<sup>12</sup> Third, Shaw's narrative includes contradicting plots, as it shows different ways in which the observed dots could be connected. She takes, for instance, account of the instrumentalisation thesis, which argues that rather than speaking to 'the very heart of a polity', citizenship is increasingly used instrumentally both by states and individuals.<sup>13</sup> Taken together, these three features do not make Shaw's narrative about constitutional citizenship an easy or conventional one. It does not offer a familiar plot that would reveal at its end one supreme meaning of constitutional citizenship, a moral message about what it should be or what simple lessons are to be learned from her story. Only very carefully does she hint to pluralism as one possible solution to some of the pressures on constitutional citizenship in her

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<sup>5</sup> Barbara Czarniawska, 'Narratives in Social Science Research' (SAGE 2006) 34 e77, 117–29. Similar arguments have been made for legal scholars, see Richard A Posner, 'Legal Narratology (Reviewing Law's Stories: Narrative and Rhetoric in the Law by Peter Brooks, Paul Gewirtz)' (1997) 64(2) *The University of Chicago Law Review* 737; Andreas von Arnould, 'Was War, Was Ist — Und Was Sein Soll. Erzählen Im Juristischen Diskurs' in Christian Klein and Matías Martínez (eds), *Wirklichkeitserzählungen: Felder, Formen und Funktionen Nicht — Literarischen Erzählens* (Springer 2009).

<sup>6</sup> Shaw (n 1) 69–70.

<sup>7</sup> *ibid* 199–210.

<sup>8</sup> *ibid* 107–109. See also Baird (n 3).

<sup>9</sup> *ibid* 168–70.

<sup>10</sup> *ibid* 47–50.

<sup>11</sup> *ibid* 31–32, 175, 253–54.

<sup>12</sup> *ibid* 255.

<sup>13</sup> *ibid* 57, 58–59.

conclusion.<sup>14</sup> This complexity is clearly Shaw's intention and posits a great strength of the book.

### III CHANGING CONSTITUTIONAL CITIZENSHIP WITHOUT CHANGING CITIZENSHIP REGIMES

Shaw's notion of constitutional citizenship carefully builds on the work of constitutional theorists such as Michel Rosenfeld, who have identified citizenship as the 'prism' through which 'constitutional identity emerges'.<sup>15</sup> She similarly conceives of citizenship as an 'articulation' of constitutional identity,<sup>16</sup> in the context of a specific polity at specific times. As Shaw rightly emphasises, for the interpretation of such meaning 'context is indeed everything'.<sup>17</sup> However, her notion of constitutional citizenship allows us to go a step further; it also encompasses the relation the other way around. Namely, looking at constitutional identity discourse as the 'prism' that exposes a deeper meaning of citizenship. Her discussion of the *Basic Law: Israel — The Nation-State of the Jewish People* ('*Israeli Basic Law*') is a case in point.<sup>18</sup> Article 1 of the *Israeli Basic Law* constitutionalises the following brief narrative: the Jewish people established the State of Israel in its homeland and now exercises its unique right to self-determination in this land. The main character of this narrative of peoplehood, the Jewish people, excludes the country's minority citizens.<sup>19</sup> In this way, the *Israeli Basic Law* gives Israeli constitutional citizenship a different and, arguably, more exclusive meaning by re-telling the narrative with a certain set of characters and without touching the formal Israeli citizenship regime itself. Such a perspective on the relation between constitutional discourse and citizenship also helps to make sense of other demands for constitutional change, which may indeed be in deep substantive contradiction to each other. For instance, on the occasion of the 70<sup>th</sup> anniversary of the adoption of the *Basic Law for the Federal Republic of Germany* ('*German Basic Law*'),<sup>20</sup> the German far-right 'Alternative for Germany' called to amend it to enshrine *inter alia* cultural identity, referring to the much-contested term *Leitkultur*.<sup>21</sup> On the other side of the political spectrum, some civil society organisations speaking for migrants and their descendants have advocated for a new section in art 20 of the *German Basic Law*, which would read: 'The Federal Republic of Germany is a diverse country of immigration. It promotes the equal

<sup>14</sup> *ibid* 258.

<sup>15</sup> *ibid* 73; Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 243.

<sup>16</sup> Shaw (n 2) 75–76.

<sup>17</sup> *ibid* 33.

<sup>18</sup> *Basic Law: Israel — The Nation-State of the Jewish People*, 26 July 2018 (Israel).

<sup>19</sup> Shaw (n 2) 71–73. See also the contributions to a debate on *Verfassungsblog* in November 2018, 'Debate: An Israel of, for and by the Jewish People?', *Verfassungsblog* (Blog, 13 November 2018) <<https://verfassungsblog.de/category/debates/an-israel-of-for-and-by-the-jewish-people/>>.

<sup>20</sup> *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany].

<sup>21</sup> Alternative for Germany, *Antrag. 70 Jahre Grundgesetz — Bewährtes Bewahren, an Neue Herausforderungen Anpassen* [Motion. 70 Years of the Basic Law — Proven Preservation, Adapting to New Changes] (Motion 19/10168, 14 May 2019).

participation, equal opportunities and integration of all people'.<sup>22</sup> These demands are based on different conceptions of a German 'people',<sup>23</sup> the former referring to an ethnocultural community and the latter including all human beings in Germany. Notably, neither conception overlaps with the formal German citizenry and neither demand would directly change the citizenship status of any individual. With their (so far unsuccessful) contributions to constitutional identity discourse, both groups instead aim to enshrine opposing versions of a 'happy ending' to their respective German narratives of peoplehood: the maintenance of a supposed coherent cultural identity and the equal participation of all residents in society. In terms of changing constitutional citizenship, though, they work similarly. The suggested amendments would have implications for the meaning of membership in a 'German people' without directly addressing citizenship regimes. Shaw's notion of constitutional citizenship opens up a new and productive way to capture and analyse this relation.

#### IV THE CONCEPTUAL AND EMPIRICAL LIMITS OF CONSTITUTIONAL CITIZENSHIP

But as every concept, constitutional citizenship, too, has its limits. Shaw clearly points this out regarding the demarcation between constitutional citizenship and citizenship more broadly — as she emphasises, constitutional citizenship 'misses much that can be said about the "street-level" aspects of the regulation of citizenship'.<sup>24</sup> The demarcation between constitutional citizenship and constitutionalism more broadly, however, remains somewhat less clear — at least to a social scientist. What is it about constitutionalism, if anything, that lies beyond the analytical scope of constitutional citizenship? The answer could maybe refer to developments within constitutional discourse that, in contrast to the examples given above, do not have clear implications for 'aspects of the membership relation that go to the very heart of a polity'<sup>25</sup> within a certain context. But what might these be? Take for instance the several typical "populist moves" on constitutional citizenship' that Shaw identifies.<sup>26</sup> Most of them directly relate to the governance of citizenship status and citizenship rights. They include, for example, the stripping of the status, or the unequal distribution, of social and welfare rights, which have a clear bearing on membership. One of these moves also refers to structural attacks on the institutions guaranteeing the rule of law itself.<sup>27</sup> While it often comes hand-in-hand with other developments — considered

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<sup>22</sup> Johannes Eichenhofer and Farhad Dilmaghani, *Mehr Integration und Teilhabe. Zwei Vorschläge für Rechtliche Neuregelungen* (Report, Friedrich Ebert Stiftung Forum Berlin 2017) <<https://library.fes.de/pdf-files/dialog/13302.pdf>>; *Anti-Rassismus Agenda 2025 — Für eine Rassismusfreie und Chancengerechte Einwanderungsgesellschaft. Maßnahmenkatalog des Begleitausschusses der BKMO* (Agenda, Bundeskonferenz der Migrantenorganisationen 31 August 2020) 25 <[https://bundeskonferenz-mo.de/wp-content/uploads/2020/08/200831\\_Antirassismus-Agenda-2025\\_BKMO.pdf](https://bundeskonferenz-mo.de/wp-content/uploads/2020/08/200831_Antirassismus-Agenda-2025_BKMO.pdf)>; *Impulspapier Der Migrant\*innenorganisationen Zur Teilhabe in Der Einwanderungsgesellschaft. Wie Interkulturelle Öffnung Jetzt Gelingen Kann!* (Report, Migrant\*innenorganisationen 2016) 9.

<sup>23</sup> Shaw (n 1) 26–28. See also Kriszta Kovács' contribution to this symposium: Kriszta Kovács, 'People, Sovereignty And Citizenship: The Ethnonational Populists' Constitutional Vocabulary' (2020) 2(2) *Statelessness & Citizenship Review* 389.

<sup>24</sup> Shaw (n 1) 44.

<sup>25</sup> *ibid* 57.

<sup>26</sup> *ibid* 190.

<sup>27</sup> *ibid* 190–91. See also Kovács (n 23).

in isolation, is constitutional *citizenship* the best way to analyse such an attack, or is constitutionalism itself on the line here?

In addition to such suspected conceptual boundaries to the broader realms of citizenship and constitutionalism, the concept of constitutional citizenship is also empirically limited. It is not helpful to analyse any polity at any time. Shaw suggests that constitutional citizenship might not play a role at all in some cases. There can even be such an ‘absence’, for example, where there is little ‘constitutional content’ to citizenship and where the dominant understanding of membership is independent of citizenship status. Shaw cites Christian Fernández’ discussion of the Swedish case in this context, where citizenship is mentioned in the four constitutional documents, but where the understanding of membership remains detached from state and citizenship and closely tied to nationhood.<sup>28</sup> In other words, the constitutional citizen is not the main character in the dominant Swedish narrative of peoplehood. Nevertheless, can the constitutional citizen really be ‘absent’? As discussed in the previous Part, Shaw shows that one can learn about constitutional citizenship beyond citizenship regimes or the explicit mention of citizenship in constitutions. She discusses in detail how equality and dignity underpin constitutional citizenship substantively and fulfil, or fail to fulfil, citizenship’s promise of full membership.<sup>29</sup> Against this background, could not the particular Swedish interpretation of these values provide some insight to what a Swedish version of constitutional citizenship may look like? In other words, is constitutional citizenship really ‘absent’ if it is not dominant in constitutional discourse and narratives of peoplehood — or is it always in the background, as an alternative story waiting to be told?

## V CONCLUSION

Overall, Shaw’s *The People in Question* offers everything but a simple narrative with a predictable plotline and unambiguous answers. Instead, it provides insightful and carefully crafted theoretical conceptualisations, clear methodological reflections and an astounding wealth of empirical illustrations. Students of constitutionalism, citizenship and political communities hungry for a broadening of their intellectual horizons will immensely profit from reading this book.

<sup>28</sup> ibid 38, 59–60; Christian Fernández, ‘The Unbearable Lightness of Being Swedish? On the Ideological Thinness of a Liberal Citizenship Regime’ (2019) 19(4) *Ethnicities* 674. The Swedish constitution consists of four documents: see *Regeringsformen* [‘Instrument of Government’], SFS 1974:152 (subsequently amended) (Sweden); *Tryckfrihetsförordningen* [‘Act of Succession’], SFS 1820:926 (amended 1979) (Sweden); *Yttrandefrihetsgrundlagen* [‘Freedom of Press Act’], SFS 1949:105 (subsequently amended) (Sweden); *Successionsordningen* [‘Law on Freedom of Expression’], SFS 1991:1469 (subsequently amended) (Sweden).

<sup>29</sup> Shaw (n 1) 77–87.