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To Belong or Not to Belong

Historical Reflections on Foreigners, Citizenship and Law

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Abstract

Even though 'statelessness' is a modern phenomenon that assumes the modern state and the modern states system, human history is abound with legal issues relating to people's political and legal status, and with exclusion of and discrimination against outsiders. Since time immemorial, the political and legal status of people is crucial to the political and civil rights they have and can exercise, to their role in public affairs, to their legal standing, to access to courts and to determine what law applies to them. This paper addresses the issue of belonging, people's legal and political status, citizenship and the treatment of foreigners from a legal historical perspective. It elaborates on these issues in ancient Greece and Rome, outlines the situation in medieval and early modern Europe and finally, goes into the rise of state citizenship as part of the emergence of the modern nation-state.

Keywords

history of citizenship – legal status – *ius gentium* – natural law – modern nation-state

1 Introduction

Man is a political animal, inclined by his nature to live with others and ultimately to form *poleis*, Aristotle (384-322 BC) wrote over 2,300 years ago.[1]

1 Aristotle, *The Politics* (Penguin Classics 1992) 59. See also Fred Miller, 'Naturalism' in Christopher Rowe and Malcolm Schofield (eds.), *The Cambridge History of Greek and Roman Political Thought* (Cambridge UP 2007) 321-343, therein 325-328.

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That would suggest that it is natural and hence normal for man to belong to groups. It also suggests that law is very likely to reflect man's social nature. It finally suggests that those to whom this does not apply form a miserable and *unnatural* exception. The a-historicity of human nature, claimed by Aristotle, would then mean that 'statelessness' is problematic throughout human history. However, one is not led to believe that this is the case. Human history, also in relation to people's political and legal status, is abound with change, and thus renders writing an historical introduction to a volume on statelessness an enduring challenge.

Both as a concept and as an actual problem to real people, statelessness presupposes the state and the nation-state's connection between state and collective identity. It also presupposes the overpowering significance of the dichotomy citizen/non-citizen that carries Laura van Waas' statement that 'nationality matters.'[2] The process of going back into time, looking for people that were not citizens of the state they resided in, or of any other one, and then analysing their situation, soon comes to a halt because statelessness presupposes a political and legal framework that was not yet in place in most periods of time. There was a time that simply everyone was stateless *stricto senso*, purely because there were no states as we conceive them. Some might even argue that this was the case up until the 19th century.[3] Since time immemorial, the political and legal status of people has nonetheless been crucial to the political and civil rights they have, and can exercise, to their role in public affairs, to their legal standing, to access to courts and to determine what law applies to them. Public authorities - especially those of polity types that define politics in terms of a community of people instead of using territorial terms or from the perspective of a ruler or divinity[4] - tend to differentiate between people on the basis of their collective identity, resulting in a different treatment of 'foreigners.'[5] This is not reserved to the nation-state. However, the distinction between aliens holding citizenship of another state and stateless aliens is a modern one, as these categories, with their current meanings, were formulated against the backdrop of the modern state, the modern conception of the world as divided into states and the global expansion of the state. Its strong focus on the state disregards internal social differentiation as

2 Laura van Waas, *Nationality Matters. Statelessness under International Law* (Antwerp 2008).

3 E.g. Andreas Osiander, *Before the State. Systemic Political Change in the West from the Greeks to the French Revolution* (Oxford 2007).

4 For a typology of polities, see Samuel Finer, *The History of Government*. vol. I *Ancient Monarchies and Empires* (Oxford UP 1999) 1-4 and 34-58.

5 'Foreigner' is used here in the very general meaning of anyone who does not belong to the relevant community and/or is considered to be an outsider.

well as 'transnational' identities that might have been more relevant to people in pre-modern societies, such as the distinction between free man and slave, distinctions based on profession or social status (e.g. the Indian caste system[6]), culture (e.g. the distinction between people from their own 'civilization' and 'barbarians' made by the Greeks and Chinese[7]) or religion[8] (the Islamic *umma* and *dhimmi* system[9] or the medieval European notion of the *Christianitas*[10]). To be sure, there has been legal discrimination between natives and foreigners throughout history. If foreigners were acknowledged as legal subjects, then quite often, legal differences would emerge between foreigners belonging to another community and those that did not. These differences would arise e.g. because of treaties that were concluded between the country of residence and their home country as international relations intensified and became more sophisticated or because they could invoke rights and privileges attached to community membership against the ruler or in courts of their place of residence as well, or because, the law of their home country or tribe would be applied to them. In contrast, occasionally, the historical counterparts of 'stateless persons' may have been better off since quite often a person would risk reprisals against him or his goods abroad because of crimes committed by fellow countrymen or because of his ruler's unpaid debts. In general, however, people's rights and legal status would depend on so many more aspects than the citizen/foreigner distinction that, at times,

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6 John Keay, *India. A History* (New York 2000) 52-55 and 188-189. For resembling social systems in China, Japan, and Europe, see Barend ter Haar, *Het Hemels Mandaat. De geschiedenis van het Chinese Keizerrijk* (Amsterdam UP 2010) 263-264 and 268; Kenneth Henshall, *A History of Japan from Stone Age to Superpower* (New York 2004) 54; Georges Duby, *Les trois ordres ou l'imaginaire du féodalisme* (Paris 1978).

7 Aristotle, *n1* 67-69; Finer, *n4* 324-325; Ter Haar, *n6* 106-107.

8 Finer, *n4* 23-27.

9 Antony Black, *The History of Islamic Political Thought. From the Prophet to the Present* (Edinburgh 2001) 11-14 and 208-210; Samuel Finer, *The History of Government*. vol. II *The Intermediate Ages* (Oxford UP 1999) 666-676 and 674-675; M. Khadduri, *The Law of War and Peace in Islam. A Study in Muslim International Law* (London 1940) 78-81 and 104-110; M. Khadduri, *The Islamic Law of Nations. Shaybani's Siyar* (Baltimore 1966) 10; Bat Ye'or, *The Decline of Eastern Christianity under Islam. From Jihad to Dhimmitude* (Madison-Teaneck 1996) 69-99.

10 Wilhelm Grewe, *The Epochs of International Law* (Michael Byers tr., Berlin-New York 2000) 51-59; Osiander, *n3* 268-282; Heinhard Steiger, 'From the International Law of Christianity to the International Law of the World Citizen' (2001) 3 *Journal of the History of International Law* 180, 184-187. For differences in rights ensuing from being part of Christianity or not, see Hugo Grotius, *On the Law of War and Peace*, (orig. 1625, Stephen Neff ed., Cambridge UP 2012) 372-373.

these issues would basically have to be determined on an individual basis. Consequently, for an historical encounter, it is necessary to reformulate and widen the issue of statelessness. The following contribution will address the issue of belonging, people's legal and political status, citizenship and the treatment of foreigners from a legal historical perspective. People not belonging to any community at all will be discussed if there were legal precursors to the current status of stateless persons that mattered at the time.

2 Citizenship in Ancient Times

It seems to be a recurrent feature of Indo-European peoples that the extended family is at the basis of their social and political organization: several families forming tribes and tribes peoples (or nations). In most pre-modern societies, law used to apply personally. The community, tribe or people a person belonged to determined what law was to be applied to him. The origins of law are often to be found in rules and institutions that were exceptions for relations between people of an in-group to the 'normal' situation of self-help and the private right of retaliation.[11] In order to keep peace and order within a community, relations between its members were regulated and conflicts among them were to be settled by due procedures, often closely connected to the community's religious practices. Therefore, law and legal procedures were strictly confined to community members. This meant that foreigners were either outside the scope of law or were to be tried pursuant to their own laws.

2.1 *Greek* Poleis

The ancient Greeks were the first to develop notions of citizenship. Their *poleis* were communities of citizens with equal rights and duties.[12] They were very restrictive in recognizing an individual as a group member. Citizenship was originally connected to kinship and to local cults, although this particularism was countervailed by religiously sanctioned duties of hospitality towards aliens.[13] In ancient Athens, one could only become a citizen if both parents

11 Erik Jan Broers, *Geschiedenis van het straf- en schadevergoedingsrecht. Een inleiding* (Antwerp 2012) 35-36.

12 Jochen Bleicken, *Die athenische Demokratie* (Paderborn-Munich-Vienna-Zurich 1995) 46, 180 and 341; Finer, *n4* 330-336.

13 David Bederman, *International Law in Antiquity* (Cambridge UP 2001) 88-89, 120; Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* vol. I (London 1911) 122-124 and 132-133.

were Athenian citizens.[14] This indicates that women, too, could be citizens, although they did not have political rights.[15] Only citizens enjoyed the protection of the law, could participate in popular assemblies, hold public offices, conclude contracts, own land, or marry under the *polis'* laws. Whereas the law of the *polis* and access to courts were exclusive to citizens, most *poleis* gradually mitigated the exclusion of non-citizens.[16] They developed legal mechanisms to extend civic rights – such as the right of intermarriage or the right to own real estate – and access to courts to others. *Poleis* concluded treaties (*symbolai*) containing reciprocal grants of civic rights[17] and appointed *proxenoi* (distinguished citizens of other *poleis*) to act as intermediaries and take care of their citizens while abroad, which also extended to representing them in court.[18] Due to these mechanisms, the issue whether a foreigner belonged to another Greek *polis* or not became more relevant. Several *poleis* also developed special judicial mechanisms and institutions for adjudication of cases in which foreigners were involved in order to bring them within the scope of law.[19]

An issue of specific interest here is how the Greek *poleis* treated the non-citizens among their populations. These might have been immigrants or their descendents, but it may also concern emancipated slaves or the offspring of Athenians outside of lawful wedlock or from mixed marriages. These were often not (or not any longer) citizens of another *polis* and thus quite closely resembled our 'stateless persons'. Their relative numbers varied. The need for able craftsmen and the necessities of commerce incited mechanisms to raise these people from one in which they lacked any rights and legal standing. Therefore, the category of *metics* was introduced in Athens. Once registered as such, resident aliens were granted some civic rights and protection of Athenian law, albeit on the condition of payment of special taxes and certain military and religious duties.[20] This did not, however, make them citizens. It did not rule out any discrimination in the judicial system; nor did *metics* gain any political rights. Though, it did safeguard them from all kinds of disadvantages put on foreigners and from reprisals for debts or deeds of fellow countrymen.[21]

14 Bleicken, *n12* 190.

15 Bleicken, *n12* 190.

16 Bederman, *n13* 124-133; Phillipson, *n13*125.

17 Bederman, *n13* 126128; Phillipson, *n13* 136-144.

18 Bederman, *n13* 130-133; Bleicken, *n12* 105; Phillipson, *n13* 147-156 and 163.

19 Bleicken, *n12* 105 and 286; Phillipson, *n13* 171-172 and 192-209.

20 Bederman, *n13* 122; Bleicken, *n12* 102-105; Finer, *n4* 324, p. 341; Phillipson, *n13*. 145-146, 158-162, and 165-171.

21 Bederman, *n13* 122-123.

Naturalization of foreigners was also very rare and difficult in the Greek *poleis*. It took a decision of the popular assembly following the legislative procedure.[22]

2.2 *Rome from City-State to Empire*

The Roman Republic, too, conceived of itself as a community of citizens.[23] The Roman *ius civilis* applied only to Roman citizens, a character acquired 'by birth, adoption, emancipation, [or; RK] admission.'[24] With the exclusion of others, citizens held civic and political rights. Relations and conflicts with non-citizens/foreigners (which could also be people not belonging to any other *civitas* such as freed slaves, conquered people or Romans who had lost their citizenship[25]) were beyond the scope of this law and foreigners could neither seize nor be brought before Roman courts.[26] However, unlike the Greek *poleis*, Rome did not remain a small city-state. As Rome expanded its territory and became an important centre for the entire Mediterranean, the restricted personal scope of its *ius civile* increasingly caused tensions and problems. Rome could simply not afford to exclude so many people from its political and legal systems nor to lack any mechanisms to settle disputes. These problems were solved in various ways.

A special magistrate was introduced in Rome charged with initiating the adjudication of cases in which free foreigners were involved; the *praetor peregrinus*.[27] These magistrates developed law and legal procedures in practice for disputes concerning any foreigners.[28] Thus, foreigners were gradually recognized as people with legal rights.[29] Under the influence of Greek Stoic philosophy – a branch of philosophy that abandoned the Greek emphasis on the particularity of the *polis* in favour of universalist and cosmopolitan

22 Bederman, *n13* 121; Finer, n4 344; Phillipson, *n13* 180-191.

23 Finer, *n4* 387; Phillipson, *n13* p. 245.

24 Phillipson, *n13* 94 and 245-266; Olga Tellegen-Couperus, *A Short History of Roman Law* (London-New York 1993) 18.

25 Roman citizenship could be lost for several reasons. Citizenship could be renounced voluntarily. It could also be lost by way of punishment e.g. for neglecting military service or as a consequence of exile, by being declared enemy of Rome, by acquiring the citizenship of another *civitas*, or by moving to a colony that lacked full rights; Philipson, *n13*, 211-213.

26 Phillipson, *n13* 213-235.

27 Jacob Giltaij, *Mensenrechten in het Romeinse recht?* (Nijmegen 2011) 29; M. Kaser & F. Wubbe, *Romeins privaatrecht* (Zwolle 1967) 378-380; Phillipson, n13 267-271.

28 Giltaij, *n27* 140; Tellegen, *n24* 53.

29 Giltaij, *n27* 32; Phillipson, *n13* 235-244.

aspirations[30] – this new Roman law was theorized as a law common to all mankind, the *ius gentium*.[31] Consequently, classical Roman lawyers came to think in terms of a duality of law consisting of the particular law of each people and the law of nations that is common to all mankind and established by natural reason.[32] This idea of universal human society, based in natural law, entered Christian thought, where it was to be used to sustain a transcendent and objective world legal order until modernity.[33] The essential point to be marked here is that foreigners thus gained legal standing and access to courts, while relations with them came to be regarded as legal. As long as natural law was deemed part of real law in legal thought – instead of the part of legal philosophy it became in the 19th century – jurists had a law to fall back on to deal with foreigners and relations between people from different communities: a tendency that was further strengthened early in the 16th century as the discovery of America provided the need for a kind of law to regard relations with the pagan inhabitants of the newly discovered lands.[34]

A second way to solve the problem of the limited scope of the *ius civile* was the gradual extension of Roman citizenship to include ever wider circles of people, from new inhabitants of the city itself to residents of colonies, subordinated or allied towns either by grants of citizenship or by treaties.[35] Eventually, citizenship spread over the entire Empire, resulting in the Emperor Caracalla's *constitutio Antoniniana* of 212 AD pursuant to which all free residents of the Empire were granted Roman citizenship.[36] In a sense, this meant that the personal application of Roman law had come full circle. Since all free residents of the Empire now shared the status of citizen, and this status was gradually shifted to the notion of all Christians being part of a single

30 Antony Alcock, *A Short History of Europe from the Greeks and Romans to the Present Day* (2nd ed., Houndsmill-New York 2002) 14; John Moles, 'The Cynics' in Rowe and Schofield, *n1* 415-434, therein 423-424.

31 Phillipson, *n13* 90-94 and 271-301.

32 Gaius, *Institutes*, I.i.1, http://faculty.cua.edu/pennington/Law508/Roman%20Law/GaiusInstitutesEnglish.htm; Ulpian *Digests* 1.1.1.4, http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/D1_Scott.htm. See also J. Kelly, *A Short History of Western Legal Theory* (Oxford 1992) 57-63.

33 Grewe, *n10* 148-149 and 287-294; Heinhard Steiger, 'Völkerrecht und Naturrecht zwischen Christian Wolff und Adolf Lasson' in idem, *Von der Staatengesellschaft zur Weltrepublik? Aufsätze zur Geschichte des Völkerrechts aus vierzig Jahren* (Studien zur Geschichte des Völkerrechts vol. 22, Baden-Baden 2009) 143-165.

34 Arthur Nussbaum, *A Concise History of the Law of Nations* (New York 1950) 58-64.

35 Finer, *n4* 388 and 411-413; Phillipson, *n13* 254-266; Tellegen, *n24* 30-31.

36 Giltaij, *n27* 46; Phillipson, *n13* 256; Tellegen, *n24* 67.

community – Christianity being identified with the Roman Empire –,[37] the connection of law to citizenship and subsequently membership of the Catholic Church excluded the legal position that now constitutes the desperate situation of many stateless people, at least among Christians, although excommunication by the Church would have had similar excluding effects as current statelessness. While, with the exception of the Empire's or Christianity's border areas, it would be highly exceptional to come across a free person not sharing the same status, people always had Roman law or the Church's canon law to turn to, and they could have redress to ecclesiastical courts which meant that they did not depend on particular political entities for rights under e.g. family law and contract law.[38] Thus, the situation that foreigners were beyond the scope of law had virtually ended in Europe.

3 The Issue of Belonging in Medieval and Early Modern Europe (c. 500 – c. 1800)

It is hard to make general comments on the legal consequences of belonging and the treatment of foreigners in medieval and early modern Europe since there was a huge variety from place to place and throughout time. As the Roman Empire disintegrated, political and legal particularism returned to Western Europe. The Germanic tribes that took hold of the Empire's provinces brought with them their own laws and tribal membership while subjecting the Roman or Romanized populations to their rule. Since people carried the law of their own tribe with them, so to speak, medieval Europe knew a situation of legal pluralism within the framework of the common religion.[39] Once the Germanic tribes had become sedentary, distinctions between the various groups blurred, eliminating the distinction of people along ethnic or cultural lines.[40] But the connection of law and rights to personality survived until modern times. As Linda and Marsha Frey put it: 'The *ancien régime* presupposed

37 Kelly, *n32* 83; Piet Leupen, *Gods stad op aarde. Eenheid van Kerk en Staat in het eerste millennium na Christus* (Amsterdam 1996).

38 Randall Lesaffer, *European Legal History. A Cultural and Political Perspective* (Cambridge UP 2009) 262-263; O. Robinson, T. Fergus and W. Gordon, *An Introduction to European Legal History* (Abingdon 1987) 141-150.

39 Lesaffer, *n38* 160-164.

40 Patrick Geary, *The Myth of Nations. The Medieval Origins of Europe* (Princeton-Oxford 2002) 10-12.

the inequality of men.'[41] Pre-modern societies were highly stratified and hierarchical. Societies consisted of several estates with their own laws, privileges, representative institutions, and courts. The law that applied to people, the legal rights they had, and the courts that had jurisdiction over them strongly depended on what order(s) and corporation(s) they belonged to.[42] But the corporatist principle that people's rights and duties, as well as the laws that applied to them and the courts they were to be tried before went much deeper, also including towns, guilds, orders of chivalry, monastic orders, universities and other kinds of corporations.[43] This resulted in significant legal inequality within societies, often overshadowing the native-foreigner distinction that emerged in the Late Middle Ages.

While tribal identity faded, law and status increasingly gained a territorial basis.[44] People came to be identified by their place of birth or origin. Most people were unlikely ever to travel further than twenty or thirty kilometres from their place of birth and anyone not from the same village, town or at the most region, was considered a foreigner.[45] As most of the people in the countryside had been subjected to serfdom, which tied them to their lords' lands, they were not even allowed to travel.[46] The territorial turn was strengthened by the emergence of feudalism, which initially replaced public notions of community and the old Germanic kingdoms by networks of diarchic relations of personal loyalty between lord and vassal.[47] Public authority became part of the ruler's patrimony, providing the logic of ruler/territory-based polities for settling the issue of particular belonging besides the universally shared identity of Christians. People became identified as their lord's or king's subjects on the ground of being born within his dominions. In many countries, this resulted in

41 Linda Frey and Marsha Frey, *Societies in Upheaval. Insurrections in France, Hungary, and Spain in the early eighteenth century* (New York-Westport-London 1987) 15.

42 Duby, *n6*.

43 Hans Spangenberg, *Von Lehnstaat zum Ständenstaat. Ein Beitrag zur Entstehung der landständischen Verfassung* (Aalen 1964).

44 S. Guterman, *From Personal to Territorial Law: Aspects of the History and Structure of the Western Legal-Constitutional Tradition* (New York 1972).

45 John Torpey, *The Invention of the Passport. Surveillance, Citizenship and the State* (Cambridge UP 2000) 20.

46 Lesaffer, *n38* 155-156.

47 M. Bush (ed.), *Serfdom and Slavery: Studies in Legal Bondage* (London 1996); Raoul van Caenegem 'Government, law and society' in J. Burns (ed.), *The Cambridge History of Medieval Political Thought c. 350- c. 1450* (Cambridge UP 1988) 174-210; F. Ganshof, *Feudalism* (London 1964); Grewe, *n10* 62-69; J. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge 1957).

a prohibition for foreigners to own or inherit land since they owed allegiance to another overlord.[48] Moreover, foreigners were legally discriminated in other ways. In France, for instance, the *droit d'aubaine* was introduced pursuant to which the property of a foreigner would devolve upon the local lord and later the Crown upon his death.[49]

The Greco-Roman idea of citizenship and political community survived at the level of the towns.[50] These were communities – *civitas* or *universitas civium* – with their own laws and institutions.[51] If a medieval European was a 'citizen', then that meant he was a member of one of these town communities. With citizenship came both civic and political duties, rights and privileges such as the *privilegium fori* that entitled them to be sued only before the courts of their town; although, both in respect to these rights and duties and to acquiring and losing the status of citizen, a huge amount of variety is to be observed. Both depended on local customs and the individual town charters. Generally speaking, citizenship seems to have been granted or sold quite liberally to permanent residents.[52] This does not mean, however, that the entire town population would consist of citizens. Especially as towns expanded in early modern times, the non-citizen population could increase to considerable numbers. The legal position of these people would be rather weak.[53]

The reception of Aristotelian political thought in late scholasticism enabled the world to be conceived in terms of political pluralism again. The ascending formation of states in Aristotle's politics, up to the point of a self-sufficient unit, implied that the world did not necessarily constitute a single and unitary political and legal order, as previously dominant Platonic-Augustinian thought

48 A. Carpenter, 'Naturalization in England and the American Colonies'(1940) 9 *American Historical Review* 288, 290.

49 See http://www.lectlaw.com/def/d201.htm consulted 23 September 2013; Ch. Wells, *Law and citizenship in early modern France* (Baltimore - London 1995); Henry Wheaton, *Elements of International Law* (Philadelphia 1836) 99-100.

50 Arjan van Dixhoorn, 'Goed burgerlijk leven in de Nederlandse Republiek' in Sociaal Cultureel Planbureau, *De goede burger. Tien beschouwingen over een morele categorie* (The Hague 2005) 20-32.

51 Ernst Kantorowicz, *The King's Two Bodies. A Study in Mediaeval Political Theology* (Princeton UP 1957) 302-313; Lesaffer, *n38* 225.

52 E.g. J. Noordkerk, *Verhandeling over het Amsterdams poorterrecht* (Amsterdam 1753).

53 P. van den Berg, 'Wie behoorde tot het 'Bataafse Volk'? Opvattingen over Bataafs burgerschap en politieke participatie in de eerste jaren van de Bataafse Republiek (1795-1798)' in (2005) 7 *Pro Memorie. Bijdragen tot de rechtsgeschiedenis der Nederlanden* 211, 216-218; E. Kuijpers, *Migrantenstad: immigratie en sociale verhoudingen in 17e-eeuws Amsterdam* (Hilversum 2005).

held, and thus opened the possibility of thinking in terms of co-existing, autonomous entities.[54] As these territories were conceived of in territorial terms, there was no medieval equivalent of 'statelessness'. The naturalness of political community implied that everyone belonged to one and 'statelessness' in any sense was conceptually inconceivable. The naturalness of political community led the Spanish theologian Francisco de Vitoria, for instance, to assert that the offspring of Spaniards and native women were to be considered members of the indigenous communities, since otherwise they would belong to no community at all which, in his view, would be contrary to the laws of nature and nations:[55] an indication that due to encounters with non-European issues, equivalent to what is now 'statelessness', emerged.

As people's identity was derived from their place of birth, they would carry their status with them if they moved abroad, voluntarily or not. In most cases the status of a subject of a territorial ruler could not be lost. This was different for other legal status e.g. town citizenship. People that moved abroad would be deprived of the rights that natural-born subjects of their new place of residence normally had; although they could obtain some of these rights by being naturalized (which did become possible in several countries in the course of the Late Middle Ages). They also might be able to invoke the rights and privileges of their order (e.g. clergymen or noblemen) or those attached to their home country or home town while abroad.

All of this does not imply that there were no outsiders. The position of Jews in medieval Europe constitutes a case in point, as they were outside the *Christianitas*. In several countries, royal charters granted them the right to reside and travel, although they were commonly banned from owning land or from practicing trades. As direct subjects of the king, Jews enjoyed royal protection then, but they were also completely dependent on the monarch, who could appropriate their possessions at will. Moreover, their very residence depended on the royal will. Thus Jews were frequently simply expelled from a country (e.g. from England in 1290 and from Spain in 1492).[56]

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54 Lesaffer, *n38* 224-227.

55 Francisco de Vitoria, 'On the American Indians' in Vitoria, *Political Writings*, (orig. 1539; Antony Pagden and J. Lawrance eds., Cambridge UP 2007) 231-292, 281.

56 D. Altabe, *Spanish and Portuguese Jewry before and after 1492* (Brooklyn 1993); R. Chazan, *The Jews of Medieval Western Christendom 1000-1500* (Cambridge 2006); R. Mundill, *England's Jewish Solution: Experiment and Expulsion, 1262-1290* (Cambridge 2002); J. Parkes, *The Jew in the Medieval Community: a study of his political and economic situation* (New York 1976).

During the Late Middle Ages, feudalism's stress on local domains and personal loyalty receded again for notions of countries.[57] More or less extensive dynastic realms emerged as conglomerations of the territories owned by one prince and ever more princes defined their authority by referring to a certain territory. Notions such as *patria, civitas*, or *communitas perfecta* came to be applied to these units, and by the 13th century in some parts of Europe the people began to identify with these larger units – although that may still have concerned regional parts of composite monarchies instead of the realm at large – whereas people's former supra-local identification with Christianity was gradually turned into a loyalty to their region of origin or residence. People demanded guarantees for territorial integrity from their prince.[58] The distinction between natives and foreigners was increasingly made at the level of these lands. Those born within the realm were the monarch's 'natural-born subjects'.[59] The status of subject carried both duties and rights.[60] This did not deprive people born elsewhere of all rights or the means to acquire some. In England, for instance, foreigners could acquire the status of subject through naturalization by means of an act of parliament or through denization by means of a royal patent.[61] From then on, they could exercise the civic rights of Englishmen, such as owning real estate or passing on their property to children as an inheritance.[62] Furthermore, this new territorial identity ended the practice of rulers appointing trustees or people from other parts of their realms to public offices at will. Late medieval charters and privileges frequently confined office holding to natives, even excluding naturalized citizens.[63] So, generally speaking, the emergence of territorial identities meant greater exclusion for foreigners.

57 Finer, *n4* 3; Lesaffer, *n38* 198-201; Piet Leupen, *Keizer in zijn eigen rijk. De geboorte van de nationale staat* (Amsterdam 1998) 150-161.

58 E.g. Article 7 of the 1356 Brabant Joyous Entry in C. de Boer and J. Sap (eds.), *Constitutionele bronnen van Nederlandse rechtsgeschiedenis* (Nijmegen 2007) 12.

59 Carpenter, *n48* 290; T. Herzog, *Defining Nations: Immigrants and Citizens in Early Modern Spain and Spanish America* (New Haven-London 2003).

60 Think of the American colonists invoking "the rights of British subjects"; B. Bailyn, *The ideological origins of the American Revolution* (Cambridge Ma.-London 1992) 30-31; J. Greene, *The constitutional origins of the American Revolution* (Cambridge 2011) 8.

61 Carpenter, *n48* 291.

62 Carpenter, *n48* 290.

63 E.g. Article 4 of the 1356 Brabant Joyous Entry, *n58* 12; Van den Berg, *n53* 218. A remnant of which can be found in the US Constitution's provision that the President needs to be a natural born citizen (Article II section 5 US Constitution).

4 The Turn to National Citizenship in Modernity

By the turn of the early modern age to modernity, citizenship shifted from towns to the level of the state.[64] The increasing burdens a more demanding and more interventionist state put on its population (e.g. higher taxes and conscription) and the need to make society more 'legible,' as James Scott put it, to enhance the effectiveness of government policies and to identify whom was entitled to social benefits necessitated policies of nation-building in order to connect collective identity, loyalty, and solidarity to the state, as well as the introduction of formal surnames and compulsory registers of the population.[65] This called for a more precise demarcation of insiders and outsiders. In addition, state attempts to gain greater control of movement across borders resulted in compulsory identification papers, providing people with a tangible sign of their nationality.[66]

The stress on popular sovereignty to legitimate state power caused debates on who was to have the right to vote. Defining who belonged to 'the people' more precisely became paramount. Therefore, the 18th century witnessed the first national laws on citizenship and naturalization. In Britain, its American colonies, and later in the United States, a series of citizen and naturalization acts were passed.[67] On the European Continent, citizenship was explicitly regulated at the state level as part of regulating the suffrage, often in the constitutions themselves. Revolutionary France led the way.[68] Moreover, it is quite telling that from the mid-18th century onwards, textbooks on the law of nations/international law came to include chapters or sections on

64 http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789.5076.html, consulted 24 September 2013.

65 Benedict Anderson, *Imagined Communities: reflections on the origin and spread of nationalism* (London 1983); James Scott, *Seeing Like a State. How Certain Schemes to Improve the Human Condition Have Failed* (New Haven-London 1998) 64-71; Philip Bobbitt, *The Shield of Achilles. War, Peace, and the Course of History* (New York 2002) 146-178.

66 Torpey, *n45* 6-7.

67 Carpenter, *n48* 299-300; J. Kettner, *The Development of American Citizenship, 1608-1870* (Williamsburg 1978).

68 Titre II articles 2 and 3 Constitution of 1791 http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1791.5082.html, consulted 24 September 2013; See also Van den Berg, *n53* 214-215; R. Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge Mass. 1992) 35-49; Chimène Keitner, *The Paradoxes of Nationalism. The French Revolution and Its Meaning for Contemporary Nation Building* (New York 2007) 69-86.

nationality law or the legal position of aliens that often discussed and compared national acts.[69]

Introducing citizenship at the state level did not settle the issue of belonging. Much depended on what form of nationalism citizenship laws were based on.[70] They could be inclusive or exclusive, liberal or strict in naturalization. At the end of the 18th century, citizenship laws were mostly introduced in territorial states that had existed for a very long time. In those states, citizenship laws tended to be inclusive addressing virtually the entire permanent population, especially since these laws were inspired by the Enlightenment's stress on the equality of men. Introducing state citizenship coincided with calls for women rights,[71] the emancipation of religious dissenters and even the Jews, and the creation of homogeneous national legal systems that did away with internal legal inequalities, legal pluralism and particularism. The French Revolutionary Emmanuel Joseph Sieyès (1748-1836) defined the nation as 'a body of associates living under a common law and represented by the same legislature' and emphasized legal equality within.[72] At least ideally, all individuals living permanently within the state were its citizens, whereas others were not. Within the state that line of reasoning denied the existence of minorities, as racial,

69 E.g. Christian Wolff, *Jus Gentium Methodico Scientifica Pertractatum* (Classics of International Law vol. 2, James Brown Scott ed., 1764 edition J. Drake tr., Oxford 1934) 74-83; Emer de Vattel, *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* (Classics of International Law vol. 3, James Brown Scott ed., 1758 Ch. Fenwick tr., Washington 1916) 87-93 and 144-148; Henry Wheaton, *Elements of International Law* (Philadelphia 1836) 100-101; Theodore Woolsey, *Introduction to the Study of International Law* (Boston-Cambridge 1860) 141-156; August Heffter, *Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen* (4th ed., Berlin 1861) 110-118; H. Halleck, *International Law or rules regulating the intercourse of states in peace and war* vol. 1 (London 1878) 348-390; Robert Phillimore, *Commentaries upon International Law* (3th ed., London 1879) 443-459; W. Hall, *International Law* (Oxford 1880) 185-205.

70 For various forms of nationalism see Timothy Baycroft and Mark Hewitson (eds.), *What is a Nation? Europe 1789-1914* (Oxford 2006); Graham Day and Andrew Thompson, *Theorizing Nationalism* (Houndsmill 2004); Ernst Gellner, *Nations and Nationalism* (Oxford 1983); Eric Hobsbawm, *Nations and Nationalism since 1780. Programme, Myth, Reality* (Cambridge 1990).

71 Condorcet, *Sur l'admission des femmes aux droits de Cité* (1790); Olympe de Gouges, *Déclaration des droits de la femme et de la citoyenne* (1791).

72 Emmanuel Joseph Sieyès, *Qu'est-ce que le tiers état?* (orig. Paris 1789) in Emmanuel Joseph Sieyès, *Qu'est-ce que le tiers état? Précédé de l'essai sur les privilèges* (Abbé Morellet ed., Paris 1822) 67.

ethnic, linguistic, religious, cultural etc. lines of distinction were declared politically irrelevant.

Moreover, Enlightenment or liberal nationalism was compatible with cosmopolitanism, that is, solidarity with mankind at large.[73] The nation-state as a political community guaranteeing individuals the exercise of their natural rights did not oppose the idea of a universal society of mankind that early modern legal scholars of the naturalist school based the law of nations on. The French National Assembly deliberately stated the rights of *man* and *the citizen*, expressing that people could derive rights both from belonging to a political community and from their human nature.[74] Thus, while championing representative government in all states, Immanuel Kant (1724-1804) could still add a 'cosmopolitan right' to civic and international right, although his cosmopolitan right amounted to little more than a duty of hospitality to foreigners, instead of treating them as outlaws.[75]

On the other hand, the shift from Aristotelianism to social contract theory opened the conceptual possibility of statelessness, since in social contract theory the natural situation of men is the pre-social state of nature and entering into civil society is deemed a matter of deliberate individual choice: man consciously deciding to leave the state of nature together with others. Suddenly, membership of a political community had become voluntary;[76] or as the French historian Ernest Renan had it, nationhood entailed a 'daily referendum'.[77]

Against the intellectual backdrop of Romanticism, other forms of nationalism developed. The importance of diversity and the nation as a cultural community were stressed.[78] In the second half of the 19th century, ethnicity as basis of defining the nation was added to the pallet.[79] Defining the nation as a

73 See Paul Hazard, *Het Europese denken in de achttiende eeuw van Montesquieu tot Lessing*, Amsterdam, 1993 (F. de Haan tr., Paris 1946) 181-186; Th. Schlereth, *The Cosmopolitan Ideal in Enlightenment Thought* (Notre Dame-London 1977) 103-112.

74 *Déclaration des droits de l'homme et du citoyen* (Paris 26 August 1789).

75 Immanuel Kant *Zum ewigen Frieden* (Königsberg 1795).

76 J. Hampton, *Hobbes and the Social Contract Tradition* (Cambridge 1986); D. Boucher & P. Kelly (eds.), *The Social Contract from Hobbes to Rawls* (London 1994); P. Riley, 'Social contract theory and its critics' in M. Goldie and R. Wokler (eds.), *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge 2006) 347-375.

77 Ernest Renan, *Qu'est-ce que c'est une nation?* (Paris 1882).

78 Martin van Creveld, *The Rise and Decline of the State* (Cambridge 1999) 192-194; Hobsbawm, *n70* 133-169.

79 Walter Opello and Stephen Rosow, *The Nation-State and Global Order. A Historical Introduction to Contemporary Politics* (London 2004) 203-205.

cultural or ethnic community created the possibility of the pre-political nation: a group of people existing independent of and before the state, creating leverage for separation or unification movements. The new forms of nationalism, being non-state bound, meant that some of the state's permanent residents were no longer regarded as members of the nation since language, culture and ethnicity were exclusive criteria for membership. Private law had basically come to apply territorially and international private law had already become more sophisticated, which mainly had an impact in the sphere of public law and political rights. Nonetheless, linguistic, cultural and ethnic minorities became politically relevant which occasionally was also reflected in citizenship laws, adopting the *ius sanguinis* instead of the *ius soli*,[80] and 'statelessness' was recognized as a legal problem in international legal doctrine.[81] As adherents of the importance of national purity and Carl Schmitt's (1888-1985) view that democracy can only work in homogeneous societies[82] pressed for more exclusive citizenship, even people whose ancestors had resided in a country for a long period of time before were excluded; the degradation of Jews from *Reichsbürger* to *Staatsangehörigen* deprived of civic rights in Nazi-Germany in 1935 being the most famous as well as most tragic example thereof.[83]

5 Conclusion

People's social, political, and legal status can be determined by many aspects and often by multiple ones at the same time. Calling statelessness a legal problem not only presupposes the existence of the state, but also assumes that not being a citizen of any state is a major deviation and defect. Although it is a constant throughout human history that people tend to treat their kinsmen and friends better than aliens and there are some historical precedents to legal exclusion of or special legal treatment for people not belonging to any political

80 E.g. Law respecting the acquisition and loss of the quality as a Prussian subject and his admission to foreign citizenship, 1842; http://www.saloforum.com/index.php?threads/prussian-citizenship-law-1842.851/ consulted 24 September 2013.

81 E.g. Hall, *n69* 204-205; Lassa Oppenheim, *International Law. A Treatise* vol. 1 *Peace* (2nd ed., London 1912) 387-390.

82 See Carl Schmitt, *Der Begriff des Politischen* (Munich 1927).

83 Mariken Lenaerts, *National Socialist Family Law. The influence of National Socialism on marriage and divorce law in Germany and the Netherlands* (Maastricht 2012) 78-84; U. Wesel, *Geschichte des Rechts von den Frühformen bis zur Gegenwart* (Munich 2006) 510-511.

entity, different distinctions seem to have dominated most of the time. For a long period of time, internal differences and transnational identities tended to overshadow the distinction between subjects, natives, or citizens on the one hand and 'stateless' foreigners on the other. Polities based on citizenship are the historical exception. Citizenship was invented by the ancient Greeks, imitated by the Roman Republic, lived on in Europe's medieval towns and then transferred from the towns to the state with the genesis of the nation-state at the end of the 18th century. And even then, in virtually all pre-modern community membership based polities, citizenship was a privileged status accruing to the happy few and leaving others, often even the majority, with little rights or none at all. Only the modern nation-state directed collective identity to the state, extended rights and vested legal equality to the extent that citizenship on the one hand democratized and became the 'normal' status of residents and on the other hand became the most significant determinant of people's rights and duties, both civic and political. Henceforth, statelessness' history is either a very short one or one too complex to be told.