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Cancellation of citizenship and national security:

A comparison between France and the UK

Rachel Pougnet

Supervised by Reader Devyani Prabhat and Professor Paula Giliker

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Abstract

This thesis is about citizenship deprivation in the context of national security. It looks at the increase in cancellation of citizenship in France and in the UK, two states which profess to hold liberal constitutional values. While citizenship deprivation is not a new measure and has been part of the states' legal frameworks since at least the aftermath of the First World War, both states have, over the past few years, either significantly increased recourse to citizenship deprivation and/or sought to drastically extend the breadth of the measure for national security purposes. Given that this increase primarily affects minority citizens, in this thesis, I seek to account for both this increase in the practice and its effect on citizenship. I suggest that cancellation of citizenship has serious implications for rights and has weakened citizenship both as a legal status and as a claim to equal rights. However, there are important differences in the states' practices, with the UK having a far more prevalent practice, coupled with an accommodating legal framework. These differences could be explained by several possible factors: a stronger conception of citizenship and equal citizenship in France; and/or different commitments to international statelessness obligations; and/or by different constitutional structures which hold back the French practice. On balance, although social and political factors are always multi-causal and complex, I suggest that the differing constitutional structures of the two states provide the best explanation for the variance in recourse to citizenship deprivation.

Dedication and Acknowledgements

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Author's Declaration

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's Regulations and Code of Practice for Research Degree Programmes and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

SIGNED: Rachel Pougnet

DATE: 20/12/2019

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List of abbreviations

1961 Convention: UN Convention on the Reduction of Statelessness 1961

9/11: 11th of September 2011

AN: *Assemblée Nationale*

BNA: British Nationality Act

BNSAA: British Nationality and Status of Aliens Act

CC: *Conseil Constitutionnel*

CE: *Conseil d'Etat*

CICC: Citizen of the Independent Commonwealth Countries

CPJ: *Contentieux de pleine juridiction*

CUKC: Citizenship of the UK and Colonies

Deb: Debate

DGSE: *Direction Générale de la Sécurité Extérieure*

DRMC: Declaration of the Rights of Man and of the Citizen

ECHR: European Convention of Human Rights

ECtHR: European Court of Human Rights

ECJ: European Court of justice

ECN: European Convention on Nationality

EU: European Union

HC: House of Commons

HL: House of Lords

HRA: Human Rights Act

ICJ: International Court of Justice

ISIL: Islamic State of Iraq and the Levant

JCHR: Joint Committee on Human Rights

JO: *Journal Officiel*

MI5: The Security Service

MP: Member of Parliament

NIAA: Nationality, Immigration and Asylum Act

PFRLR: *Principe Fondamental Reconnu par les Lois de la République*

QPC: *Question Prioritaire de Constitutionnalité*

REP: *Recours pour Excès de Pouvoir*

SC: Supreme Court

SIAC: Special Immigration Appeals Commission

TA: *Tribunal Administratif*

TEO: Temporary Exclusion Order

TPIMs: Terrorism Prevention and Investigation Measures

WS: Written statement

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Genovese v Malta (53124/09), (2014) 58 EHRR 25

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ECJ

Rottmann v Freistaat Bayern (C-135/08), [2010] ECR I-1449

Chapter 1: Introduction

“I thought it [cancellation of citizenship] could unite us but it is what divided us”¹ François Hollande, former President of France.

“Once any one of us has a passport that says we are British, we are as British as anybody else, whether they were born here or got their passport five minutes ago. It is incredibly important that there is equality before the law for all Her Majesty’s subjects who are living in this country and have right of residence here” Jacob Rees-Mogg, Conservative MP (HC deb 30th January 2014: c1086).

1.1 Introduction

This thesis is concerned with the rollback of citizenship rights in the context of national security. It looks at the increase in the practices of citizenship deprivation in France and in the UK, two states which profess to hold liberal constitutional values. While citizenship deprivation is not a new measure and has been part of the states’ legal frameworks since at least the aftermath of the First World War, both states have, over the past few years, either significantly increased recourse to citizenship deprivation and/or sought to drastically extend the breadth of the measure for national security purposes. Such retooling has occurred in the context of increasing numbers of citizens who travel to Syria and surrounding areas to allegedly participate in Jihad. Cancellation of citizenship has serious implications for rights and has weakened citizenship both as a legal status and as a claim to equal rights.

The march of cancellation of citizenship powers for national security purposes is not limited to France and the UK. Belgium, the Netherlands, Canada, Turkey, and Australia, to name but a few, have also recently turned to citizenship deprivation as a counter-terrorism measure.² During heightened debates around the extension of the measure to birthright citizens at risk of statelessness in 2015, the

¹ « Le ‘seul regret’ de Hollande, ‘avoir proposé la déchéance de nationalité’ », *Le Parisien*, 2019
<http://www.leparisien.fr/elections/presidentielle/le-seul-regret-de-hollande-avoir-propose-la-decheance-de-nationalite-01-12-2016-6401871.php> (28/04/2019).

² Recently, Ireland also turned to citizenship deprivation on national security grounds. “Man convicted of terror offences attempts to stop stripping of Irish citizenship”, *The Irish Times*, 2019
<https://www.irishtimes.com/news/crime-and-law/man-convicted-of-terror-offences-attempts-to-stop-stripping-of-irish-citizenship-1.3763111> (24/06/2019).

Denmark also proposed to extend citizenship deprivation to multiple nationality holders who went for Jihad in Syria and to preclude their children who would have been born abroad from getting birthright citizenship.
« Le Danemark veut priver de nationalité les enfants de djihadistes », *Le Monde*, 2019
https://www.lemonde.fr/international/article/2019/03/28/le-danemark-veut-priver-de-nationalite-les-enfants-de-djihadistes_5442740_3210.html (13/11/2019).

then French Prime Minister Manuel Valls referred to this domino effect to clear citizenship deprivation of allegations of illiberalism. As he then declared:

“How can we say that to deprive an individual, condemned for terrorism, of his/her French nationality is a far-right idea? First because this is strictly wrong: this policy exists in a number of democratic countries close to France: in the UK, Canada, Switzerland, the Netherlands and probably in other states. The same debate exists in Belgium”.³

But what Manuel Valls does not acknowledge is that this recent turn is a drastic one. The UK is a leading player in the practice, as it became possible in 2014 to make citizens stateless if they are naturalised citizens. For birthright citizens, more recent cases show that the UK government opted for *de facto* statelessness, where individuals are potentially legally entitled to acquire another citizenship, but are, in fact, left in the limbo of statelessness. The decision to strip Shamima Begum of her citizenship in 2019, a UK-born citizen of Bangladeshi heritage who had fled to Syria to participate in Jihad, illustrates this. Soon after the UK cancelled her citizenship, Bangladesh issued a statement saying that she did not have Bangladeshi nationality and would not be allowed into Bangladesh.⁴ Begum is thus left *de facto* stateless, unable to return to the UK or to ask for diplomatic protection and must now conduct her appeal from the Al-Roj refugee camp in Syria where she currently is. Although a high-profile case, the case of Begum is not a unique one. In 2017, the UK issued 104 cancellation of citizenship orders.⁵ In March 2019, two other British-born women were stripped of their citizenship after they married ISIS fighters. The women, it is reported, who are the mothers of British children, are also currently in the Al-Roj refugee camp in Syria and purported to be eligible for Pakistani citizenship.⁶ To that extent, the legitimating effect which Manuel Valls then sought through comparison with the UK must be taken with a grain of salt.

In France, citizenship deprivation was amongst the government measures introduced in response to the terrorist attacks in Paris (13th November 2015) which killed 130 individuals and injured another 413. It was proposed alongside the introduction of the special derogatory procedure of the state of

³Available at, Facebook (Manuel Valls), 28th December 2015, <https://www.facebook.com/manuelvalls/posts/2015-12-28/966087946804883/> (28/04/2018).

All translations my own. I have put the original French wording when I was unsure about the translation.

⁴ “Shamima Begum will not be allowed here, says Bangladesh”, *The Guardian*, 2019 <https://www.theguardian.com/uk-news/2019/feb/20/rights-of-shamima-begums-son-not-affected-says-javid> (28/04/2019).

⁵ HM Government Transparency Report 2018, “Disruptive and investigatory powers”, 2018, 97pp. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727961/CCS207_CCS0418538240-1_Transparency_Report_2018_Web_Accessible.pdf (13/11/2019).

⁶ “Government ‘strips citizenship’ from two more British women in refugee camps because they married Isis fighters”, *The Independent*, 2019 <https://www.independent.co.uk/news/uk/home-news/isis-brides-reema-iqbal-zara-syria-uk-citizenship-shamima-begum-home-office-sajid-javid-a8816221.html> (28/04/2019).

emergency in the Constitution. Both were purported to enhance national security protection and “national unity”.⁷ Eventually these proposals fell through following intense political debate and the resignation of the then Secretary of Justice Christiane Taubira. In December 2016, the then French President François Hollande announced that he would not run for a second mandate. His main regret, he said, was bringing forward a proposal for cancellation of citizenship. As he has since declared: “I thought it [cancellation of citizenship] could unite us but it is what divided us”.⁸

As with most counter-terrorism measures, the practical efficiency of citizenship deprivation to protect national security is difficult to evaluate.⁹ As a symbolic measure, the case of Shamima Begum and the French 2015–16 debates show that citizenship deprivation is divisive beyond political affiliations. During the debates in 2014 in the UK, the Conservative MP Jacob Rees-Mogg fiercely opposed the extension on grounds of the differentiation it furthered amongst British citizens. In the Commons, he said:

“Once any one of us has a passport that says we are British, we are as British as anybody else, whether they were born here or got their passport five minutes ago. It is incredibly important that there is equality before the law for all Her Majesty’s subjects who are living in this country and have right of residence here” (HC deb 30th January 2014: c1086).

In France, the UDI (centre-right) MP¹⁰ Jean-Christophe Lagarde developed a similar argument before the National Assembly. He argued that:

“... we judge individuals for actions that they have committed. We don’t judge them according to their heredity, to their parents, to their origins. It is a fundamental principle of the Republic.

⁷ See the full speech of the then president François Hollande: Service de Presse de la Présidence de la République, « Discours du Président de la République devant le Parlement réuni en Congrès », 2015, 10pp.

<http://www.ariège.gouv.fr/content/download/9989/68738/file/16112015%20CONGRES%20VERSAILLES%20AT%20TENTATS%20DE%20PARIS%20DISCOURS%20DE%20FRANCOIS%20HOLLANDE.pdf> (26/11/2016)

Hollande met with the leaders of the political parties in the night following the terrorist’s attacks on the 13th of November. Citizenship deprivation was proposed by the then leader of the Conservative party (*Les Républicains*) and former president, Nicolas Sarkozy, and by the leader of the then National Front (now *Rassemblement National*), Marine Le Pen. The “unity” which Hollande sought must thus be read within this political context – as a symbol which could unite the then main political families of the French political landscape. But as will be clear in this thesis, the measure triggered heightened criticisms, both from Hollande’s political family (the socialist party), the left in general, and from right-wing parties.

⁸ *Op cit* 1.

⁹ Turkey, for example, recently said it will deport foreign terrorist suspects, including those who have been stripped of their citizenship.

“Turkey threatens to send foreign Isis suspects home from next week”, *The Guardian*, 2019

<https://www.theguardian.com/world/2019/nov/08/turkey-isis-suspects-repatriation-islamic-state> (14/11/2019).

¹⁰ I refer hereafter to “deputies” (*ie* members of the National Assembly) as MPs and keep the term “senators” for the members of the Senate as senators are not directly elected.

And for us, it is impossible to derogate from this principle as there is only one category of French people” (JO, Assemblée Nationale, 5th February 2016, 1021).

Both Rees-Mogg and Lagarde point at a critical issue: the fact that the revival of citizenship deprivation and the drafting of the measure differentiates between citizens according to their ethnic heritage. The Begum case evidences that this is so, even when the individual does not hold another citizenship. Citizenship deprivation thus downgrades citizenship to the status of a privilege for some rather than a right and/or risks increasing statelessness. This was well captured by the French Communist MP Jean-Jacques Candelier in the National Assembly: “... for our part, Mr President, we have chosen: we neither want a breach of equality nor an increase of statelessness” (JO, Assemblée Nationale, 9th February 2016, 1152).

In this thesis, I am concerned with explaining the rollback of citizenship rights. I concur with the literature (Carens, 2000; Joppke 2010) which understands citizenship as encompassing three core features, namely that it is:

- a legal status which gives access to rights protected by the state;
- a political claim to participation and equal treatment from the state; and
- a concept mediated by different approaches to membership, to who belongs and what is required to belong.

Some of the over-arching questions that this thesis seeks to address are: what can account for the increased focus on the citizenship of ethnic minorities,¹¹ even at the risk of creating statelessness, in two countries which actively participated in the shaping of the post Second World War system of rights protection? Why is it that the perception of nationality as the “right to have all rights” (to paraphrase Arendt, 1958) seems long gone? Also perplexing, is the question of why France did not go as far as the UK in the extension of cancellation of citizenship powers? And, crucially, what is left of citizenship in the face of national security concerns? Can the revival of citizenship deprivation as a counter-terrorism measure tell us anything about the content of citizenship and belonging in both France and the UK?

The originality and significance of this thesis lie in the comparative insights it produces on the tension between citizenship and national security and on citizenship more broadly in France and in the UK, thereby revealing the presence of a deep insecurity in western, liberal states as to how citizenship is understood with respect to migrants who become citizens. Despite the recent interest in the practices of citizenship deprivation (Lavi, 2010; Gibney, 2013; Sawyer, 2013; Macklin, 2014; Lenard *et al*, 2015),

¹¹ Origin and nationality are features which are often encapsulated under “ethnicity”, although ethnicity can have broader reach and include culture and religion. I will use “ethnicity” in this thesis to refer to these features. I also refer to “ethnic heritage” to include, for example, ancestry from some other country.

and the comparison between France and the UK more specifically (Mantu, 2015; Mills, 2016; Fargues, 2019), the limited attention paid thus far to other processes which can inform state practice and the difference in state behaviour, such as, for example, the constitutional structures of the states, opens up a gap which this thesis addresses. Aside from Mills (2016), few have sought to explain the differences in the practices between France and the UK, and Mills does not address the differences in the context of national security. Furthermore, only a few within the scholarship on citizenship deprivation adopt a socio-legal approach (for example, Prabhat, 2016a), one which contributes a more critical view to the connection between state practice, national security, and citizenship. Socio-legal scholarship, broadly put, sees the “law” as existing through actors, practices and contexts. For the present study, this is acknowledging the role of the state in producing the law, the importance of context(s) and individual actors and practices within the state’s institutions, and the kinds of symbols and narratives which the state produces through the law. From this perspective, I approach “state” citizenship as a concept regulated by law and state practices within a specific constitutional framework, and contingent on contexts. In order to grasp the relationship between state citizenship and national security and to study it comprehensively, I focus on a specific issue: that of France and the UK’s recourse to cancellation of citizenship as a counter-terrorism measure in a similar context of national security threat. In-depth and comparative analysis of these case studies will offer insights into the relationship between citizenship and national security.

1.2 Research questions

This thesis and the research questions it addresses have emerged from the following factual scenario: in the context of national security threats from their own citizens, both France and the UK turned to cancellation of citizenship as a legal measure. Both sets of laws treat ethnic minorities differently from the majority of the citizenry as they distinguish between single and multiple nationality holders and/or birthright and naturalised citizens. Yet, despite these similarities, the reach of deprivation powers is far more extensive in the context of the UK than in France. For example, in 2015–16, France did not go ahead with the changes required to denaturalise its own citizens at risk of statelessness whereas the UK amended its laws to permit this process in 2014. These facts invited a number of questions, of which I chose three which were most pertinent to understanding the relationship between citizenship and national security and the differences in the trajectory of cancellation in similar national security contexts.

First, why did both countries increase their recourse to cancellation of citizenship for naturalised or multiple nationality holders in the context of a heightened national security threat? (research question 1)

Second, why is the practice more prevalent in the context of the UK than in France? And, linked to this question, why did the French extension to cancellation of citizenship not take place in 2015–16? (research question 2)

Finally, in light of the current over-arching actions and legal frameworks of the two states in question which treat different kinds of citizens differently for the purposes of deprivation, I ask a conceptually linked question: can we learn anything about the content of citizenship and belonging in both countries? (research question 3)

1.2.1 Research question 1

On the night of 13th November 2015, after triggering the special derogatory procedure of the “state of emergency”, which suspends the normal protection of rights and allows for faster executive action, the then French president François Hollande gathered both Houses of Parliament (the National Assembly and the Senate)¹² in Versailles. On 16th November, before this exceptional gathering of 577 deputies and 348 senators,¹³ he delivered a speech which purported to enhance both “national unity” and national security protection. The speech was a serious one. According to Hollande, France was “at war” and needed to be “ruthless” against those “despicable” acts.¹⁴ The main propositions which came out of this speech were to modify the procedure of the state of emergency and extend cancellation of citizenship. As he then declared in Versailles:

“We must be able to strip the nationality of an individual who has been condemned for acts contrary to the fundamental interests of the Nation or acts of terrorism, even if the individual was born French, and I mean it “even if the individual was born French” so long as the person has another nationality”.¹⁵

At the time, citizenship deprivation was applicable to individuals who had naturalised as French citizens for less than 10 years (15 for acts of terrorism) and who hold a second nationality. According to the Conseil d’Etat, in a non-binding advisory opinion¹⁶ on the proposition, the extension of cancellation of citizenship to French-born citizens could only be found legal if it was to be introduced in the Constitution directly. As a result, in light of the Conseil d’Etat’s advice, the government proposed

¹² The National Assembly is the lower house of the French Parliament: it is directly elected by French citizens. The Senate is the upper house and is indirectly elected by around 162,000 *grands électeurs*: representatives of the different constituencies (regional, departmental, municipal councillors and mayors).

¹³This procedure is called the “Congress” and enshrined in article 89 of the Constitution of the 5th Republic, 1958.

¹⁴ *Op cit* 7.

¹⁵ *ibid.*

¹⁶ The Conseil d’Etat has two roles within the French legal system: it is the higher court of the administrative system and, also, an advisory body to the government.

to amend the Constitution to introduce two measures: firstly, the procedure of the state of emergency (article 1 of the proposal) and, secondly, cancellation of citizenship (article 2). Article 2 fuelled intense debate across French society and enjoyed widespread press coverage from French newspapers of all kinds. Finchelstein (2017: 99) cites more than 10 public opinion polls, 850,000 tweets on social media, the resignation of Christiane Taubira, the Secretary of State for Justice, and all this for a relatively short debate: 136 days in total. Prior to the proposed extension, the latest deprivations were issued in 2015, in the aftermath of the terrorist attacks on *Charlie Hebdo*.¹⁷ These five deprivation orders were in addition to the other eight since 1973, according to the *rapporteur* in charge of evaluating the 2015 legislative modification before the Commission of the laws of the National Assembly.¹⁸ Since then only one deprivation has been issued, in June 2019.¹⁹

Since 2002 (under the Nationality, Immigration and Asylum Act 2002), deprivation powers are applicable to birthright citizens who hold a second nationality in the UK. Prior to 2002, the powers were reserved to naturalised citizens (British Nationality Act 1981). From 2006 to 2015, the UK Home Office deprived 36 individuals of their citizenship on grounds that it was conducive to the public good to do so (McGuinness and Gower, 2017). The Bureau of Investigative Journalism reported a significant rise in 2013, in part to prevent the return of multiple nationality holders who had gone to fight in Syria.²⁰ In 2018, the Home Office Transparency Report stated that the UK deprived 104 individuals in 2017²¹ and, as previously examined, the case of Shamima Begum suggests that minority citizens, single nationality holders, are at risk of being left *de facto* stateless on account of their foreign heritage. The figures contrast sharply with the claim, professed by the government of the UK in 2014, that the

¹⁷ « Bernard Cazeneuve demande la déchéance de nationalité pour cinq anciens ‘terroristes’ », *Le Monde*, 2015 https://www.lemonde.fr/police-justice/article/2015/10/07/bernard-cazeneuve-demande-la-decheance-de-nationalite-pour-cinq-anciens-terroristes_4783849_1653578.html (28/04/2019).

¹⁸ Assemblée Nationale, rapport no 3451, « Au nom de la Commission des lois constitutionnelles, de la législation et de l’administration générale de la République sur le projet de loi constitutionnelle no 3381 de protection de la Nation », Dominique Raimbourg, 28 Janvier 2015, 191pp, at p16. <http://www.assemblee-nationale.fr/14/rapports/r3451.asp> (04/12/2019)

The work of the Commissions is equivalent to that of the committees in the UK. Their work is to discuss the relevant bill, to hear the relevant minister and experts, and to make potential amendments to the bill. In ordinary legislative proceedings (*ie* not constitutional ones) this is the text of the Commission which is then being discussed by the relevant house of Parliament. In this thesis, I will thus use “Commissions” and “committees” interchangeably. For a discussion of the work of the Commissions, see: Urvoas (2013).

¹⁹ « Condamné pour terrorisme, un Franco-marocain déchu de sa nationalité française », *France Info*, 2019 https://www.francetvinfo.fr/politique/debat-sur-la-decheance-de-nationalite/condamne-pour-terrorisme-un-franco-marocain-dechu-de-sa-nationalite-francaise_3471385.html (24/06/2019).

²⁰ “Rise in citizenship-stripping as government cracks down on UK fighters in Syria”, *The Bureau of Investigative Journalism*, 2013 <https://www.thebureauinvestigates.com/stories/2013-12-23/rise-in-citizenship-stripping-as-government-cracks-down-on-uk-fighters-in-syria> (24/06/2019).

²¹ *Op cit* 5, p28.

measure would be “used sparingly” and only against “very dangerous individuals” (Theresa May, HC deb 30th January 2014, c1050).

A common feature between these different state approaches is that they treat different kinds of citizens differently for the purposes of national security protection. There is extensive literature on equal citizenship, and on equal citizenship and national security more specifically, which I consolidate in this thesis. In chapters 2 and 4, for example, I draw on these bodies of the literature and examine what critical factors can potentially explain why states are turning upon their own minority citizens for the purposes of citizenship deprivation. However, to arrive at a more comprehensive answer to this first research question, I engage with these developments within broader historical and institutional contexts. Some of the questions I ask are: what were the states’ practices of cancellation of citizenship and how did they fit within the counter-terrorism frameworks of the states prior to the purported increase (chapter 2)? Is there any relevant international framework which would obligate the states in relation to citizenship issues? (chapter 2) And, historically, what are the states’ images and practices of equal citizenship (chapter 3)? In the latter context, I ask if there are or have been fields other than security protection which distinguish between different kinds of citizens. The purpose of these supplementary questions is to bring complexities and nuances to the research question.

1.2.2 Research question 2

Despite the states’ similar approach to distinguishing between different kinds of citizens for the purposes of deprivation, there are important differences in their legal frameworks and practices. In France, citizenship deprivation can only be ordered after a criminal sentence and a prior positive assent from the Conseil d’Etat, whereas in the UK the powers can be exercised pre-emptively and are not subject to any form of pre-emptive scrutiny. There are also critical differences in numbers: in 2017, the UK government issued 104 cancellation orders, whereas there are, so far, only 14 reported cases in France since 2001. Crucially, France failed to take forward the changes required to denaturalise its own citizens at risk of statelessness in 2015–16, whereas the UK amended its laws to permit this process. In spite of the exceptional legal frameworks which the terrorist attacks of 2015 triggered, the two French houses of Parliament could not reach mutual agreement on a similar text. The National Assembly did not want to enshrine in the Constitution a distinction between citizens according to their holding of another nationality. By contrast, the Senate refused to leave open the possibility of creating statelessness. This deadlock did not reflect the popular opinions of the time: a poll conducted by *OpinionWay* for the newspaper *Le Figaro* concluded that 85% of French people questioned between

28–29th December 2015 were in favour of the extension of the measure to French birthright citizens who were multiple nationality holders. Of these, 62% were “totally in favour” of the measure.²²

In this context, the second research question thus asks why is the practice more prevalent in the context of the UK than in France? And, connected to this question, why did the French extension to the cancellation measure not take place? The literature on state practice at times of heightened national security threat, which I discuss in the chapters 2 and 6, often highlights the incapacity of Parliaments to resist national security claims. It is unclear whether the failure in 2015–16 can be attributed to the specific political context at the time (a right-wing Senate and left-wing National Assembly), to the lack of popularity of President Hollande and the uncertainty of the regional elections (which were to take place in June 2016), to the constitutional structures of France (why introduce citizenship deprivation in the Constitution in the first place?), to the rigidity of the French Constitution (article 89 requires a majority of 3:5 of both houses gathered together in Congress on a similar text), to the importance of citizenship/nationality in the French national narrative, or to different international commitments. In the following chapters, I examine multiple possibilities behind the UK’s more prevalent practice. These are: that there is fundamentally a stronger conception of citizenship and/or equal citizenship in France (chapters 3 and 4); and/or that there may be different commitments to international law and international statelessness obligations (chapters 2 and 4); and/or that the constitutional structures of both countries and scrutiny of state power contribute to understanding what propelled and enabled the British cancellation agenda and held back the French one (chapters 5 and 6). I investigate these potential different scrutinies of state power in the context of the courts in chapter 5 and Parliament in chapter 6.

1.2.3 Research question 3

When introducing the proposed amendment to the Constitution, the French government contended that citizenship deprivation pursued a legitimate aim which “consists of sanctioning the authors of acts so grave that they do not deserve to belong to the national community anymore”.²³ Appearing before the Commission on the laws of the National Assembly, Manuel Valls said that the state would undertake the creation of statelessness in some limited circumstances and reiterated that citizenship deprivation was (also) a “symbolic weapon” which can have important reach in the fight against

²² “85% des Français seraient favorables à la déchéance de nationalité », *Le Monde*, 2015 https://www.lemonde.fr/police-justice/article/2015/12/30/selon-un-sondage-85-des-francais-sont-favorables-a-la-decheance-de-nationalite_4839945_1653578.html (28/04/2019).

²³ Assemblée Nationale, rapport no 3381, « Projet de loi constitutionnelle de protection de la Nation », présenté au nom de M. François Hollande, Président de la République, par M. Manuel Valls, Premier Ministre, et par Mme Christiane Taubira, garde des sceaux, ministre de la justice, 23 Décembre 2015, 12 pp <http://www.assemblee-nationale.fr/14/projets/pl3381.asp> (23/10/2019).

terrorism.²⁴ According to him, the measure was there to distinguish between the “terrorists”, who are held to have “broken off” from the “national pact”, and the rest of the citizenry. He portrayed the “national pact” as including a set of values which “defined” individuals as French. During the passing of the UK amendment in 2014, the then Prime Minister Theresa May, for the government, said that essentially citizenship deprivation allowed the state to consider whether the individual’s actions “are consistent with the values we all attach to British citizenship”. According to May, the script for these values can be found in the “oath that naturalised citizens take when they attend their citizenship ceremonies” (HC deb 30th January 2014: c1042). As noted, the effect of the 2014 amendment was to reintroduce a distinction between citizens according to their mode of entry into citizenship and to allow for statelessness in limited circumstances.

A common feature of these different state approaches, beyond the view that rightlessness can be a legitimate outcome of purported involvement in terrorism activities, is that citizenship becomes conditional on a certain behaviour. Rather than being a right, it is presented as a “privilege” that can be taken away if the individual fails to comply with standards of good citizenship, which seems to include the upholding of certain values. Citizenship deprivation, which formulates a point of rupture between the citizen and the state, thus appears to be a critical gateway through which to examine what citizenship encompasses from the point of view of the state. The third critical question which this thesis addresses investigates the extent to which more local and contingent factors, such as claims of national security protection, bring variations into the different levels of citizenship (of rights, equality and belonging). There is extensive literature that addresses the content of citizenship rights in the context of national security which I seek to further in this thesis. For example, in chapter 5, I look at the courts’ views of citizenship as potential statements of rights and equality in deprivation and non-deprivation cases and examine the extent to which the context of national security protection permeates judicial reasoning. There is also critical literature which discusses state-led exclusionary politics of belonging, which, as Yuval-Davis (2006) frames, are political projects which draft requisites of belonging (for example, through shared values, identities, common descent) and exclude individuals who do not seem to fit within these requisites. This literature is critical because it investigates forms of exclusion beyond the holding of citizenship status. Throughout this thesis I seek to build on this literature and consider what deprivation of citizenship reveals about the content of

²⁴ *op cit* 18, p48. The full quote is: “I do not want a distinction between French multiple nationality holders and the others. This is not the object of this article. I want to differentiate between the terrorists and the others. [...] This is the clarification which we propose: the real distinction separates those who break off from the national pact, with what we are and with France and its values, and the vast majority of our compatriots, if not their quasi totality, irrespective of their mode of entry into citizenship [...] What matters is the way through which they [the citizens] embody the values which define them as profoundly French. [...] I believe in the concrete strength of symbols, enshrined in a Constitution.”

political belonging in both countries. To add complexity, I examine the two states' historical approaches to citizenship and political projects of belonging in a non-national security context to account for potential continuities or discontinuities in the states' practices.

1.3 Methodology: why compare France and the UK?

The comparison between France and the UK is consciously adopted to explore and develop a more complex picture of these states' behaviours and to give richer explanations to the research questions. The aim is twofold: first, to provide for a deep and complex understanding of the tension between citizenship and national security through small-n comparisons and thick descriptions to bring about contingency in time and space; second, to explain the specific puzzle of the thesis: namely, why did both countries turn upon their minority citizens in the context of national security and why did France not go as far as the UK in its practices of citizenship deprivation against a similar background of national security threat? Drawing from these research aims, the research strategy adopted is qualitative and deductive. The empirical data— essentially documents such as case law, legislation,²⁵ parliamentary debates, official and non-official documents, NGO reports – will be used to reveal the complexities, such as common mechanisms and processes, as well variations and deviances, and to refine the terms of the comparison, with limited interest in generalisation. My sampling strategy, a purposive one, is thus informed by my methodological orientation (to acquire in-depth knowledge and empirical details of different contexts) and the research questions.

France and the UK have been chosen for their ability to bring such complexity and variation and to gain deeper insights into the tension between citizenship and the context of national security. Both countries have long-enshrined counter-terrorism frameworks. In comparing the counter-terrorism frameworks of both states, Foley (2013) cites their long histories and important similarities, as well as their differences. As his research demonstrates, these similarities include, for example, the reinforcing of pre-emptive measures to tackle terrorism post 9/11 and an alleged similar perception of the threat, whereas some of the differences include distinctive institutional frameworks (Foley, 2013: 5). Despite these long-enshrined counter-terrorism frameworks, both states turned to cancellation of citizenship as a counter-terrorism measure in the context of a heightened national security threat posed by their own citizens. As noted, the measure primarily targets ethnic minorities and multiple nationality holders, which brings out interesting elements as to how both countries, both former colonial empires

²⁵ In line with socio-legal scholarship (for example: Banakar and Travers, 2005), I treat legal texts and case-law as data. This is because legal language constitutes a form of social practice which can sustain empirical claims.

and now pluralist states, cope with demands for the recognition of difference within the debates of universal, formally neutral, citizenship.

France and the UK are also both members of the Council of Europe, and, still for now, members of the European Union (EU), thus bringing an important multinational dimension to rights and obligations, and potential explanations to similarities in practices. In her work on foreign terrorist fighters, De Londras (2019) demonstrates the influence of EU policies in the convergence of the states' counter-terrorism behaviours for individuals purported to be going to support Jihad. She also highlights the process of "de-politicisation" of the issue, which this multi-governance system creates, and its potential implications on political discussions at the domestic level (De Londras, 2019). In this thesis, the international dimension is also important for the potential constraints on state practices. Both France and the UK are engaged, to different degrees, in a broad spectrum of commitments to various international treaties and conventions, such as, for example, the 1961 Convention on the Reduction of Statelessness.

Against this backdrop of apparent similarities, the countries have often been presented as embodying different approaches to nationhood. For example, in theorising the nation, Schnapper (1998) says that what brings people together in France are political links expressed through citizenship, which is portrayed as universal and equalitarian. By contrast, she frames the UK nation as "empirical" and grounded in the value of tradition, history, and the recognition of diversity (Schnapper, 1998). In the work of Favell, these different national trajectories are important because he uses them to explain what he frames as mutually exclusive approaches to pluralism, *ie* towards the recognition of difference and diversity within public discourses and law (Favell, 2001b). Away from normative discourses of nationhood, the UK and France also follow different legal traditions – a common law system and a civil law one, respectively – located within different legal and political cultures (constitutional frameworks, political principles, and constitutional practices). The UK constitution is famously uncodified and operates under the constitutional principles of parliamentary sovereignty and the rule of law. The French Constitution, by contrast, is codified and enshrines a list of principles and rights which are all of the same legal force. Crucially, the French codified Constitution is the source of validity of the legal system, and a special body, the Constitutional Council, was instituted to ensure the supremacy of the Constitution over ordinary laws. Put simply, this means that if Parliament was to introduce legislation contrary to the provisions of the Constitution, the Constitutional Council would be able to strike it down. By comparison, in rights challenges, the UK Supreme Court can only issue a declaration of incompatibility under section 4 of the Human Rights Act 1998 which has no legal effect. However, the supremacy of the French Constitution over ordinary laws is not immutable: Parliament or the people

through referendum can modify the Constitution and, through it, the conditions of validity of the legal system (article 89 of the Constitution).

1.4 Methods

These similarities and differences are important because they facilitate the identification of critical “parameters”, “variables” and “indicators”²⁶ of what seems to influence the state behaviours and thus answer the research questions. In the social sciences, similarities are classically helpful to reduce the number of variables for the hypothesis – when these are focused on explaining differences – and to bring the focus to the variables which *are* different (Della Porta, 2008: 214). Similarities are also critical to set up meaningful comparison. However, it is never just about similarities, and the identification of differences through thick descriptions is also crucial to “deepen” the terms of the analysis and refine the indicators. In addition, to bring complexity and unravel the purported contingency of citizenship on the political context of national security, I turn to time, in the sense of history, as a critical factor in the analysis. To look at history helps to critically assess if there is anything “new” about the ways in which citizenship and national security interact in the context of the increase in citizenship deprivation. Or, whether minority citizens and dual nationality holders have ever been in an equal relationship with the state. For these purposes, to bring complexity to the analysis and identify relevant indicators of what the past can bring to the study of state practices, I turn to the literature on historical institutionalism and its criticisms.

1.4.1 Bringing complexities

The literature on historical institutionalism is a good starting point in the search for analytical tools to bring complexities. Steinmo, a leading scholar in the field, writes that historical institutionalism does not constitute a particular theory or method but, rather, constitutes an “approach” to studying policies and change (Steinmo, 2008: 118). What this means is that historical institutionalists have a particular way of addressing policy changes, or absence thereof; one which looks at history and institutional settings to explain why things happen in the ways they did or did not. Perhaps this is best encapsulated in Pierson and Skocpol’s statement, two other leading scholars in the field, who explain that historical institutionalism has sought to “make visible and understandable the overarching contexts and interacting processes that shape (and reshape) states, politics and public policy making” (Pierson and Skocpol, 2002: 1). In her own work, Skocpol (1979) demonstrates the influence of state and international structures in the outcomes of the “social revolutions” of France, Russia and China.

²⁶ I use all terms interchangeably.

By comparing successful revolutions with unsuccessful ones, she seeks to infer causality and generalisation: namely, what are the conditions for a successful revolution? (Skocpol, 1979). The work of McAdam, Tarrow and Tilly (2001) is also a good example of how to go about implementing a “historical institutionalist approach” towards research, in their case, on collective political struggle. Their work looks at how different forms of contentions, across countries and time (*ie* from very different case studies), result from similar mechanisms and processes. To unravel such mechanisms and processes they explore several combinations with the aim of discovering recurring causal sequences of contentious politics (McAdam *et al*, 2001: 4). Although the research studies mentioned pursue different objectives, inferring causality, they remain useful when thinking about relationships between the data – for example, between events, legislation and case law – and to make sense of them in the comparison. They also help to highlight convergences (acting in “similar ways” rather than similarly) in settings marked by a difference of conditions and the influence of state, and international structures in the process. Even when the purpose is not to infer causal relationships, Thelen (2002) critically points out that any linkage between the data, sequencing or thinking about relationships, must be theoretically sound (*ie* “why” does such linkage exist?) and must pay due consideration to contexts (*ie* when things happened) (Thelen, 2002: 97). In this thesis, this entails explaining why, for example, it is relevant to look at the potential of juridical decisions on state action or the context surrounding counter-terrorism law-making.

Historical institutionalists also stress the potential influence of historical processes, long-enshrined state practices, on policy-making. This is the “path-dependent” approach, which is often advocated in the work of Pierson (2000; 2015) and sees history as a process which can be “self-reinforcing” with increasing return effects. A path-dependent approach to policy and state practice aims to look at how past institutional arrangements affect policy outcomes, or how past institutional practices create experience which potentially explains institutional behaviour, *ie* by analysing institutions in context (Pierson and Skocpol, 2002: 11). In other words, it is the idea that institutions and policy actors learn from the past and can frame their future behaviour accordingly. It will be useful here to critically engage with institutional behaviours at times of purported emergency crises and/or when faced with claims of exceptional times: is there anything actually out of the “ordinary” in such behaviours? In the context of their respective analyses of the UK and the French Parliaments’ behaviours at times of purported emergency threatening the life of the nation, both Neal (2012b) and Cahn (2016) have demonstrated that the Parliaments have interiorised certain patterns of behaviours. These essentially (although not always) include endorsing the executive’s account of the threat and passing new legislation.

The fact that this “does not always happen” is important and is acknowledged in their respective work. Indeed, the fact that it is unable to account for change is a common criticism of path-dependent analysis and explanations. In reviewing the literature and work on historical institutionalism, Peters *et al* (2005) propose ways through which this criticism could be addressed. These include, they argue, looking at ideas as drivers of change (rather than just maintaining continuity) and also accounting for the larger social economic and political context or extra institutional-exogenous forces (Peters *et al*, 2005: 1297). Cappocia’s criticism adds to this, addressing “endogenous” change, *ie* the dynamic and transformative nature of institutions and their influence over political action – including over their own development (Capocchia, 2016: 1277). Perhaps a more theoretical critique lies in the problem of even thinking of the past as a continuous process. Foucault (1991), in one of his more radical uses of history, which he frames as “history of the present”, says that rather than thinking of the past in terms of continuities one must purport to show that nothing is stable, that objects are problematised differently across time. The purpose is a different one, however. As Garland (2014: 373) indicates in his account of Foucault’s work, it is to show and trace the “power struggles” behind present-day practices, to unravel the “discontinuous process whereby past became present”. In other words, the aim is to unravel something important but hidden about a practice, a concept, *etc*. Taken together, these criticisms are useful in critically engaging with historical institutionalism: to account for disruptions, conflict and change in purported stable patterns, and to think about how the past is constituted and frames present-day practices and categories. Drawing from these criticisms and to refine the terms of the analysis, I look at the literature which has criticised a historical institutionalist way of building “citizenship models” and proposed tools to counter it.

1.4.2 Beyond models of citizenship

Important scholarship from the beginning of the 21st century classifies state practices of citizenship, immigration and integration into different “models” or “philosophies” (for example, Brubaker, 1992; Schnapper, 1997; Favell, 2001b; Koopmans *et al*, 2008). The aim is to simplify complex institutional settings and highlight the importance of historical arrangements and “national narratives” on policy-making. To that extent, this body of the literature is relevant to identify potential markers of difference between state practices and evaluate their explanatory powers. For example, Brubaker’s (1992) seminal work on France and Germany starts by highlighting critical differences in the ways in which the states bond their citizenries and allow foreigners to become citizens. At the time of his writing, France’s mode of acquisition of citizenship from birth and naturalisation rules were more inclusive of foreigners. According to him, these differences can be explained by distinct understandings of nationhood (which he also frames as “cultural idioms”): a state-centred and assimilationist approach

in France versus an ethnocultural and differentialist approach in Germany. His work demonstrates that these “cultural idioms” have emerged and later been consolidated in very specific historical and institutional contexts and, crucially, that they have both framed and justified policy-making. As he writes, these cultural idioms have “framed and shaped judgements of what was politically imperative, of what was in the interest of the state” (Brubaker, 1992: 16). In other words, what Brubaker shows is the extent to which “cultural idioms” or national narrative are important cognitive frames for state actors with critical justificatory political power.

However, often, in the analyses of “modelled” approaches to citizenship and nationhood, national trajectories are assumed rather than explored and/or over-emphasised to prove continuity, and/or concepts are over-simplified at the risk of losing complexity. These flaws have been pointed out and systematised in two important articles in 2012 (Bertossi and Duyvendak, 2012; Finotelli and Michalowski, 2012), though critics had identified these flaws previously. For example, in his criticisms of a modelled scholarly account of religious diversity in Europe, Bader expounds that societies within nation states are often less integrated than assumed and represent more “patchworks or bricolages than orders” (2007: 875–876). In other words, societies are more internally heterogeneous than homogeneous, coherent and stable wholes: there is disagreement, dissensus and conflict within the models. In the context of France, Bertossi (2012), for example, investigates the contention over “republicanism” and identifies at least four different meanings from 1980 to 2012. Laborde (2001), from a normative point of view, makes a similar point in what she frames the “culture(s) of the republic”. These criticisms do not deny the importance of models, however. Beyond the usefulness of models to simplify complex settings, Bertossi (2011) demonstrates that models are constantly debated by individual actors and state practice is often couched in a “modelled” language. His work shows that actors in France often justify their actions through a “republican way” of doing things – *ie* attributing substantive content to their actions and justifications – though again without necessarily explaining what they mean by “republican” (Bertossi, 2011: 1572). Models/images are thus also important objects of “legitimation” once they have been fully embedded within the rhetoric of the state–society arrangement. What this suggests is that to talk about “republican French citizenship” has a performative effect, although one which can entail different meanings according to the institution/actor. These criticisms are critical for this study, considering the level at which I conduct my research: at macro level (the state) rather than micro, which increases the risk of simplification of complex realities. The kind of data that I will be analysing can help to mitigate abstraction, bring about disagreement and acknowledge the role of the different institutions in (re)producing national narratives. For example, I describe different views on citizenship by looking at contrasting case law in chapter 5 (in deprivation and non-deprivation cases), or by looking at different sets of parliamentary

debates, institutional and non-official documents in chapters 4 and 6. In chapter 3, I also examine different images of citizenship which permeate the socio-political and historical debates of both France and the UK. Taken together, this varied data provides multiple layers of meanings and tells different stories.

1.4.3 Deepening contexts

To identify relevant parameters which deepen the analysis, bring complexities and address the factual scenario of the thesis, (*ie* what to reference in the comparison), I draw from scholarships which have given an important place to context in their comparative works. Such scholarship is located both in the field of qualitative empirical studies of the law and in more orthodox comparative law methodology. As recently demonstrated by Creutzfeldt, Kubal and Pirie (2016: 377) and Riles (2006), both fields of scholarship have a lot in common: they identify similarities and differences, pay attention to empirical detail and interpretation, engage in thick descriptions, *etc.* As they note, the scholarships also tend to be more intertwined in light of the globalisation of the legal profession and new debates about legal pluralisms and legal cultures. But what is important for the present is that both bodies of the literature have purported to answer similar questions: such as, for example, how does one assume certain points of stability to critically engage with the comparison and make sense of similarities and differences?

Critical comparative scholars such as Legrand (2003; 2015) have argued that the comparatist needs to go “deeper”, to go below the “surface” of the laws, to get a comprehensive understanding of a legal system and unravel the *mentalité* (deep cognitive structure) of the law itself. Legal culture scholars (Örücü and Nelken, 2007: 16–19), constitutional comparatists (Hirschl, 2014) and other critical comparatists (Samuel, 2004; Frankenberg, 2006) have also called for the need to “open out” the field to other disciplines – such as history, sociology, *etc.* In essence, what these scholars describe is the importance of delving further into the case studies through thick descriptions, so as to fully grasp the objects of analysis and potentially change and/or nuance the terms of the comparison.

The question thus turns to how one utilises context in a way which is relevant to the case studies and respectful of variations and contingencies? In other words, what does one need to reference in the comparison to make sense of the research questions? For the purposes of this thesis, in line with my research aims, the scholarship on legal and political cultures – with its emphasis on what is distinctive about the way law/legal behaviour works and is experienced in different places – provides a good starting point from which to identify relevant parameters to reference in the comparison and answer the research questions.

1.4.3.1 *Legal culture(s)*

Legal culture scholars are concerned with the relationship between law and society and stress the importance of ideas, as well as the practices of legal professionals in a legal system. In this project, I will not be using legal culture as a variable which would account for change. Rather, I intend to draw indicators from the scholarship and use legal culture as a way to think about the data, to stress empirical detail and to underline complexity. Nelken (2004; 1995), a leading scholar in the field, brought clarity to the concept and potential ways in which to use it. Legal cultures, broadly put, refer to a way of describing “relatively stable patterns of legally oriented social behaviour and attitudes to the law” (Nelken, 2004: 1). These, as Nelken writes, range from facts about institutions (*ie* to the ways lawyers and judges are appointed, the methods of adjudications and so on) to forms of behaviour (*ie* how people turn to the law), and to underlying values, ideas and aspirations (Nelken, 2004). To this “internal culture” Friedman adds what he calls “external” legal culture, namely opinions, interests and pressures brought to bear upon legal processes by wider social groups (Friedman, 1977). Relevant indicators in explaining similarity and difference could therefore be, for example, the method of legal reasonings, judicial appointments, judicial practices and procedures and the international legal system. However, Glenn (2004) warns that culture is a contested concept which has been long rejected as an all-encompassing variable by anthropologists. As he demonstrates, culture is itself an element of conflict, one which is disputed and should not be essentialised to explain behaviours (Glenn, 2004). Bell (2008) further adds that the state’s legal systems often encompass different legal cultures. He illustrates this in the context of France through the different practices between public and private law lawyers. In addition, as Nelken (2004) contends, legal cultures are increasingly “relational”, meaning that they develop in contact with others. In essence, this means acknowledging, when analysing the data, that there is nothing “essential” or “original” about culture or “legal cultures” because, for example, a country can encompass different legal cultures, and these can shift or vary in different contexts. This also means acknowledging the role of the constitutional frameworks of the state and underlying values in shaping legal behaviour – what I frame as “political cultures” for want of a better term.

1.4.3.2 *Political culture(s)*

Thus, by political culture I refer to the politico-legal discourses and the influence of state arrangements on the ways in which laws are drafted and practised. These state political arrangements are primarily couched within the constitutional frameworks of states. Here, I mean the different set of principles which guide the political operation of states, the relationships between the different organs, and the

forms of scrutiny exercised on political power. These constitutional arrangements are enshrined in a Constitution, which operates as a “blueprint for operating government” (Tushnet, 2019: 1240), as well as in the state’s practice. Sometimes, government action is bound by both formal and substantive rules because constitutions, such as the French one, can include declarations of fundamental rights and principles.²⁷ But prior to the Constitution of 1958 there was no constitutional review mechanism to enforce these formal and substantive rules. Checks on executive action were enforced through political means (Bell, 1992). Tushnet (1999; 2018), whose work on comparative constitutional law constitutes one of the leading authorities, demonstrates the critical role which these different forms of scrutiny on state action can play in upholding the formal and substantive elements of constitutions, as well as in shaping institutional behaviours. For example, in the context of the US constitutional framework, he evidences that strict legal checks on state action can create incentives for the state to self-limit its power by anticipation of a contradictory decision from the courts (Tushnet, 1999). I consolidate these ideas in chapter 6, but, for the present, Tushnet’s work helps to think about the extent to which constitutional designs and practices can power and/or limit the state’s actions – and explain similarities and differences. In that sense, Prosser (1995) demonstrates the effect of different political cultures on policy implementation in France and the UK. He frames political cultures as encompassing concepts of the state, constitutional values and the more formal constitutional and institutional frameworks of the states. His work expounds the extent to which the different constitutional structures of France and the UK have had a critical effect on the privatisation of public enterprises and regulation after privatisation. As he noted, the doctrine of parliamentary sovereignty and the lack of a set of critical principles against which to judge legislation in the UK implied political control over legislation and more discretion in administrative action. By contrast, the rigidity of the French constitutional system and its set of substantive values exercised more pressure on government action and provided more tools for the judiciary (Prosser, 1995: 508). At the time of his writings, the UK had not introduced the Human Rights Act 1998, but his work remains critical to evidence the potential influence of constitutional structures on the ways through which power is/should be exercised.

When scrutinising state action, formal and substantive rules in the text of constitutions also appear to be important because they frame what constitutes the legitimate exercise of power. Frankenberg (2006) argues that, when engaging with the constitutional frameworks of states and state practices, one should consider constitutions not just as what empowers the citizens (for example, in vindicating rights against the state) but also as what empowers the state. This is because public authorities are,

²⁷ The declaration is included in the preamble.

indeed, often said to be acting in “the public interest” in a way which is “conducive to the public good”, which makes their actions more difficult to challenge. Frankenberg writes that they create “value-based duties” for the state/public authorities which act upon them (Frankenberg, 2006). Applied to the present research, this means critically engaging with the process of legitimation which actors within a constitutional framework can seek through constitutional norms (for example, by asking what effect a claim of “constitutionality” has upon political debate). It also helps to think about constitutions as objects which both embody and can trigger disagreement (for example, about the nature of the rule of law and how to interpret and apply it in judicial reasoning). Essentially, what this shows is that “constitutions neither originate nor operate in a vacuum” (Hirschl, 2014: 152) but, rather, operate in a certain socio-historical context. Taken together, the work of these authors demonstrates that constitutions must be approached as entities that construct as well as constrain politics – reflecting as well as shaping national trajectories and identities – and that constitutional/judicial review has an impact on policy by either triggering change and/or legitimating policies.

1.5 Acknowledging the role of the researcher

What the developments of the previous two sections also suggests is that deepening the context of the comparison through the lens of legal and political culture scholarships runs the risk of crowding the scene with relevant and irrelevant variables. Therefore, in this thesis, I will engage in an “iterative” process between the data and the literature. In other words, I will use my data to refine the parameters and select those which are relevant to my research questions while leaving space for other indicators to emerge. I will then use the literature to engage with the data and address the research questions. The data will be analysed thematically; *ie* being categorised under themes which demonstrate its importance in relation to the research questions (Braun and Clarke, 2006: 82).

Taken together, the iterative and thematic analyses indicate the importance of the role of the researcher in the research design and analysis. What this suggests is that by collecting the relevant data to access the complexities of citizenship, I participate in a struggle for the production of meanings (Harrington and Yngveson, 1990; Webley, 2010). Specifically, in the field of comparative law, Legrand is critical of the ability of the comparatist to *ever* get a good grasp of the concept which s/he compares (2001; 2003). This is because Legrand tends to have an idealistic vision of the law, one which is so deeply embedded within a certain legal context – addressing certain structures, rules of language, relations of powers and the like – that it becomes incomparable because the researcher can never fully access all these complexities. Although Legrand’s approach is a radical one, it is still important to contemplate the role of the comparatist in the comparative process and the impossibility of gaining full control over all the elements. As Frankenberg summarises it, “wherever she [the comparatist] may

migrate and however much she may compare, at the end of the day she still has to settle with incomplete knowledge and less than total ‘cognitive control’” (2006: 441). In my own case, having studied in both legal systems (to master’s level in France and as an Erasmus student in the UK), and subsequently working on my PhD at a UK institution in which I have taught public law (constitutional rights) for four years, I am somewhat in an “in between” position. Although the processes of socialisation and education primarily happened in France, the deconstruction of the categories of knowledge developed through education mostly occurred in the UK, during the years of the PhD process. Thus, I am, to borrow one of Zedner’s reflections on the role of the comparatist, “the child of one and at best the distant cousin of the other” (1995: 519).

1.6 Chapter plan

In chapter 2, I introduce the key terminology which undergirds the research questions and analysis of this thesis, namely: citizenship and nationality, the international framework of citizenship deprivation and, in particular, how it relates to statelessness and, more broadly, some key features of the counter-terrorism frameworks of France and the UK. The chapter then sets out briefly a timeline of key moments in the practice of citizenship deprivation in both states which attempts to clarify what is distinctive about citizenship deprivation and present the critical themes it triggers. In chapter 3, I seek to demystify some predominant views about French and British citizenship by looking at the socio-historical debates and historical practices which mediate the relationship between the individual and the state. The chapter is intended to bring together trends and complexities for meaningful comparative analyses and to answer the research questions, for example, the extent to which equal citizenship has substantive content in both states’ frameworks and historical practices. In chapter 4, I examine what critical factors can explain the distinctions between formal citizens for cancellation of citizenship purposes and what effect the distinctions potentially have on citizenship. Building on existing literature on the overhaul of citizenship rights in France and the UK, I engage with three potential factors. These are: the prohibition against statelessness; different expectations of conduct for people who naturalise as citizens; and doubts about the political belonging of second-generation migrants who became citizens. In chapter 5, I scrutinise the courts’ approaches to citizenship deprivation cases and examine the extent to which these can tell us something about the difference in the states’ behaviours or, if there are similarities, about the extent to which national security contexts (re)define the contours of citizenship protection. In chapter 6, I deepen the search for answers in the critical difference in the states’ behaviours and turn to the constitutional structures of the states, in particular, their supposed degree of flexibility or rigidity. I examine the extent to which these have played a critical role in the debates which spanned over the period of 2014–16 in both

countries. From this I draw insights about the protection of citizenship rights in the context of an adverse rights environment, in the context of claims of national security protection and scepticism towards diverse forms of belonging to the state. Together, these present a complex picture of the issues that this thesis addresses and point towards answers deeply rooted in the constitutional structures of nation states.

1.7 Conclusion

In this chapter, I have introduced the factual scenario which drives the research questions of the thesis and the methodology and methods through which I intend to address these questions. My research attempts to explore and explain how more specific, contingent and local factors bring about changes in citizenship policies. Through combining a socio-legal and comparative law methodology I intend to bring contextual complexities to my document analysis. Indicators of what these complexities might be are derived from the literatures on legal and political cultures and historical institutionalisms. In the next chapter, I turn to some of the key terminology which power the research questions of the thesis and seek to delineate critical themes from a brief timeline of citizenship deprivation in both countries.

Chapter 2: Cancellation of citizenship and national security: frames of reference

“It [cancellation of citizenship] is prejudicial to the French Republican tradition and, in no way, protective of the citizens”¹ François Hollande, MP, 2010.

“Should individuals who have been naturalised for less than 10 years and kill a policeman be deprived of their citizenship? Asked like this the question is caricatural: would it prevent murders? No. ... I think we need to leave it there. We are entering a debate which is vile and absurd ... in which we seek to make ourselves believe that immigration and insecurity are linked”² Manuel Valls, MP, 2010.

“A part of the left is getting lost in the name of big values and forgets the context, our state of war, and the speech of the President before the Congress”³ Manuel Valls, PM, 27th December 2015.

2.1 Introduction

In chapter 1, I presented the context of the research questions of the thesis and the methodology and methods through which I intend to address these questions. In this chapter, I will first introduce the key terminology which undergird the research questions and analysis of this thesis, namely, citizenship and nationality, statelessness and counterterrorism, which I locate in the French and UK contexts. I then move on to set out briefly a timeline of key moments in the practice of citizenship deprivation in both states to clarify what is distinctive about citizenship deprivation and to explain what seems to drive these powers. Drawing from the timeline and academic literature, I then search for patterns and themes which may explain the puzzle of this thesis: why did both states increase their recourse to citizenship deprivation against their own minority citizens and why did France not go as far as the UK?

¹« Quand Hollande et Valls conspuaient la déchéance de nationalité au nom de grandes valeurs » *Le Monde*, 2015

https://www.lemonde.fr/politique/article/2015/12/29/quand-hollande-et-valls-conspuaient-la-decheance-de-nationalite-au-nom-de-grandes-valeurs_4839120_823448.html (09/05/2019)

« Déchéance : critiques de Hollande », *Le Figaro*, 2010

<http://www.lefigaro.fr/flash-actu/2010/08/31/97001-20100831FILWWW00608-decheance-critiques-de-hollande.php> (09/05/2019).

²« Les contradictions de Manuel Valls sur la déchéance de nationalité » *Le Monde*, 2014

https://www.lemonde.fr/les-decodeurs/article/2014/06/03/decheance-de-nationalite-valls-imprecis-valls-amesique_4430975_4355770.html (09/05/2015)

³ « Valls au JDD : « Une partie de la gauche s'égaré au nom de grandes valeurs » », *Le Journal du Dimanche*, 2015

<https://www.lejdd.fr/Politique/Valls-au-JDD-Une-partie-de-la-gauche-s-egare-au-nom-de-grandes-valeurs-765743> (09/05/2019).

This chapter thus provides frames of reference. It lays down the principles, the groundwork which will assist me to organise discussions of the data in the coming chapters.

2.2 Terminology

In this thesis, I use citizenship deprivation, cancellation of citizenship, deprivation of nationality and revocation of citizenship/nationality interchangeably, but these terms are not themselves straightforward and therefore I would like to introduce these here. Different images and legal meanings have been attached to citizenship and nationality, a point which I examine further in this section. Another issue of terminology is that citizenship deprivation covers different kinds of individual behaviour and state actions. For example, Bauböck and Paskalev (2015), differentiate between procedures of “voluntary loss” and procedures of “involuntary loss” of citizenship. As they note, citizenship can be voluntarily renounced, but its loss can also result from a state sanction or from a conflict of nationality laws between states, *etc* (Bauböck and Paskalev, 2015). For reasons which I set out below, I focus on citizenship deprivation as a state sanction for security purposes. Security, however, is only one of the numerous grounds on which states can “sanction” individuals through deprivation. To give an example, a comparative study conducted by the European Observatory on Citizenship identifies 15 different procedures for deprivation of citizenship in 30 European states (De Groot *et al*, 2010). These include deprivation for fraudulent acquisition of citizenship, deprivation for concealment of material facts and so on.

2.2.1 Citizenship and nationality

At their core, citizenship and nationality refer to the same concept: they place individuals within nation states. Politically, citizenship and nationality have different images which historically came about at different times. In the French context, nationality was introduced as a political concept in the course of the 19th century, and as a legal category during the 20th century (Noiriel, 2001). Gaven (2017), drawing from an archaeology of deprivation powers, thus makes a critical point when he argues that if deprivation of citizenship has a long history in France, deprivation of nationality does not. In the context of the UK, nationality appeared as a legal category in the 1980s (in the British Nationality Act 1981) and, as Tyler (2010) demonstrates, was only invested politically in the context of break-up from the empire. Previously, what mediated the relationship between the individual and the state was the status of the “subject” and, from 1948, the “citizen-subject”. I develop these different images of citizenship, subjecthood and nationality in the context of France and the UK in Chapter 3.

Legally, however, citizenship and nationality are often used interchangeably, although they differ slightly. Citizenship encompasses the rights and obligations attached to individuals by the state at the domestic (state) level. But one issue with citizenship is that it is often not defined as a clear set of legal rights.⁴ Lochak (1991), for example, talks about a “blurred” legal concept in France, which does not appear anywhere save for in the Declaration of the Rights of Man and of the Citizen 1789 (DRMC), and, since the time of her writings, in article 77 of the Constitution, which deals with the special status of New Caledonia. By contrast, nationality refers to the legal bond which attaches individuals to states within the international legal framework and is legally defined. At the international level, nationality confers rights upon individuals: the right to diplomatic protection, the right to return to one’s country of origin and the right not to be deported. In 1955, the International Court of Justice said that to be recognised as the national of a state at the international level and access rights requires a “genuine link” between the individual and the state (*Nottebohm (Liechtenstein v Guatemala)* [1955] ICJ 1). In the eyes of the court, drawing from the practice of states, “nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties” (p23).

In both France and the UK this “genuine connection”, which I develop in more depth in chapter 4, is encapsulated through a combination of “*jus soli*” (birth on the territory) and “*jus sanguinis*” (descent) for citizenship acquired from birth. After birth, it is contained in the different criterion to be granted nationality through naturalisation, marriage or registration,⁵ namely, at least for the first two: residence, good character and knowledge of the institutions and the languages of the state. A critical feature of most states including France and the UK is that citizenship is nationalised. This means that the exercise of most citizenship rights, such as, for example the right to come and go without immigration checks, can be conditional upon the holding of nationality – hence, the reason why both terms are often used interchangeably. Residence in a state, however, usually allows access to most domestic citizenship rights (such as, for example, access to healthcare, civil rights *etc*). In the context of the UK, political rights such as the franchise are also conferred on some non-nationals.⁶ The

⁴ This critical feature has been acknowledged by institutional reports in both countries.

In France: Conseil d’Etat, « La citoyenneté. Être (un) citoyen aujourd’hui », Les rapports du Conseil d’Etat (ancienne collection études et documents du Conseil d’Etat), 2018, 211pp, at p32

<https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/184000629.pdf> (29/07/2019).

In the UK: “Citizenship: our common bond”, Lord Goldsmith QC, citizenship review, March 2008, 138pp, at p6

<http://image.guardian.co.uk/sys-files/Politics/documents/2008/03/11/citizenship-report-full.pdf> (11/09/2019).

⁵ Registration primarily concerns the children of migrants born in the territory of a state. In these instances, the children are not citizens from birth but have a right to claim citizenship, often subjected to conditions of residence. In this thesis, I use “naturalisation” more broadly to refer to the modes of acquisition of citizenship after birth.

⁶ Goldsmith, *op cit* 4.

exclusive granting of citizenship rights through nationality is thus nuanced. It is further nuanced by the international bodies and treaties which can grant rights to individuals, the paradigmatic example being that of the European Union (EU). In 1992, the EU introduced a citizenship of its own and a corollary right attached to it: freedom of movement for EU citizens (Treaty on European Union, Maastricht, 1992).⁷ In the 1990s, some academics argued that this double process signified the end of the nation states as exclusive regulators of rights (Soysal, 1994). Practices such as that of citizenship deprivation nuance these claims because they reveal that individuals still need a state to act in order to enable the operation of their rights. Arendt (1958) evidenced this in the aftermath of the Second World War in the context of the development of a rich international system and body of rights protection. At that time, statelessness was a core issue because individuals had been deprived of their citizenship during the war and/or had had their citizenship withdrawn (for naturalised citizens). Through the example of the stateless, Arendt exposed the practical limitations of international human rights: without a state to implement them the individuals were *de facto* left rightless (Arendt, 1958).

A modern expression of this, the idea that the states remain the primary actors to actionize rights, can be found in the European Court of Justice (ECJ) case of *Rottmann* (Case C-135/08 *Janko Rottmann v Freistaat Bayern*). Rottmann was of Austrian origin but lost his Austrian citizenship when he naturalised as a German citizen. Rottmann also had European citizenship, initially as a result of his Austrian citizenship and, later, by naturalising as German. In Austria, Rottmann was suspected of serious fraud in the exercise of his profession and a national warrant for his arrest was subsequently issued. He did not disclose this judicial proceeding against him when he naturalised as a German citizen. As a result of the discovery of the fraud, the deception to the German authorities, Germany sought to revoke his citizenship. Because the revocation would entail absence of the surviving of any citizenships and the loss of Rottmann's European citizenship, Germany turned to the ECJ for advice on the interpretation of the provisions of the Treaty establishing the European Community relating to citizenship of the EU (para 1 of the judgment). The court acknowledged the sovereignty of member states over procedures of grant and loss of national citizenship even when it puts individuals at risk of statelessness and loss of EU citizenship. The court did, however, seek to frame the conditions under which a member state could deprive individuals of their national and European citizenships: member states should have "due regard" to the laws of the EU when issuing a deprivation order (para 39). The court also said that state authorities and domestic courts must respect the principle of proportionality when depriving someone of their citizenship (para 55). What this means is that only the gravest departures from what nationality requires could justify deprivation. The court considered fraud to be

⁷ At present, the right to move and reside freely within the territories of member states is enshrined in article 21 of the Treaty on the Functioning of the EU.

one such departure and gave hints as to what others could be. According to the court, it was: “legitimate for a member state to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality” (para 51). Loss of EU citizenship can thus only be justified in the eyes of the court for breaches of the “solidarity” and reciprocity of rights and duties between the state and its nationals; and provided that a proportionality scrutiny of the exercise of the powers has been conducted.

2.2.2 Grounds of citizenship deprivation

The case of *Rottmann* illustrates one of the various ways through which individuals can lose their citizenships: in this case, fraud. In France, the law distinguishes between procedures of “loss” of citizenship (which accounts for a change in allegiance, where individuals behave as the citizens of other states) from deprivation on grounds of wrongful conduct, a sanction taken by the state (*eg* citizenship deprivation for actions contrary to the fundamental interests of the state, fraud *etc*). However, history reveals that the distinction between loss and the different grounds of deprivation is more tenuous in practice (Zalc, 2018), a point which I examine later in the chapter. For the present, it is important to note that the distinction is enshrined in different articles of the Civil Code: procedures of loss can be found in articles 23-7 and 23-8 of the Civil Code; deprivation on grounds of national security in articles 25 and 25-1; fraud after naturalisation by decree in article 27-2; and fraud after acquisition of citizenship by marriage in article 26-4. Similar provisions existed in the UK prior to the British Nationality Act 1981, where individuals could “lose” their citizenship if they had spent seven years abroad. But these are no longer enshrined in the wordings of section 40 of the British Nationality Act 1981 which covers deprivation for fraud, false representation, concealment of material facts⁸ and national security.

Within the grounds of deprivation of citizenship, I focus on those which sanction acts contrary to the national security of the state. In the UK, it entails actions “seriously prejudicial to the vital interests of the state” (s40A(b)) and instances where the Home Secretary is “satisfied that deprivation is conducive to the public good” (s40(2)). In France, it covers actions under article 25: crimes or misdemeanours

⁸According to chapter 55.4 of the Home Office guidelines, false representation entails “dishonest” mistakes on the part of the applicant; concealment of material fact means the concealment of an important fact which had a direct implication on the decision to naturalise, for example; whereas fraud entails either of the above. Home Office UK Visas and Immigration, “Chapter 55: Deprivation and Nullity of British Citizenship”, 2017, 22pp, at pp4–5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/631643/deprivation-nullity-Chapter-55.pdf (04/11/2019).

For a comparative analysis of these grounds see: Fargues (2019).

against the national interest of the state or crimes or misdemeanours of terrorism (article 25.1); crime or misdemeanour of public agents against the administration (article 25.2); crimes for the failure to meet the requirements of national service (article 25.3); and if the individual performs actions incompatible with the “quality of being French” to the benefit of a foreign state and prejudicial to the interests of France (article 25.4). I focus especially on the actions covered under the ground of article 25.1: actions against the national interest and terrorism. The distinction between the different grounds is important for two reasons: first, the grounds require different levels of compliance with the international framework of rights protection and, especially, statelessness; second, it is useful to introduce what falls under the ground of national security protection in both states and how it fits within the state’s existing counter-terrorism framework. I turn to these different frameworks in the next sections.

2.3 Statelessness and the relevant international framework

The UN International Convention on the Reduction of Statelessness (New York, 30th August 1961) precludes deprivation if the individual would be left stateless (article 8.1), subject to limited exceptions (listed in articles 2 and 3). The exemptions include fraud (article 8.2), breach of loyalty (article 8(3)(a)) such as, for example, actions against the vital interests of the state (article 8(3)(a)(ii)), or repudiation of allegiance (article 8(3)(b)). However, the states can only claim exemptions from article 3 (loyalty and national security) if, at the time of signature, ratification or accession, they have reserved their right to do so through a declaration. The UK signed the UN Convention on 30th August 1961 and later ratified it in March 1966. In the case of France, the statelessness Convention does not have the same binding effects. This is because France signed the Convention in 1962 but never ratified it.⁹ Therefore, it is only bound by the principle of “good faith” under international law which precludes behaviour which would go against the “spirit” of the Convention. Despite the different “legal force” of the Convention, a critical similarity between both states is that they have reserved their right to depart from the full protection of the Convention for national security purposes.¹⁰ What this means is that

⁹ The reasons behind the absence of ratification are still unclear. In 2012, during the second cycle of the universal periodic review (a UN mechanism which allows states to make recommendations to other states in light of their international commitments), Slovakia pointed out France’s lack of ratification of the 1961 Convention. France said that it “does not consider, at present, to ratify this convention which would entail a modification of its domestic legislation on nationality” (articles 27-2 and 21-4 of the Civil Code). France also said it was “open to dialogue on this question” but no legal changes have yet happened.

UN High Commissioner for Refugees, « Soumission par le Haut-Commissariat des Nations Unies pour les réfugiés », pour la compilation établie par le Haut-Commissariat aux droits de l’homme. Examen périodique universel : 3eme Cycle, 29eme Session, France, 32 pp, at p9 <https://www.refworld.org/pdfid/5b0816fd4.pdf>. (04/12/2019)

¹⁰ The full wording of the declaration of the UK reads as follows: “[The Government of the United Kingdom declares that] in accordance with paragraph 3(a) of Article 8 of the Convention, notwithstanding the provisions

the states can make individual citizens stateless for national security purposes, provided that they comply with the conditions set out in their declarations. Other relevant international provisions on statelessness include article 7(3) of the European Convention on Nationality. Article 7(3) bans deprivation resulting in statelessness, save for issues of acquisition by fraudulent conduct. However, the UK neither signed nor ratified the Convention, and France signed it but did not ratify it. There are more general international provisions against “arbitrary” deprivation of nationality¹¹ but, as Macklin (2014: 10) demonstrates, it is often difficult to comprehend what “arbitrary” means and entails, who are the addressees of the rights, whether the instruments have full legal force, and whether nationality is referred to specifically. Taken together, these conventions and the exceptions they entail suggest that there would be contested ideas as to what the states can and cannot do with regards to statelessness, a point which I consolidate in chapters 4 and 6.

2.4 Citizenship deprivation within the counter-terrorism frameworks of France and the UK

Citizenship deprivation on grounds of national security covers a wide range of actions. France and the UK have long enshrined counter-terrorism frameworks, but new approaches to counter the threat posed by terrorism are constantly being proposed. Post 9/11, the movement has been one of critical legislative growth in both countries, a phenomenon which is not restricted to the counter-terror legal frameworks, although it is a domain where it is especially salient. One potential rationale behind this legislative growth post 9/11 is that counterterrorism requires new forms of actions to adapt to “new” forms of terrorism. Spencer (2006: 4) writes that “new” terrorism is often framed as involving “different actors, motivations, aims, tactics and actions”. He is critical of this framing, however, as he

of paragraph 1 of Article 8, the UK retains the right to deprive a naturalised person of his nationality on the following grounds, being grounds existing in the UK law at the present time: that, inconsistently with his duty of loyalty to Her Britannic Majesty, the person

(i) Has, in disregard of an express prohibition of Her Britannic Majesty, rendered or continued to render services to, or received or continued to receive emoluments from, another state, or

(ii) has conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty”. Convention on the Reduction of Statelessness, “Chapter V: Refugees and Stateless Persons”, *United Nation Treaty Collection*, New York, 1961

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-4&chapter=5&clang=en, (06/03/2019).

As for the French declaration, it is: “At the time of signature of this Convention, the Government of the French Republic declares that it reserves the right to exercise the power available to it under article 8(3) on the terms laid down in that paragraph, when it deposits the instrument of ratification of the Convention”. *Ibid.*

¹¹For example, article 15 of the Universal Declaration of Human Rights 1948 states that everyone has a right to nationality and that arbitrary deprivation of nationality is unlawful. Article 12(4) of the International Covenant on Civil and Political Rights provides that: “No one shall be arbitrarily deprived of the right to enter his country of origin”, while the African (Banjul) Charter on Human and People’s Rights 1981 guarantees “the right to leave any country including his own and to return to his country”.

finds that this tends to give more legitimacy to the expansion of state power. This view, that the current terrorist threats differ from previous ones and require state action, seems supported empirically when one looks at the kind of justifications which have been advanced by different governments to increase the reach of their powers. For example, in answering questions about why the French government had introduced several counter-terrorism laws since 2012, the then Home Secretary Bernard Cazeneuve said that “we only adopt new laws because we are facing a *moving* threat which calls for *constant* adaptation” (Cazeneuve, 2016: 5) [my emphasis]. The “moving” character of the threat has led to an increasing use of citizenship as a counter-terrorism measure, for example, to preclude re-entry or allow for the deportation of the alleged terrorist such as through deprivation powers. Academics have demonstrated how this movement has left citizenship, as an entitlement to rights, less secured for some citizens (Jarvis and Lister, 2015). To fully come to terms with the similarities in the processes overhauling citizenship rights post 9/11 in both France and the UK, I first return to what appears to influence counter-terrorism law-making in both contexts. I move on to present some measures which emulate effects similar to citizenship deprivation – for instance the curtailment of free movement – to determine what, if anything, seems distinctive about citizenship deprivation. I then briefly touch on how academics have discussed what can potentially explain the support for these drastic reversals on citizens’ rights.

2.4.1 Events and counter-terrorism law-making

Scholars who have focused on state conduct at times of heightened national security threats have cited the influence of the political context on counter-terrorism law-making. Scheppele (2006; 2004), for example, finds scripts of state action in such contexts. What she frames as “emergency legal frameworks” often include a centralisation of powers into the hands of the executive underpinned by deference from Parliament and the judiciary. For example, she evidences that the executive can be given powers to act pre-emptively through administrative procedures and that there may also be a militarisation of state power. As she notes, such emergency frameworks do not necessarily entail a neglect of constitutionality, in the sense that they do not operate outside of the law, because the legal frameworks of the state often include clauses which suspend the ordinary playing out of politics and allow derogation from a full protection of rights (Scheppele, 2004; Scheppele, 2006). De Londras (2011: 10) adds to this critical lens the analysis that extensive state power at times of emergency crises can be driven by both the “top” (*ie* manufactured by the state) and the “bottom” (*ie* the people who are undergoing a social experience of fear and panic). She demonstrates that top-down and bottom-up pressures to expand security powers create a political space which can facilitate consensus, beyond political affiliations, and the taking of drastic measures (De Londras, 2011).

There are evidences of past practice in France and the UK which point to the relevance of these frames of analysis. Historically, both France and the UK have implemented emergency legal frameworks at times of heightened threat to the security of the state and derogated from the normal protection of rights. For example, in the second half of the 20th century, the resurgence of political violence in Northern Ireland in the UK led to the introduction of a series of legislation measures (the Emergency Provision Act 1973, the Prevention of Terrorism (Temporary Provisions) Act 1974) which conferred exceptional legal powers upon the executive. Donohue (2000; 2007), who reported this legislative evolution, shows that the powers included pre-charge detention, stop and search, non-jury trials, exclusion orders and the like. More recently, following the attacks of 9/11, the UK derogated from article 5 of the European Convention on Human Rights (ECHR) and introduced section 23 of the Anti-Terrorism Crime and Security Act 2001. Article 15 of the ECHR allows for such derogation at times when states are facing a situation of emergency “threatening the life of the nation” and so long as the measures taken do not entail a disproportionate infringement of the rights protected by the Convention. Through section 23, the UK government could indefinitely detain foreign citizens. In the French context, the special derogatory procedure of the “state of emergency”¹² was triggered in the context of the aftermath of the terrorist attacks of November 2015.¹³ Some of the measures include the possibility for administrative authorities to issue house arrests, curfews, the closing of public venues, or restrictions on the media. The procedure lasted for two years and most of its provisions were incorporated into domestic legislation by law no 2017-1510 of 30th October 2017 (*securité intérieure et lutte contre le terrorisme*). In the UK, too, some of the provisions of the Prevention of Terrorism Act 1974 were enshrined in the Terrorism Act 2000.

These examples reveal a critical feature of emergency legal frameworks: the fact that they tend to linger well beyond the context which introduced them. Emergencies have in fact been “normalised” in that they have been incorporated into ordinary legislation. Bigo and Bonelli (2018) demonstrate that these times of exceptional crisis have a “ratcheting effect” (*effet de cliquet*) in that they transform the previous equilibrium of power and accommodation of security and liberty towards more security. For example, Bigo (2002) shows that states are increasingly governing through “managements of unease”, ruling not through the fear of what has happened, but what might happen. Translated into law, this frame of analysis can provide support to explain the state’s increasing recourse to pre-

¹² The procedure is launched by a decree of the government and lasts for 12 days. It applies to the whole or parts of the territory, and it can be extended by law. Challenges to the measures are held before a commission composed of administrative authorities and set up by the Conseil d’Etat. The decisions of the commission can be challenged before administrative courts. The special derogatory procedure was applied during 12 months in 1955, three months after the *coup d’Etat* of 13th May 1958 in Alger, also in 1961, 1963 and in 1984, in New Caledonia, and in 2005. See, for example, Heymann-Doat (2016).

¹³ For a critical assessment, see on the operation of the state of emergency: Sureau (2017) and Bigo (2019).

emptive measures to curb the potential security threat, a point which I examine further in the next section. It is also possible that emergency legal frameworks have been “normalised” in the sense that the institutions of the state have incorporated these exceptional moments into their everyday practices. For example, Neal (2012b; 2012a) in the UK, and Cahn (2016) in France demonstrate how the “script” of state action when faced with claims of national security protection and the transfer of power to the executive is almost always reproduced by the organs of the state. In such contexts, the courts and Parliament, as they show, tend to defer to the executive and allow for overreaching state action. What their work indicates, then, is that there is nothing “exceptional” in the behaviour of state institutions before claims of national security protection. Arguably, what is, in fact, exceptional is the reach of the powers and their effect on individual’s rights.

As recently demonstrated by Blackburn, De Londras and Morgan (2020) in the context of the UK, this “normalisation of the exceptional” triggers important issues for accountability, in the sense of the citizens being aware of the state’s actions and the state being answerable to the citizens. They refer to the UK as a “counter-terrorist state”, pointing to the permanent architecture of counter-terrorism laws and discourses across state activity and structures. Their work reveals that there are structural factors, such as state secrecy, executive control over review and the like, which impose limits on the reach of counter-terrorism review (Blackburn *et al*, 2020). I engage with these in more depth in chapter 5 in the context of the courts and in chapter 6 in the context of the French and UK Parliaments.

2.4.2 Internationalisation of counter-terrorism law-making

To fully account for these expansive state powers and potential issues of accountability, a critical view would also look at the influence posed by the international field. As Scheppele (2010) demonstrates, post 9/11, international organisations such as the UN Security Council called upon states to take counter-terrorism measures and coordinate their actions. De Londras (2019) encapsulates this process in what she frames as the “new institutional infrastructure of transnational counterterrorism”. She argues that this new framework has important implications for the politicisation of security issues. First, as she contends, this is because transnational counter-terrorism operates at a level which leaves little space for political disagreement; second, because these transnational measures can be used as a process of legitimisation for domestic measures. As De Londras writes, within these frameworks, “the states have created for themselves the capacity to depoliticise, to reduce contestation, to shut out rights-based perspectives and to evade accountability” (De Londras, 2019). The core measures which De Londras refers to were recently introduced by a European directive and aimed to curtail the movement of individuals and prevent movement back and forth to Syria. They entailed the criminalisation of “outbound travelling for the purpose of terrorism” or the withdrawal and the

cancellation of passports (Directive (EU) 2017/541 of 15th March 2017). Given that both France and the UK are part of the Council of Europe and, still for now, of the EU her analyses have important resonance to account for similar counter-terrorism practices. However, most of these measures, which were intended to curtail the movement of citizens, already existed in the frameworks of France and the UK, but their reach has been expanded. In the next section I scrutinise the contexts under which these measures emerged and the conditions for their implementation and practices. A scrutiny of these conditions is important because some of the measures emulate effects similar to citizenship deprivation: they impede re-entry into the state and/or preclude travel and can, therefore, give hints as to the specific effects on individuals of the cancellation of citizenship.

2.4.3 Examples of the use of citizenship as a counter-terrorism tool

The administrative measures of passport withdrawal, passport refusal, temporary exclusion from the state and/or temporary prohibition of travel are now critical features of the architecture of the counter-terrorism frameworks of both states. What is particularly distinctive about these measures is that they are administrative measures directed at the states' citizens. Previously, administrative measures which purported to emulate similar effects, for example, to preclude entry or deport individuals, were reserved to non-citizens through immigration law. Walker refers to this kind of security practice as the "exit model", one which deports and annuls the prospect of rehabilitation (2007). Increasingly, however, in the context of individuals travelling purportedly for Jihad in Syria, the "exit model" through restriction on movement has been applied to the citizens of the state. To give an example of the "exit" model and its application to both nationals and foreigners, the then French President, in his speech in Versailles following the terrorist attacks of November 2015 in Paris, said that:

"We must be able to forbid a dual national from coming back to our territory if s/he represents a terrorist risk, unless s/he accepts to be subjected to a drastic check through the border authorities, as do our British friends. We must be able to expel more quickly foreigners who represent a particular threat to public order and the security of the nation, but we must do it in respect of our international commitments".¹⁴

Some of the "drastic checks" which these "British friends" implement were advocated for by Theresa May, then Home Secretary, who, in a written statement issued in 2013, said that passport withdrawal

¹⁴ Service de Presse de la Présidence de la République, « Discours du Président de la République devant le Parlement réuni en Congrès », 2015, 10pp.
<http://www.ariège.gouv.fr/content/download/9989/68738/file/16112015%20CONGRES%20VERSAILLES%20AT%20TENTATS%20DE%20PARIS%20DISCOURS%20DE%20FRANCOIS%20HOLLANDE.pdf> (26/11/2016)

should be re-enforced to target individual purported Jihadis who seek to return to the UK to conduct attacks against the state (HC, WS 25th April 2013: c69). At the time, she said that the measure should be able to be applied to individuals who had not expressly voiced their wish to travel abroad (c70). The pre-emptive character of the measure was thus far-reaching. Drawing on the subsequent implementation of the powers, Kapoor and Narkowicz (2017) point to the opacity around which the Passport Office establishes the suspicious character of the individuals from whom to withdraw passports. In one instance, they report a judgment where the judge agreed that each of the points raised a “minor suspicion” (being late at the airport, having an encrypted USB key), but that, taken together, it amounted to something more serious, and thus approved the retention of the passport (Kapoor and Narkowicz, 2017: 11). In France, passport withdrawal also exists, but a study of the “impact” of the measures commissioned by the National Assembly reveals that they were considered “insufficient” for the prevention of travels to Syria.¹⁵ The government, to curtail movement, preferred to temporarily seize passports, a procedure valid for six months against minors and over-18s alike (law of 2014-1353, 13th November 2014). The grounds for temporary seizure of passports also give broad powers to the executive.¹⁶ So far, only one reported case quashed an order from the executive, on grounds of error of facts. In the case of *Mme A* (TA no1508479/3-1, 7th July 2015) the Administrative Tribunal of Paris found that: “While Mme A’s project to travel abroad is unprecise and uncertain, the administration does not bring any element justifying that she was intending to leave for a place where terrorist operations are conducted”. The UK also has recourse to such powers (schedule 1 of the Counter-Terrorism and Security Act 2015). In 2017, it seized 17 passports of UK nationals and cancelled the passports of another 14.¹⁷ The UK went a step further, however, as it enshrined in law the possibility for the state to prevent the return to the country of its citizens for a period of a maximum of two years, renewable (s4(3)(b)) (schedule 2 of the Counter-Terrorism and Security Act 2015). But, by contrast to the broad discretion that the executive enjoys in the field of citizenship and immigration, temporary exclusion orders (TEOs) are exposed to prior scrutiny from a judge, although a light one: the court must ensure that there is no gross violation of the procedure. This does not minimise the fact that, as the former independent reviewer of terrorism legislation, David Anderson

¹⁵ Assemblée Nationale, « Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », étude d’impact, Juillet 2014, 72pp
<http://www.assemblee-nationale.fr/14/pdf/projets/pl2110-ei.pdf> (06/11/2019).

¹⁶ The measure is based on serious reasons to think that individuals intend to “1/go abroad to participate in terrorist related activities 2/to go abroad in a place where there are terrorist operations conducted by terrorist groups, in such conditions which are at risk of endangering public security once returned to the territory” (decree n 2015-36 of 14th January 2015).

¹⁷ HM Government Transparency Report 2018, “Disruptive and investigatory powers”, 2018, 97pp.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727961/CCS207_CCS0418538240-1_Transparency_Report_2018_Web_Accessible.pdf (13/11/2019).

suggests, this forfeiture of the right to return echoes ancient notions of banishment.¹⁸ In 2017, nine TEOs were issued.¹⁹ Given the importance of free movement as a core aspect of legal citizenship,²⁰ these measures are especially drastic ones. They give broad powers to the executive and target diluted forms of conduct (*ie* distant from the commission of a wrongful act). At times, the measures entail criminal law consequences. For example, in France, individuals who travel in spite of a seizure of passport or refuse to give their passport up are liable to a two-year prison term and a fee of €4,500 (articles L 224-1 to R224-6 of the Code of Internal Security). In the UK, the Counter-Terrorism and Security Act 2015 also makes it unlawful for the subject of a TEO to return to the UK without reporting to the authorities. When in their home countries, individuals subjected to TEOs in the UK or prevented from leaving the territory in France can be under obligations to routinely report to a police station and/or to attend “de-radicalisation” programmes.²¹ In the French context, these programmes are framed as “reinsertion and acquisition of the values of citizenship” (article L225-5 of the Code of Internal Security, law of 2016-731 of 3rd June 2016) and can lower the sentencing penalty from the state. The level of state sanction can thus be “tailored” to the individual’s commitment to showing proof of being a “good citizen”. Both Zedner (2010: 397) in the UK and Poncela (2016) in France give other examples of the use of a standard of “good citizenship” as a tool to monitor criminal sentencing in the context of what they identify as substantive developments in the state’s criminal laws.

These measures remain less drastic than citizenship deprivation, however. Formally, they differ from citizenship deprivation in that passports are only a proof of the identity of the individual (McGuinness and Gower, 2017: 12); substantively, too, as the rights can be restored. This is not to minimise the symbolic character of the measures in that, as Kapoor and Narkowicz indicate in the context of passport withdrawal, they echo the experience of the undocumented (Kapoor and Narkowicz, 2017: 6). But, to use Lavi’s phrase: “citizenship deprivation is not merely a severe punishment [it is] a unique

¹⁸ D Anderson QC (Independent Reviewer of Terrorism Legislation), Citizenship Removal Resulting in Statelessness: first report of the independent reviewer on the operation of the power to remove citizenship obtained by naturalisation from persons who have no other citizenship (presented to Parliament pursuant to section 40B(5) of the British Nationality Act 1981, April 2016), 21 pp https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/518120/David_Anderson_QC_-_CITIZENSHIP_REMOVAL_web_.pdf (07/12/19).

¹⁹ *Op cit* 17

²⁰ In the French context, free movement – as enshrined in articles 2 and 4 of the DRMC – has constitutional value (this was recognised by the Constitutional Council in 1993 (DC no 93-325 13th August 1993) and, more recently, in a decision concerning travellers (QPC no 2010-13, 9th July 2010, M. Orient O. et autres). However, the Council also said that the liberty could be limited in the public interest, if it satisfies conditions of proportionality (QPC no 2015-490, 14th October 2015, M. Omar K).

²¹ In the UK, these increasingly fall under the desistance and disengagement programme (DPP) which was introduced as a new feature of the CONTEST strategy in 2016.

HM Government, “CONTEST: The United Kingdom’s strategy for countering terrorism”, 2016, 100pp https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf (16/12/2019)

one" (2011: 797). What this means is that, by contrast with these other measures, citizenship deprivation prevents the restoration of rights. To paraphrase Macklin, citizenship deprivation is a "two-step exile": first strip, then deport (EUI, 2015: 9). In the context of the UK, as a transparency report from the Home Office indicates, the powers of deprivation have been used extensively over the other measures mentioned above.²² What then potentially supports such an extreme exercise of state power?

2.4.4 Securitisation of citizenship

Mills (2016) suggests that what can potentially explain the support for these drastic reversals of citizens' rights is that the individuals who are exposed to deprivation powers are often "already foreign" in the eyes of the public. Her work focuses on explaining the ways through which citizenship deprivation has been legitimised or contested in the contexts of France and the UK through a study of media reports. She argues that the portrayal of individuals as foreigners in the media and public debate has determined the ways through which their conducts should be handled by the state: through deportation (Mills, 2016). Kapoor makes a similar claim and evidences that the representation of Muslims as criminals and immigrants as "terrorists", "welfare scroungers" and "foreign criminals" provide the discourse which serves to legitimate the necessity of expulsion (Kapoor, 2015: 105). Both in fact point to prior processes which Balzacq (2003) identified in the aftermath of 9/11: the interplay between "securing" practices and "securitisation". His work demonstrates that, before the taking of "securing" measures (*eg* deportation), the individuals and their actions must have been turned into "security" issues – the process of "securitisation". "Securitisation", a concept which is diverse and has been brought from the literature of the social sciences into the field of counter-terrorism, involves a critical inquiry into the role of politics and society in determining what constitutes a threat that needs the taking of measures to address it (Buzan *et al*, 1998). Scholars have demonstrated, post 9/11, the extent to which immigration and citizenship have been turned into security issues in political discourses and the media (Bigo, 2002; Dobrowolsky, 2007; Guillaume and Huysmans, 2013). In essence, what this literature attempts to show is that both the language of security and the identification of something as a "threat" have a political function, namely, the potential to legitimise certain security measures. For Macklin (2014), in a similar way to Mills (2016), the revival of citizenship deprivation is one outcome of such processes of securitisation. As she writes: "I was worried about not just the demonising of non-citizens but also producing the alien within"; and "citizenship deprivation makes the production of the alien within entirely literal" (Macklin, 2014: 3). In the context

²² *Op cit* 17

of this thesis, in the same way as Mills and Macklin, I understand securitisation as the process which facilitates the making of citizens into foreigners in their own state.

The literature has also pointed to the spill-over effect of the securitisation of certain groups or practices, especially for those who share purportedly similar characteristics with the terrorist offenders. What it has revealed is that individuals, citizens or not, from different ethnic minorities are more exposed to drastic security measures than others and have their rights and/or feelings of citizenship diminished. For example, Volpp (2002) shows how those non-citizens, who were perceived as Arab, Muslim and Middle-Eastern in the aftermath of 9/11 in the United States, have since been excluded from the scope of rights protection. In France, a recent study, which investigated over 775 judicial decisions during the state of emergency, found that the measures had a discriminatory impact on minority citizens who were identified as “radical Muslims” (Hennette-Vauchez *et al*, 2018). While Jarvis and Lister (2015), drawing from interviews with UK citizens, also pointed to similar processes and feelings of undermined citizenship from minority citizens there.

Taken together, these different frames of analysis, of the normalisation of expansive security measures and state conduct before security claims, the increased use of citizenship as a counter-terrorism tool and the processes of creating “foreigners within” through public discourses, appear as critical references for a study of citizenship deprivation. In what follows, I turn to the past to look for the different meanings which have been attached to the exercise of deprivation powers in France and the UK and examine what kind of light these can shed on to present practices. These thick descriptions are here to refine, nuance and potentially add to the frame of analysis set out above and to retain only those which are most relevant to the context of France and the UK and the current research questions.

2.5 Chronologies: why look at the past?

The overhaul of citizenship rights which took place in 2014 and 2015–16 contained numerous references to the past. In the UK, Theresa May repeatedly said in the Commons that the drastic powers she was seeking in 2014 were not a new measure. She said that “it is noteworthy that depriving people of their citizenship is a concept with a long history” and, later, “we are not seeking a wholly new power” (HC deb 30th January 2014: c1038). The argument she put forward was that the UK needed to get back to the situation the country held prior to a major legislative overhaul in 2002 (c1044). In the French context, the then Prime Minister Manuel Valls engaged in an historical inquiry into the genesis of the powers and its march to the present day to prove that citizenship deprivation was “a

core feature” of the republic (JO, AN, 5th February 2015, 1003).²³ Other deputies used references to historical moments where citizenship deprivation was used to ostracise individuals on grounds of their ethnicity or political affiliations to criticise the powers.²⁴

These references help us to think critically about the relationship between past and present. What does the past bring to present times? As these scattered examples indicate, the past, history, can have significant political power: long-enshrined practices, as continuities, can legitimate current practices while discontinuities are useful tools to criticise them. Zalc (2018), from her point of view as a historian, examines this intricate relation between history and power in her scrutiny of the debates of 2015–16 in France. In her analysis, she stresses the selective recourse to history by parliamentarians and members of government. One such example was, as noted, the fact that Manuel Valls found a legitimating argument in pointing to the “long history” of citizenship deprivation within the republican tradition. He did not, however, refer to the practices of the Vichy government during the Second World War, which engaged in forms of ethnic cleansing through citizenship withdrawal (Zalc, 2018). When asked about it, he said that, although Vichy was part of French history, it was not the republic (JO, AN, 5th February 2015, 1010). It is thus important to come back to these historical moments to nuance present-day claims by showing the different meanings attached to citizenship deprivation and practices, the different contexts in which they thrived, and the debates which surrounded them. For these purposes, and clarity, I have established a chronology of the evolution of cancellation of citizenship in each context: France and the UK. Chronologies can be misleading, however, for they risk presenting historical evolutions as a “flow”, a linear process of events and practices each building up to the present day. Finchelstein (2017) emphasises this risk in his account of the failure of the French constitutional reform in 2015–16. He uses a chronological reading of events to draw lessons from the failure of the constitutional amendment. Rather than establishing a linear reading of these events, he isolates moments which, according to his research purposes, marked referral points. In his work, these include moments where the debates permeated the different state institutions and moved in different directions, thereby indicating that the outcome could have been otherwise (Finchelstein, 2017). His work thus brings useful insights into what to reference within a chronology to meet one’s research aim. For the purposes of the present chronology, I reference the main legislative evolution, the main cases, and moments where cancellation of citizenship permeated the political debates in both contexts. Each bring critical elements as to the ways in which the measure evolved, the kind of justifications which supported it, and can help to think about why the practice persists despite its

²³ For other historical inquiries into the evolution of the powers, see also René Dosière (JO, AN 5th February 2015, 1013) and Francois de Ruy (JO, AN, 5th February 2015, 1023).

²⁴ See for example, the contribution from Cécile Dufflot (JO, AN, 5th February 2015, 1005–1009).

retrogressive features. In the same way that I mentioned other counter-terrorism measures which aim to expel individuals and/or restrict their movements, here I also reference measures which purport to check and/or sanction the loyalty of such citizens to the nation. This is because, as indicated in the previous chapter, citizenship deprivation also appears to pursue a more symbolic purpose: namely, to underpin the characteristics which states regard as their core values. Taken together, these can tell us something about the potential specificity of citizenship deprivation. I engage with France and the UK separately, as to frame both chronologies under shared themes would run the risk of losing the singularities of each context.

2.6 The French context of citizenship deprivation

The first piece of legislation on citizenship deprivation in France marked a symbolic moment. The decree of 27th April 1848, which abolished slavery in the French colonies, instituted the procedure of cancellation of citizenship for slave traders and individuals involved in human trafficking more broadly. It is unclear whether the measure was ever applied on this ground (Weil and Truong, 2015: 51). The historical root to citizenship deprivation is more commonly attributed to the outbreak of the First World War, where deprivation was to signify suspicion of allegiance. Two laws, the law of 7th April 1915 and 18th June 1917, allowed the government to “denaturalise” individuals whose country of origin was at war with France when, for example, the individual might have sought to avoid military conscription and/or helped directly or indirectly an enemy power.²⁵ The decree could only be taken after an advisory opinion from the Conseil d’Etat and was open to challenge before the tribunals. Zalc identifies 549 denaturalisations of individuals originally from Germany and Austria (2018: 53). In the interwar period, the law of 10th August 1927 procedurally restricted the scope of the powers but extended the grounds for deprivation. Although still reserved to individuals who had acquired citizenship after birth, deprivation could only be ordered by a tribunal, and only for 10 years after the acquisition of citizenship (articles 9 and 10 of the law), for actions contrary to the security of the state, breaches of loyalty, or eviction of military conscription (respectively, article 9(a)(b)(c)). The purpose of the powers thus moved from solely sanctioning multiple allegiances to protecting the state. From 1938, two developments were happening. First, the limitation of the procedural scope of the measure and, second, the extension of the grounds to deprivation. The decree of 12th November 1938 required a prior positive assent from the Conseil d’Etat before the making of the decree. It also limited in time

²⁵ All the quotes from the legislation come from a report from the Constitutional Council which lists the legislative evolution of the powers and their original wordings. Conseil Constitutionnel, « Dossier documentaire décision no 2014-439 QPC, article 25 1° et article 25-1 du code civil » 2015, 42pp https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2014439qpc/2014439qpc_doc.pdf (06/11/2019).

the action from the executive: the state could only make a deprivation order within 10 years after the commission of the wrongful act. But despite these procedural limitations, it expanded the possibility to deprive “recently” naturalised citizens following the commission of a crime or misdemeanour leading to a prison term of at least one year in France or abroad.²⁶ In the interwar period, then, deprivation also appeared as a tool to monitor the conduct of “new” citizens.

Under Vichy (10th July 1940–20th August 1944), there was no such double process of procedural limitation and an extension of the grounds. The French government engaged in a massive withdrawal of naturalisation decree (law of 22nd July 1940), alongside deprivation of citizenship. The withdrawal of naturalisations was taken irrespective of whether the individual acted wrongfully and irrespective of whether the individual was originally from countries at war with France. Weil (2008: 88), whose work on French citizenship constitutes one of the leading authorities, points to the fact that the law of 1940 must be read as part of a broader programme of a complete recasting of French nationality along racist lines. The Vichy government “withdrew” the citizenship of 15,000 individuals, including 7,000 Jews, and deprived 132 individuals, including General De Gaulle, for lack of loyalty, including unauthorised departure from the territory and actions contrary to the state.²⁷

The current legal regime of cancellation of citizenship finds its roots in the aftermath of the Second World War (*ordonnance* no 45-2441 of October 1945)²⁸ and abrogated the distinctions operated under Vichy. It keeps most of the features of the pre-Second World War regime: it still reserves its application to individuals who acquired citizenship after birth, provided they have been naturalised for less than 10 years, and allows the state to deprive the individual during a period of 10 years after the commission of the act, after a positive assent from the Conseil d’Etat. Weil (2008) identifies 479 deprivations in the aftermath of the War.

2.6.1 Other loyalty measures: “national indignity” and treason laws

²⁶ Décret-loi of 12th November 1938, article 10.4 (*Relatif à la situation et à la police des étrangers*).

²⁷ The data comes from the Commission of laws of the National Assembly and Zalc’s work.

Assemblée Nationale, rapport no 3451, « Au nom de la Commission des lois constitutionnelles, de la législation et de l’administration générale de la République sur le projet de loi constitutionnelle no 3381 de protection de la Nation », Dominique Raimbourg, 28 Janvier 2015, 191 pp, p14

<http://www.assemblee-nationale.fr/14/pdf/rapports/r3451.pdf> (06/11/2019).

It is important to note that in 2015–16, references to the Vichy regime often confused deprivation and withdrawal of naturalisation, throwing big figures into the debates. These demonstrate the political use of history and the need to distance oneself from present-day claims. However, Zalc, in her study, shows that in practice even the agents at the time confused withdrawal of naturalisation and deprivation of citizenship, mixing both procedures in similar folders etc. She also found that the criterion to apply the law of withdrawal of 22nd July 1940 relies heavily on criterion delineated for deprivation of citizenship (2018 :55).

²⁸ It was integrated in the Civil Code by law no 93-933 of 22nd July 1993.

This number must be read in light of two other measures from the Second World War which sanctioned the disloyalty of individuals to the nation – the measures on treason and spying and the measure on “national indignity” – as calls have been made for the revival of these measures for French purported Jihadis.

The *ordonnance* of 26th December 1944 introduced national indignity to sanction the purported lack of loyalty of some citizens during the war. The grounds were exceptionally broad. Any French citizen who had, voluntarily or not, helped Germany and its allies, had infringed the unity of the nation, and therefore their liberty, equality, or both, could be exposed to the measure. The measure was circumscribed to a certain timeframe, the period of the Second World War, and entailed the retroactive privation of civic and political rights, as well as the impossibility of taking up certain professions. At the time, the French writer Albert Camus opposed it and described it as a law of “dishonour”, one which “condemns those who betrayed their countries without betraying the law” (Camus, 1944 (2002)).²⁹ During the debates in 2015–16, the reintroduction of the measure was proposed over citizenship deprivation. For Anne Hidalgo (mayor of Paris and member of the socialist party) and Jean-Pierre Mignard (a lawyer), the privation of civic rights through national indignity would suffice and prevent a distinction between citizens, naturalised or not, as it could apply equally to all.³⁰ In the National Assembly, Jean-Christophe Lagarde (UDI, centre right) said it could be an answer to the return of purported Jihadis (JO, AN, 5th February 2015, 1022) and Roger-Gerard Schwartzberg (radical left) labelled it a measure “simpler and more effective [than cancellation of citizenship]” (1024). The idea was soon abandoned, however, in part because the Law Commission of the National Assembly, whose former President Jean-Jacques Urvoas (socialist) had become Secretary of State for Justice, had previously opposed a proposal to revive the measure in 2015. The arguments advanced were that national indignity was of little practical value and pertained to the specific historical context of the aftermath of the Second World War.³¹ As the report then concluded: “On second thought, the re-activation of national indignity, which corresponds, to a certain extent, to the secularisation of excommunication, which stems from canon law, would indescribably be for the Republic the confession of a failure”.³²

²⁹ The quote comes from an editorial of Camus, on 28th September 1944.

³⁰ « Non à la déchéance de nationalité, oui à l’indignité nationale », *Le Monde*, 2016
https://www.lemonde.fr/idees/article/2015/12/30/non-a-la-decheance-de-nationalite-oui-a-l-indignite-nationale_4839880_3232.html (06/05/2019).

³¹Assemblée Nationale, « Rapport d’information sur l’indignité nationale n°2677 », Commission des lois constitutionnelles, de la législation et de l’administration générale de la République, 25 mars 2015, 65pp
<http://www.assemblee-nationale.fr/14/rap-info/i2677.asp> (09/05/2019).

³² *Ibid* p38.

Treason laws were not proposed *in lieu* of citizenship deprivation during the debates of 2015–16, but arguments to use the measure to reinforce the legislative arsenal to deal with alleged terror threats were sparked both prior to and after the debates. In 2015, the conservative MP Claude Goasguen, in a written question addressed to the then Secretary of Justice Christiane Taubira, asked if article 411-4 could be applied to purported Jihadis – and whether it already had been.³³ The article falls under broader measures of the Penal Code on treason and spying (articles 411-2 to 411-11 of chapter I, Title I, book IV “of crimes and misdemeanours against the nation, the state, and public peace”). Essentially, what these articles sanction is sharing intelligence or helping foreign powers. The minimum prison term is seven years, rising to life. In answer, the Secretary of Justice said that the legislative intent of the drafters of article 411-4 was to target organisations exhibiting the characteristics of a sovereign state. In addition, the Secretary of Justice noted that the scope of the crime, *ratione materiae* (in this case, the sharing of intelligence), is stricter than under most terrorist criminal provisions which cover the “intention” rather than the action itself (*ie* enabling prevention before a crime is committed). The proposal was abandoned. In 2016, the leader of the National Front (now rebranded as the *Rassemblement National*), Marine Le Pen, made a similar proposal: to apply treason laws to individuals “with whom we are convinced of their links with the Islamic state”,³⁴ but, here too, the proposal was not seriously considered. Over the past few years, three individuals (two civil servants from the DGSE, the equivalent of the MI5, and one civil servant from the Senate) have been implicated with treason for sharing intelligence with North Korea.³⁵

In essence, what the failed attempt to revive the measure of national indignity and treason laws suggests is that citizenship deprivation could eventually become the preferred state conduct for engaging with purported disloyal behaviour.

2.6.2 Post Second World War developments

So far, what these developments show is that there are, and have been, various meanings and practices attached to citizenship deprivation or alongside it, sometimes within the same historical

³³ Assemblée Nationale, 14^{ème} législature, « Question écrite n°76050 de M. Claude Goasguen au ministère de la Justice. Question publiée au Journal Officiel le 17/03/2015, réponse publiée le 05/01/2016 » , 2pp <http://questions.assemblee-nationale.fr/q14/14-76050QE.htm> (05/06/2019).

³⁴ “Juger les Djihadistes pour ‘intelligence avec l’ennemi’ la fausse piste de Marine Le Pen”, *Le Monde*, 2015 https://www.lemonde.fr/les-decodeurs/article/2016/06/15/juger-les-djihadistes-pour-intelligence-avec-l-ennemi-la-fausse-piste-de-marine-le-pen_4950903_4355770.html (05/06/2019).

³⁵ “Mise en examen pour trahison : l’étrange affaire de l’espion qui venait du Sénat”, podcast : Vous en parlerez aujourd’hui, *France info*, 2019 https://www.francetvinfo.fr/replay-radio/vous-le-partagerez-aujourd-hui/vous-en-parlerez-aujourd-hui-mise-en-examen-pour-trahison-l-etrange-affaire-de-l-espion-qui-venait-du-senat_3036441.html (05/06/2019).

contexts. Deprivation has been framed to signify a symbolic departure from reprehensible acts (*eg* the slave trade), as a tool to sanction multiple allegiances at times of war, as a security measure, and as a tool to monitor the conduct of newly naturalised citizens.

The law, as it was framed in 1945, remained practically unchanged until 1996, when terrorism was introduced as a ground for deprivation after a series of attacks perpetrated in 1995 by the *Groupe Islamique Armé*, an Algerian organisation. The constitutionality of the extension was challenged by a group of 60 MPS (60 Senators or 60 deputies) under the procedure of *ex-post* constitutional review (article 61 of the Constitution).³⁶ One of the grounds for challenges was that the sanction was neither necessary nor useful to the protection of public order, a principle grounded in article 8 of the DRMC.³⁷ At the time, the Constitutional Council agreed with the government and found that the “particular gravity of acts of terrorism” was enough to justify a non-violation of article 8 of the DRMC (no 96-377 DC of 16th July 1996 *cons* 23), in other words, that the extension did not breach the Constitution.

In 1998, the law of 16th March on nationality (no 0064) limited the scope of the measure *ratione personae* and included a provision against statelessness. In practice, this meant that only naturalised citizenship, *ie* dual nationality holders who have been naturalised for less than 10 years, could be deprived under one of the four listed grounds of article 25, for a period of 10 years after the commission of the wrongful act. The law of 23rd November 2003 (no 274), on immigration control, stated that the measure could be taken for acts committed prior to the acquisition of citizenship. Crucially, in 2006, in the aftermath of the attacks in London and Madrid, the law 2006-64 of 23rd January 2006, which aimed to reinforce the fight against terrorism, extended both 10-year time limits to 15 years for acts of terrorism.

Since then, all the legislative proposals to expand the scope of the measure have failed, often after heightened political debates. In 2010, Nicolas Sarkozy, then President, proposed extending the powers to all French nationals of “foreign origin” who were prepared to bear arms against “public officials”.³⁸ The proposal was adopted by the majority of the National Assembly but refused by the Senate and later dropped. At the time, both Manuel Valls and François Hollande had fiercely opposed citizenship

³⁶ The procedure provides for challenges before the Constitutional Council with respect to the compatibility of the legislation with the provisions enshrined in the Constitution and its preamble. I examine it in chapter 5.

³⁷ Article 8 says that “the law must prescribe only the punishments that are strictly and evidently necessary; and not one may be published except by virtue of a law drawn up and promulgated before the offence is committed, and legally applied”.

³⁸ The full discourse is accessible here:

Nicolas Sarkozy, « Le discours de Grenoble du 30 Juillet 2010 », *Le Figaro*, 2014, <http://www.lefigaro.fr/politique/le-scan/2014/03/27/25001-20140327ARTFIG00084-le-discours-de-grenoble-de-nicolas-sarkozy.php> (06/03/2019).

deprivation.³⁹ In 2014, a proposition from the Conservative MP Philippe Meunier aspired to deprive individuals, dual nationals, who would be willing to carry “arms against the French forces” in the context of French citizens allegedly going to Jihad, but it was refused in debates in the national assembly (JO, AN, 5th December 2014, 9718). In 2015, the socialist government failed to extend it to naturalised and birthright citizens for serious crimes, contrary to the fundamental interests of the nation. In one of the proposals of the government, no provision against statelessness was enshrined. The Conseil d’Etat, commenting on the proposition at the time, underlined the symbolic role of the measure with limited practical effects. I return to these legislative proposals in greater depth in chapters 4 and 6.

2.6.3 Limited use of the powers

To echo the Conseil d’Etat, the powers have scarcely been used, although there has been an increase in the practice since 2001. The *rapporteur* in charge of evaluating the 2015 legislative modification before the Commission of the National Assembly noted that the executive had issued 13 orders since 1973, all after 9/11: one in 2002, one in 2003, five in 2006, one in 2014 and five in 2015.⁴⁰ Another deprivation was issued in June 2019,⁴¹ followed by a declaration from the Home Office that the procedure might intensify in the next few months.⁴² In 2017, a report from the Senate investigating the “organisation and means available to the state to face the evolution of the terrorist threat after the fall of ISIL” called for the increase in the procedure for the “terrorist Islamist”, dual-nationality holders, for those who have already been sentenced of a prison term.⁴³ Within these individual cases, none was successful before the courts. I engage with the potential reasons behind these failures in chapter 5. The case of *Ahmed S* (no 2014-439 QPC, 23rd January 2015, “Ahmed S”) is particularly telling in that matter, because it used all available domestic means to challenge the legality of the order: on merits and against EU law before the Conseil d’Etat, and against the Constitution before the

³⁹ For example, Manuel Valls characterised citizenship deprivation as “unbearable and not France”.

« Quand Hollande et Valls conspuaient la déchéance de nationalité au nom de grandes valeurs » *Le Monde*, 2015 https://www.lemonde.fr/politique/article/2015/12/29/quand-hollande-et-valls-conspuaient-la-decheance-de-nationalite-au-nom-de-grandes-valeurs_4839120_823448.html (09/05/2019).

⁴⁰ *Op cit* 27, p16.

⁴¹ « Condamné pour terrorisme, un Franco-marocain déchu de sa nationalité française », *France info*, 2019 https://www.francetvinfo.fr/politique/debat-sur-la-decheance-de-nationalite/condamne-pour-terrorisme-un-franco-marocain-dechu-de-sa-nationalite-francaise_3471385.html (15/05/2019).

⁴² « Déchéance de nationalité, nouvelle loi...Laurent Nunez et l’Etat face au terrorisme » *L’Express*, 2019 https://www.lexpress.fr/actualite/societe/attentats-dejoues-decheance-de-nationalite-nouvelle-loi-l-etat-ferme-face-au-terrorisme_2081708.html (05/06/2019).

⁴³ Sénat, Session extraordinaire de 2017–18 n°639, « Rapport fait au nom de la commission d’enquête (1) sur l’organisation et les moyens des services de l’Etat pour faire face à l’évolution de la menace terroriste après la chute de l’Etat islamique », Cazeau Bernard (président), Goy-Chavent Sylvie (*rapporteuse*), 292pp, at p11. <https://www.senat.fr/rap/r17-639/r17-6391.pdf> (05/06/2017).

Constitutional Council. In all these instances, although answering different legal questions, the courts found the order proportionate. Ahmed S was deprived in 2014 following a criminal conviction for participation in an organisation with terrorist motives in 2013. He was later expelled to Morocco after the government issued an express deportation order, thereby preventing his lawyer from challenging the deportation order before the ECHR.⁴⁴ Recently, five individuals who were deprived in the aftermath of the Paris attacks have appealed to the ECHR on substantive grounds.⁴⁵ In essence, then, in France, deprivation powers had specific aims and functions, and, save for during the first half of the 20th century, the powers have rarely been used and are subject to important legal and judicial safeguards.

2.7 The UK context of citizenship deprivation

The UK's first law on denaturalisation emerged from the context which pre-dated the First World War and allowed for the withdrawal of citizenship obtained by fraud (British Nationality and Status of Aliens Act 1914 (BNSAA)). A prior attempt to introduce the measure was established under the Gladstone government in 1870. Gibney (2013), in his study on the UK's denaturalisation and deportation regime, writes that the idea in 1870 was to allow for the renunciation of citizenship and for the revocation of naturalisation on grounds of breach of allegiance and/or residence abroad. If the first succeeded, renunciation, the second failed. Gibney reports that it was challenged on grounds of the extensive powers it gave to the Home Secretary and the distinction it created amongst then "subjects" (Gibney, 2013). In 1918, the fear of German spies led to an extension of the powers, from renunciation of citizenship to the revocation of the citizenship of naturalised citizens. Under the Act, citizenship could be revoked where, for example, the individual had traded with the enemy (s7(2)(a)) or been sentenced to a prison term of at least 12 months within the first five years of acquisition of

⁴⁴ In two other instances, the individuals successfully challenged their subsequent deportation order to the European Court of Human rights. Both Kamel Daoudi and Djamel Beghal were sentenced to a 10-year prison term in 2005 after they were found guilty of participating in an enterprise with terrorist motives, in this case, the planning of an attack against the US Embassy in 2001. They challenged the subsequent deportation order to their country of other nationality, Algeria, before the ECHR and were both successful, on grounds that they risked inhumane and degrading treatment if sent back.

Daoudi v France, no. 1957/08, ECHR, 2009 (unreported)

Beghal v France, no.27778/09, ECHR, 2011 (unreported)

Daoudi has been since put under house arrest, with an obligation to check into the nearest police station four times a day, while Beghal, the alleged mentor of some of the killers of 13th November, was sentenced to another 10-year prison term in 2013 for plotting the escape of one of those responsible for the terrorist attacks of 1995 « Beghal, mentor des tueurs, et déchu de sa nationalité en 2006, n'a pas été expulsé », *Le Figaro*, 2015 <http://www.lefigaro.fr/actualite-france/2015/01/13/01016-20150113ARTFIG00424-beghal-mentor-des-tueurs-et-dechu-de-sa-nationalite-en-2006-n-a-pas-ete-expulse.php> (09/05/2019).

⁴⁵ « La Cour européenne des droits de l'homme saisie de la déchéance de nationalité », *Le Monde*, 2016 https://www.lemonde.fr/police-justice/article/2016/09/05/la-cour-europeenne-des-droits-de-l-homme-saisie-de-la-decheance-de-nationalite_4992603_1653578.html (09/05/2019).

citizenship (s7(2)(b)), or remained a citizen of a state at war with the UK (section 7(2)(e). At the time, the Secretary of State had to show that keeping citizenship was not “conducive to the public good” (section 7(2)). The Act also required the referral of the order to a committee of three judges to review the Secretary of State’s decision (BNSAA, para 7.3).⁴⁶ The committee was an advisory one, whose decisions were non-binding.

The 1918 Act also mentioned deprivation on grounds of fraud and if the individual had proved, by act or speech, to be “disaffected or disloyal to his Majesty” (s7(1)). Many years later, the Court of Appeal in the case of *Hicks (Secretary of State for the Home Department v David Hicks [2006] EWCA Civ 400)*, said that the words disaffection and disloyalty “requires an attitude of mind towards an entity to which allegiance is owed, or at least to which the person belongs or is attached” (para 32). David Hicks, an Australian citizen whose mother was British, applied to register as a British citizen when he was held in the US prison of Guantanamo Bay. At the time, the British government was seeking to have its citizens released, but in this case the Home Office refused to register him as a citizen. It argued that Hicks had proved to be disaffected with the UK because he was detained for taking part in terrorist training in Afghanistan. The Court of Appeal found otherwise and argued that disaffection “[was] not apt to cover, in relation to the United Kingdom, an outsider, whether a German during the 1st World War, or an Australian in Afghanistan in 1990” (para 32).

2.7.1 Treason laws

The court also refused to see in the case of *Hicks* an instance of treason. At present, treason is covered by the Treason Act 1351 which entails life-sentencing (execution for treason was abolished in 1998). The last person convicted for high treason was William Joyce, also known as “Lord Haw-Haw”, a Nazi supporter during the Second World War whose pro-Nazi broadcasting was considered a treason to the UK. In 2006, the court said that Hicks was in a different situation from Joyce because Joyce had a British passport. Although the court recognised that it is possible for a non-citizen to be found disloyal or disaffected to the Crown (and, through it, to the UK), it didn’t find that the circumstances of the case amounted to it. Disaffection and disloyalty, as a ground for deprivation, was removed by the Nationality, Immigration and Asylum Act 2002. Recently, there have been calls for review and update of treason laws. In 2018, a report from the think-tank “Policy Exchange” entitled “Aiding the Enemy” proposed expanding treason laws to cover non-international armed conflicts involving non-state

⁴⁶ This was compulsorily on some grounds, for example, under s7(2a) and s7(2e), ie trading with the enemy or original citizenship from an enemy country.

groups.⁴⁷ Previous proposals to update the legislation had been rejected by the Law Commission, in part because the offence had “ceased to be of contemporary relevance” and because “new offences have been developed which are far better suited for tackling the problems that currently afflict society”.⁴⁸ In 2019, the then Home Secretary, Sajid Javid said he was considering introducing a bill. However, it is unclear if treason legislation will be applied *in lieu* of citizenship deprivation and/or in addition to it and/or to different contexts. Sajid Javid said that the bill would aim to cover terrorism and “hostile state activity”, though acknowledging that the “definition of terrorism is probably broad enough to cover those who betray our country by supporting terror abroad”.⁴⁹

2.7.2 Post Second World War developments

In the aftermath of the Second World War, the law on citizenship deprivation was extended to citizens by registration. The 1948 British Nationality Act allowed for individuals, born within the Dominion⁵⁰ or the colonies of a British citizen, to qualify as a British citizen after a year of residence. Citizens by registration faced deprivation on grounds of fraud, misrepresentation or concealment of material facts (section 20(2)) when naturalised citizens could be deprived on similar grounds as the 1918 Act (disaffection to the crown, sentencing to one-year imprisonment, trading with the enemy: s20(3)). The British Nationality Act 1981 removed the distinction between the two (naturalised and citizens by registration) and also allowed deprivation for registered citizens on grounds of disaffection to the Crown.

From 1949 to 1973, the government issued 10 orders.⁵¹ Weil and Handler (2018) argue that this small number derives from the three-person committee established in 1918. They contend that the committee created a system of *ex ante* judicial review of the Home Office’s deprivations. Although non-binding, and not a court *per se*, they point to the political constraint that the Committee exercised on government’s action. As an example, they show that between 1949 and 1961, 120 cases were

⁴⁷ Policy Exchange, “Aiding the enemy: how and why to restore the law of treason”, Ekins Richard, Hennessey Patrick, Mahmood Khalid MP. Tugendhat Tom MP, 2018, 60pp
<https://policyexchange.org.uk/wp-content/uploads/2018/07/Aiding-the-Enemy.pdf> (05/06/2019).

⁴⁸ The Law Commission “Tenth programme of law reform”, no 311, HC 605, 10th June 2008, 46pp, at p16.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/250282/0605.pdf (05/06/2019).

⁴⁹ “UK treason laws will be updated to cover terrorism and hostile state activity, says Sajid Javid”, *The Independent*, 2019
<https://www.independent.co.uk/news/uk/home-news/uk-treason-laws-sajid-javid-terrorism-syria-isis-bride-home-office-a8921616.html> (05/06/2019).

⁵⁰ The term “Dominions” was enshrined in 1907 and refers to the self-governing colonies of Canada, Australia, New Zealand and South Africa.

⁵¹ Human rights Joint Committee, Twelfth Report. Legislative Scrutiny: Immigration Bill (Second Report), 2014. para 18
<https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/142/14205.htm> (28/06/2019).

referred to the Home Secretary but only nine naturalised subjects were eventually deprived, and, during the Second World War, out of 207 reviewed only 15 individuals were denaturalised (Weil and Handler, 2018: 307–308). Between 1973 and 2000, a Home Office report stated that the powers were not used at all.⁵² As Gibney (2013: 647) frames it, the powers, by the end of the 20th century, had “fallen into desuetude”.

2.7.3 Aftermath of 9/11: increase in the powers

In the aftermath of 9/11, the three-person committee was removed by the Nationality, Immigration and Asylum Act of 2002. The Act also extended the powers to cover all British citizens, irrespective of their mode of entry into citizenship (birthright, naturalised and registered citizens). The measure was taken alongside policies which sought to enhance British citizenship (such as citizenship ceremonies and language training). The previous grounds for deprivation (disloyalty and criminality, then s40(3)) were replaced by a single standard: proof that the individual acted in a way which is “seriously prejudicial to the vital interest” of the state. If it formally applied to all citizens irrespective of their modes of entry into citizenship, in practice the provision was only applicable to dual nationality holders. This is because the government also introduced a safeguard against statelessness to mitigate the effects of the extension (at the time, at s40(4)) and to make the powers compliant with the then European Convention on Nationality (1997) which the UK was willing to ratify (Harvey, 2014; Mantu, 2018). The Act also created an automatic right of appeal. Under these new provisions, the cleric preacher Abu Hamza was successful in challenging his deprivation order on grounds that the measure would have left him stateless, which was forbidden under the Act save for fraudulent acquisition of citizenship (*Abu Hamza and the Secretary of State for the Home Department*, SC/23/2003). As Sawyer (2013) contends, a potential consequence of the government’s failure in the *Hamza* case was that the right of appeal was made non-suspensive in 2004. From then on, individuals, if subsequently deported, could be compelled to conduct their appeal from abroad. The UK courts refused the argument that absence of an in-country right of appeal would be a breach of common law (*G1 v Secretary of State for the Home Department* [2012] EWCA Civ 867).

In addition, following the London bombings of July 2005, the government modified the legislation, and introduced an amendment to the Immigration, Asylum and Nationality Act 2006 (then bill) which replaced the ground of conduct “seriously prejudicial to the vital interest of the state”. Since then,

⁵² Home Office, “Secure Borders, Safe Haven: Integration with Diversity in Modern Britain”, February 2002, 138pp, at p38, para 2.22 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/250926/cm5387.pdf (28/06/2019).

what matters is for the Home Secretary to show that cancellation of citizenship would be “conducive to the public good”. Within academic circles, the ground was heavily criticised for its equation with the test to deport non-nationals implemented in immigration regimes (Majid, 2008; Sawyer, 2013). The ground was not defined then, but a subsequent secondary piece of legislation, chapter 55 of the Nationality Instructions, says that it entails involvement in terrorism and serious crimes, as well as unacceptable behaviours (point 55.4.4), such as, for example, serious crimes or intercommunity violence.⁵³ The change in the legislation allowed the government to deprive David Hicks of his citizenship a few hours after he succeeded in registering as a UK citizen. Current UK practice shows that this ground is the most common (104 deprivations in 2017) and was used to cover actions from involvement in terrorism⁵⁴ to the grooming of young girls by a Manchester gang (*Ahmed and others v Secretary of State for the Home Department* [2017] UKUT 00118 (IAC)). I turn to these cases in more depth in chapter 5.

More recently, section 66 of the Immigration Act 2014, which modified the British Nationality Act 1981, reinstated the “seriously prejudicial to the vital interest” standard for naturalised citizens and removed the safeguard against statelessness. The case followed the government’s failure to deprive Hilal Al Jemma of his citizenship, for the order would have left him stateless as he had not recovered his lapsed Iraqi citizenship (*Al Jemma v Secretary of State for the Home Department* [2013] UKSC 62). Under the current legal framework, section 40 of the British Nationality Act 1981 enables the Home Secretary to deprive birthright citizens of their citizenship, if they are dual nationals (s40(4)) and if the deprivation is conducive to the public good (s40(2)), and naturalised citizens, single nationality holders, if the individual has acted in a manner seriously prejudicial to the vital interest of the UK (s40(4Ab)). The only limitation to the powers introduced are assurances from the Home Secretary that the individual naturalised citizen would not be left stateless in law and a provision for an external review of the powers every three years. The case of Shamima Begum indicates that the government is not concerned about increasing *de facto* statelessness for British-born citizens. Therefore, at present, *de jure* statelessness seems to constitute the only safeguard for both naturalised and birthright citizens against deprivation for individuals suspected of involvement in terrorism. In essence, this chronological reading of the evolution of the powers in the UK demonstrates that, here too, there are both continuities and discontinuities in the framing and exercise of the powers. By the

⁵³The full list is available here:

Charles Clarke, “Tackling terrorism-behaviours unacceptable in the UK”, 24th August 2005

<http://www.statewatch.org/news/2005/aug/07uk-terr-behaviour.htm> (09/05/2019).

⁵⁴ For example, *Y1 v Secretary of State for the Home Department* SC/112/2011; *S1, T1, U1 & V1 v Secretary of State for the Home Department* [2016] EWCA Civ 560; *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064.

end of the 20th century, the powers which seemed to support the idea of an on-going monitoring of people who naturalise, through the sanction of disloyalty and criminal conduct, had fallen into disuse. It is only in the aftermath of 9/11 that they were explicitly re-tooled as security measures and used extensively. In the next section, I present critical themes which emerge from these chronological readings of the powers and the academic discussions set out at the beginning of this chapter.

2.8 Critical themes and frames of analysis

A cross-reading of the chronologies of the evolution of deprivation powers corroborates the view that citizenship deprivation has been normalised as a counter-terrorism measure and practice post 9/11. France revived the powers to include the ground of terrorism for future executive action following the terrorist attacks in 1995. It subsequently increased the reach and practice of the power after the Madrid and London bombings in 2004 and 2005 respectively, and in Paris in 2015. In the UK, the revival of the powers in 2001 happened at a time of broader rethinking of citizenship and counter-terrorism legislation. As the government then put it, citizenship deprivation was outdated and did not reflect accurately “the types of activity that might threaten our democratic institutions and way of life. September 11th provided a horrific illustration of the sort of threat we have in mind”.⁵⁵ The government substantively increased these powers after the terrorist attacks in 2005, at a time when the then Prime Minister Tony Blair said he would not “let anyone be of any doubt that the rules of the game are changing”.⁵⁶ Later, he said he would extend citizenship deprivation to make “the procedures simpler and more effective”.⁵⁷ Since 2013, increase in the practice follows the increase in the number of UK citizens allegedly going to Jihad in Syria. The frame of “normalisation” is thus useful to capture the overreaching state action and the “ratcheting down” of the level of rights protection (and perception of what this level should be) post 9/11. For example, the work of Weil and Handler (2018) points to the *ex ante* administrative structure of the committee of judges as something that could potentially explain the limited use of the powers during the second half of the 20th century. According to them, this mechanism of oversight and accountability prevented abuses from the executive (Weil and Handler, 2018). Their argument is appealing because it expounds the potential influence of institutional design as an extra layer against abuse and the role of the judiciary in upholding this

⁵⁵ Select Committee on the Constitution, Nationality, Immigration and Asylum Bill, House of Lords, session 2001–02, Sixth Report, 8pp, Appendix 2: Reply from the Lord Rooker, Minister of State, Home Office, 16th May 2002, p6

<https://publications.parliament.uk/pa/ld200102/ldselect/ldconst/129/129.pdf> (28/06/2019).

⁵⁶ “The rules of the game are changing”, *The Guardian*, 2005

<https://www.theguardian.com/uk/2005/aug/05/july7.uksecurity5>(28/06/2019).

⁵⁷ “PM’s press conference- 5 August 2005”, Number 10, 2005

<https://webarchive.nationalarchives.gov.uk/20080909054553/http://www.number10.gov.uk/Page8041> (28/06/2019).

institutional design. Since the extensive use of citizenship deprivation coincided with the elimination of the *ex ante* form of review of the committee and the institution of the Special Immigration Appeals Commission as an *ex post* form of review, this supports the view that the context post 9/11 has triggered new institutional arrangements which have reworked previous equilibria of power and, arguably, towards broader executive discretion.

Crucially, the chronologies outlined here have highlighted that, despite security being a core feature of the current framing of the powers, historically, security was not the sole purpose of citizenship deprivation. Deprivation has also been used in both contexts as a tool to monitor the conduct and the suspected allegiances of “recent” naturalised citizens. At times, it was confused with other practices, such as withdrawal of naturalisation on political and racist grounds, treason laws, or with more symbolic measures such as national indignity. Mantu (2018: 17) contends that, in the context of the UK, the powers were perceived as a relevant tool to nation-building, one which “deemed the ethnicity or race of some citizens to be a sign of their dangerousness and irreconcilable difference”. Troy (2019), in positioning the discussions leading to the UK BNSAAs (1914–18) within an imperial framework, furthers this claim by revealing that issues of immigration, naturalisation and emigration were critical in developing the legal framework of citizenship deprivation (Troy, 2019: 316). In the French context, the fact that the measure only applies to “recently” naturalised citizens indicates that the use of deprivation to police the boundaries of the nation may have some force. Fundamentally, since the chronologies reveal that the measures have only applied to citizens with strong foreign connections (naturalised citizens and/or second-generation citizens but not birthright citizens or single nationality holders), they suggest that there are heightened conduct requirements for people with a different ethnic heritage, thereby making the inquiry into the state’s approaches to equal citizenship a critical task. Conceptions of nationhood and the state’s politics of belonging, politics which, as Yuval-Davis (2006) explains, set up requisites of belonging with potential exclusionary effects for those citizens who do not meet the requirements, also appear as critical frames for the analysis because they point to different (state) approaches to equal citizenship. Taken together, and because the expansion of deprivation powers towards minority citizens has been linked to issues of security protection, these processes demonstrate how Macklin’s (2014) and Mill’s (2016) characterisations of deprivation powers as practices arising out of earlier measures and discourses that created “foreigners within” constitute important frames of reference. The confusion between these different frames, of security, ethnicity and citizenship which appear to coalesce into deprivation powers, is striking when one looks at the kind of legislation which has modified citizenship deprivation in recent years: nationality law, national security laws and laws on immigration. Perhaps it is that the revival of deprivation powers is an example of the “everyday bordering” practices of governance which Yuval Davis, Wemyss and

Cassidy (2019) recently expounded. In their work, they refer to processes of “bordering” as both projects of governance and particular projects of belonging, whose purpose is to make people “feel safe”. They demonstrate that “bordering” in everyday life has been used as a “technology of control of diversity by governments”, which, they contend, has been seeking to reassert control over the composition and security of their populations (Yuval-Davis *et al*, 2019: 17). In sum, the history and current practices of deprivation powers suggest that the themes of nationhood, security protection in a “normalised” post 9/11 institutional setting, and equal citizenship are critical. And that the powers must be read as infused by both concerns of security protection and deeper questions relating to the states seeking to monitor their citizenries.

2.9 Conclusion

In this chapter, I introduced the key terminology which propel the research questions and analysis of this thesis. I also presented a timeline of the key moments of citizenship deprivation in which I referenced the major legislative evolutions, case law and instances where citizenship deprivation permeated the political debates. I discussed these concepts and the timeline in the context of what the literature had to say on the subject to deepen the relations between the patterns and delineate relevant themes and frames of analysis for my research questions. These include: the normalisation of exceptional security measures and state practices; equal citizenship; and state images of citizenship and nationhood. In the next chapter, I turn to two of these critical themes: equal citizenship and the state images of citizenship and nationhood. I aim to demystify some predominant views about French and British citizenship, by looking at the socio-historical debates and historical practices which mediate the relationship between the individual and the state, to bring complexities into the analyses.

Chapter 3: Images of citizenship in France and in the UK

“[Cloots] prefers the status of citizen of the world to that of French citizen”, he becomes a “traitor that must be put under surveillance” Robespierre (Masure, 2014: 65).

“Algerians Israelite are French, although they are not citizens” Imperial Court of Alger, 24th February 1862.

“This flood of immigrants has set us back considerably. We hear all sorts of stories about how, in the coloured countries, the white man is told to go home, but we here are not allowed to tell the black man to go home” Harold Gurden (HC deb Commonwealth Immigrants Bill, 16th November 1961: c736).

“My conclusion, after much thought, is that it is not reasonable to expect us to open our doors to a vast number of people who have no direct connection with Britain and who do not in any way belong here. I consider that, if they wish to leave Kenya, they should return to their countries of origin – India and Pakistan, which certainly would not refuse them admission” Duncan Sandys (HC deb Commonwealth Immigration Bill, 2nd February 1968: c1278).

3.1 Introduction

The objective of this chapter is to unravel and frame the different images which have been associated with citizenship in France and the UK. Because I am interested in a policy – citizenship deprivation – which enunciates exclusion from society and a rupture from formal equality for minority citizens and dual nationality holders, I am looking at history to find clues about what attributes are and have been required in order to access belonging to the state and being in an equal relationship *with* the state. For example, some of the questions I ask in this chapter are: can we grasp something about present-day practices of citizenship deprivation by looking at the different ways through which France and the UK framed their politics of belonging, politics which include and exclude individuals under different requisites? In looking at how states have answered who belongs and what is required to belong, can we learn something about citizenship more broadly as a claim to an equal relationship with the state? To address these questions, I first present what these images of citizenship might be from extracts from parliamentary debates which I have selected in light of the themes and research questions of the thesis. I then address what the general view of these images is in academic literature and how I intend

to “demystify” them: through applying the analytical lens of the “politics of belonging” in inquiring into historical meanings of citizenship.

3.2 Framing the terms of the “images”

In chapter 2, I established chronologies of the developments of deprivation powers in both France and the UK, laid out some of the key terminology which powers the thesis, and presented critical themes for the research questions. Two such themes were linked to the state’s images of citizenship and their approaches to nationhood and equal citizenship. As I have suggested, it is possible that deprivation powers operate as a tool to police the boundaries of nation states, through monitoring the states’ populations with potential heightening effects on minority citizens. To that extent, the scrutiny of the images which have been attached to citizenship and equal citizenship is a critical task. These images and their potential different framings are also relevant to explain the different approaches to cancellation of citizenship today. France has not gone as far as the UK in its cancellation of citizenship policies and practices: could this be because of strong historical commitments to equalitarian citizenship in that country? In this chapter, I seek to demystify the said images by focusing on historical practices which placed citizens in an unequal relationship with the state. The aim is to identify trends and complexities for meaningful comparative analyses and answers to the research questions, in light of the epistemological commitments of the thesis.

3.2.1 Images in the parliamentary debates

During the debates on the extension of cancellation of citizenship in 2015–16, a recurring line of argument from the French government was that the commission of terrorist acts by home-grown citizens evidenced a crisis of French citizenship. From the perspective of the government, citizenship deprivation could be used as a tool to reconsider what citizenship means and encompasses. For example, when Manuel Valls introduced the bill in the National Assembly, he said that “at times where our country interrogates itself, we need actions which remind us what is the French nation, what it means to be French”(JO, AN, 5th February 2016, 1003). He concluded the debates in the Senate by arguing that the measure essentially answered one question: “What is for us, in our heritage, in our tradition, a nation [?]” (JO, Sénat, 16th March 2016, 4178). In the UK, the government also initially revived powers post 9/11 within a broader set of policies which aimed to strengthen British citizenship through fostering a sense of belonging and identity. The Home Office report *Secure Borders, Safe Haven*, which introduced the proposed extension to the deprivation measures, stated that “the government believes that a corollary of attaching importance to British citizenship is that the UK

should use the power to deprive someone of that citizenship”.¹ Twelve years later, in the debates which propelled citizenship deprivation to the fore once more, the Conservative MP Alok Sharma said in the Commons that he supported the bill “wholeheartedly” because there are “rights as well as obligations that come with British citizenship” (HC Deb 30th January 2014: c1042). By contrast, Jacob Rees-Mogg, also a Conservative MP, worried that “if we give the Government the ability to take passports away from a certain category of British subject but not from other, it will create a potential unfairness and a second category of citizen” (HC Deb 30th January 2014: c1086). In France, the Green MP Cécile Dufflot, who had, a year before the 2015–16 debates, resigned from her position as Secretary of State for territorial equality and housing, argued that citizenship deprivation was “fundamentally contrary to the first article of the Constitution which guarantees that ‘France ensures equality before the law of all its citizens without distinction of origin, race or religion’”(JO, AN, 5th February 2016, 1007). The Green MP Noel Mamère criticised the extension of the powers to birthright citizens on the grounds that it contradicted the French approach to citizenship which is “grounded on the *jus soli* [acquisition of citizenship by birth in the territory] and equality” (JO, AN, 5th February 2016, 1015).

What these quotes indicate is that part of the debate around citizenship deprivation is to delineate what deprivation would “do” to citizenship, at a more abstract level. Would it strengthen or weaken it? And, in fact, what *is* “it”? Rees-Mogg refers to citizenship deprivation as a measure which removes “passports”, one which risks modifying the categories of “subjecthood” and creating “second class citizens”. Sharma talks about citizenship as rights and obligations. The French Prime Minister and the UK government report in 2002 brought issues of national belonging and values to the debate, while the French Green MPs talk about citizenship as a status which is unmediated: where individuals are put in an equal relation with the state.

3.2.2 Images in academic literature

What “it”, citizenship, is and encompasses in France and the UK, beyond first-hand political representations, has triggered important academic discussion. Brubaker’s (1992) work on citizenship and nationhood in France and Germany, which I briefly presented in chapter 1, has had important influence in this literature. In his book, Brubaker presents citizenship as an element of closure: according to him, citizenship is “externally exclusive” in that it differentiates between citizens and

¹ Home Office, “Secure Borders, Safe Haven: Integration with Diversity in Modern Britain”, February 2002, 138pp, at p32
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/250926/cm5387.pdf (31/07/2019).

foreigners, and it does so in a way which varies from one nation state to the other (Brubaker, 1992). The idea, put simply, is that there is something distinctive about images of nationhood in a country which, in turn, frames state policies of citizenship. From this tradition, scholars such as Favell (2001b), in the context of integration policies, and Schnapper (1998), in theorising the nation, have demonstrated that France and the UK have different representations of citizenship. This is especially salient in the work of Favell who focuses on the state's accommodations of plural identities in the public sphere. Favell models the countries' approaches in two different "public philosophies": a republican approach in France and a multicultural approach in the UK. As he argues, the responses of France and Britain to the kinds of questions triggered by immigration and integration are:

"... almost reversed mirror images of one other: France emphasising the universalist idea of integration, of transforming immigrants into full French *citoyens*; Britain seeing integration as a question of managing public order and relations between majority and minority populations, and allowing ethnic cultures and practices to mediate the process" (Favell, 2001b: 4).

In chapter 1, I drew on the literature which highlighted some of the short-comings of these "modelled" analyses, namely, the fact that they tend to reify and uniformise national narratives and their correlation with citizenship legislation and practices beyond what can be observed empirically and historically. Favell acknowledges these different narratives and practices in a later work in which he talks about the "disparate range of state policies, laws, local initiative, and social dispositions which could be implemented by many agencies at many levels [and] comes to be thought of as a single nation state's overall strategy or policy of *integration*" (Favell, 2001a: 351) [his emphasis]. The critical question thus becomes how to bring complexity and nuances into the framing of the state's images of citizenship.

3.2.3 Analytical framework: the politics of belonging

In this chapter, I contend that one way to demystify the said images is to examine who is belonging in the eyes of the state and who is made foreign through law, discourses and institutional practices. For these purposes, I turn to the literature that discusses state-led policies concerning inclusion and exclusion beyond citizenship as a legal status. These are what Nira Yuval-Davis (2006) frames as the "politics of belonging". Yuval-Davis explains that, if belonging operates at the level of the individual, it is about social locations, feelings, emotions and values, the politics of belonging are state-led political projects "aimed at constructing belonging in particular ways to particular collectivises that are, at the same time, themselves being constructed by these projects in very particular ways" (Yuval-Davis, 2006: 197). In other words, they are state policies, laws, discourses and practices which tell us

something about who belongs, what are the “requisites” to belonging, and, more broadly, into “what”: *ie* what are the rules on which the community of membership rests. James Crowley’s (1999) widely used definition of the politics of belonging as “the dirty work of boundary maintenance” is useful in this regard because it helps us to think about the politics of belonging as an exclusionary practice which divides the world between “us”, members of a community of membership, and “them”, the others. Yuval-Davis points out that any such delineation between “us and them” involves an act of active and situated imagination, in the sense that who is “us” and who is “them” and what is required to be “us” has shifting boundaries. She contends that these shifting boundaries or different projects of belonging operate at the different levels of belonging – social locations, identifications and emotional attachments, and ethical and political values – and, at times, collapse together (Yuval-Davis, 2006: 209). Crucially, she points to the influence of specific contexts in triggering politics of belonging: as she writes, belonging becomes naturalised, articulated and politicised when it is threatened in some way (Yuval-Davis *et al*, 2006: 3). Furthering Yuval-Davis’ claim, the few quotes from the parliamentary debates which I presented in the introductory lines of this chapter show that the context of national security threat triggers inquiries, if not obsessions, with meanings of Britishness and French-ness. And, as it appears, in these cases, the politics of belonging of the states are built around shared identities (belonging to the nation), as well as ethical and political values (expressing solidarity through rights and duties). One of the benefits of scrutinising images of citizenship through the lens of the politics of belonging is that it helps to go beyond formal legal inclusion, in the sense of citizenship as a legal status. It brings in contingency and porosity within the categories of the citizen and the “other” in the state’s representations of who is “us” and who is “them”. To paraphrase Antonsich (2010: 650): to think about citizenship through the lens of belonging helps to “thicken” it.

The question then becomes how does one go about it? What markers are useful to determine the state’s politics of belonging? As previously mentioned, I am seeking out elements which can tell me who is foreign: who is “in” and who is “out”. The laws and practices which grant and exclude individuals from citizenship are useful as a starting point because they tell us something about what is required to become a member of the legal community of belonging, here, within the nation state. However, this tells us little about who can get a chance to claim citizenship in the first place, the role which the politics of immigration plays in this process, and the process through which individuals, legal citizens, become “othered” and made foreign. For example, in their work, Fox, Morosanu and Szilassy demonstrate that the EU enlargements at the beginning of the 2000s have had the effect of privileging white against non-white European workers in the UK (Fox *et al*, 2012). Their work evidences that promoting certain patterns of economic migration can, in practice, exclude individuals on racial grounds. Crucially, it tells us not to stop at the text of the policy but to scrutinise its practical

consequences. Parker (2015) makes a similar point when he shows that the United States (US) has never welcomed all possible immigrants, nor naturalised all long-term residents but, rather, carefully chosen who could come to the US and become US American, despite a long-enshrined narrative of universal inclusion (*ie* “soft” external boundaries of citizenship). In addition, for those who are “already in”, Parker indicates that US history has been marked by the creation of “foreigners within” (Parker, 2015: 5). His work demonstrates how individuals such as original settlers were made foreign through speeches, acts and immigration legislation, thereby pointing out that there is nothing original about the state as the author of representations of cultures and values. Rather, the narratives of membership are primarily written from the perspectives of the included and the categories of insider and outsider are, in fact, moving and porous². In the context of the UK, Anderson (2013), too, disrupted the categories of the citizen and the alien by looking at the ways in which the British state, which, she argues, thinks of itself as a “community of values”, differentiated between the “good citizen” (the “liberal sovereign self”), the “failed citizen”(the rioter, the criminal, the benefit scrounger), the “tolerated member” (the hardworking migrant) and the non-citizen. Her work similarly examines how immigration law and citizenship legislation are in tension, in that they constantly redefine the boundaries of the categories, and adds to this critical image the role individuals play in seeking to pierce through the categories (Anderson, 2013).

Drawing from these analytical insights, in this chapter, I look at the different statuses which have mediated the relationship between the individuals and the states, the conditions set out to enter the categories, the role played by immigration legislation and the public discourses in framing the contours of membership in both states. In other words, I scrutinise what the requisites have been to be in or out, and what this means for how we can understand citizenship today. I focus on images: the image of “subjecthood”, “citizenship” and “nationality”, which are not exclusive of one another and do not reproduce a linear historical process. Thus, the themes under which I gather certain historical “moments” are not chronological nor all-encompassing. For example, although I differentiate between pre-imperial and imperial subjecthood, I acknowledge that colonisation was already at work during the “pre-imperial” times. In short, I have chosen to focus on moments of deep tension in the states’ constructions when the politics of belonging of these two states was more clearly expressed.

3.3 Pre-imperial subjecthood

² In the context of the US, see also Ngai (2007: 2521; 2014) and her concept of the “alien citizen”, individuals who, although formally US citizens by virtue of their birth in the territory, have their US citizenship suspected on account of their immigrant ancestries.

One of the first images which formulated membership to France and to then England³ was the 16th and 17th-century concept of “subjecthood”. The main characters were the subjects and the Crown. Both were bound by a reciprocity of engagements: one of allegiance against protection. To be part of the image in both countries, to be a subject, one initially needed to be born in the kingdom.

3.3.1 *Calvin’s case: personal allegiance*⁴

In the UK, this was formulated in *Calvin’s case* in 1608 (Co Rep 1a, 77 ER 377) where the court found that birth in the territory (ligeance, *jus soli*) brought with it the sense of allegiance (Dummett and Nicol, 1990). But at a time of imperial expansion through war, who could be in or out by being born in the territory was not so straightforward. For example, following the accession of James VI of Scotland to the crown of England in 1603, a fundamental question which lawyers at the time had to answer dealt with the status and rights of individuals born in Scotland or England before and after the accession. This was the critical issue of *Calvin’s case*. Calvin was born in Scotland after the accession to the throne of James VI and I and claimed properties (land) in England. The question was whether as a Scotsman born after the accession (*Postnati*) he was considered as subject or alien to the Crown and could claim rights in England (land). In studying the case, Kim (1996) reports that, for those against Calvin’s claim, allegiance was tied to laws, and English law did not extend to Scotland and Scotsmen prior to accession. Twelve out of 14 judges found otherwise and argued that Calvin was a subject because of the transcendental bond of obedience which attached him to the King. The outcome of the case thus suggests a quasi “mystical” view of subjecthood and belonging, one which served expansionist purposes.

3.3.2 *Allegiance under the Ancien Régime: more political than personal*

In the French context, subjecthood refers to at least two images of membership and historical moments: it is the status which linked individuals to the King during the Middle-Ages and pre-Revolution organisation of the Ancien Régime (16th century–1789); and the status which subjected individuals to French domination during the second period of colonial expansion of the 19th and 20th centuries. Similar to the UK, subjecthood in the Ancien Régime was primarily acquired by birth in the territory. An example of the juridical recognition of the *jus soli* can be found in the decision from 23rd

³ The UK, as we know it today, was instituted in 1921 but for purposes of clarity I will refer to the “UK” throughout this work rather than to the different constituents of the political organisation.

⁴ There is extensive literature on subjecthood and the Calvin’s in the UK (see, for example, Dummett and Nicol, 1990). This chapter is a conceptual chapter leading up to present day framings and understandings of citizenship and does not purport to be exhaustive.

February 1515 of the Parliament of Paris.⁵ The acquisition of subjecthood by descent was introduced soon after, and in the 19th century in the UK.⁶ Sahlins (2000; Sahlins *et al* 2008), whose work on the subject constitutes the leading authority, demonstrates that what differentiated the “French” from others was not so much concerned with the transcendental nature of the link of allegiance which attached the individual to the king. Rather, the core difference between the “French” (the *régnicoles*) and the foreigners (the *aubain*) was linked to the incapacity of the *aubain* to inherit and possess goods.⁷ Sahlins indicates that, although these legal incapacities were common in Medieval Europe, the French absolute monarchy used them as a tool of state-building (Sahlins, 2008). In the UK, the main restrictions against aliens were restrictions on land, which *Calvin’s* case illustrated (Dummett and Nicol, 1990). Hence why individuals would seek to naturalise as French or British subjects. In both contexts, naturalisation was about proving allegiance to the Crown.⁸ Through an analysis of the letters petitioning for the status of subject and the capacity to inherit, Sahlins *et al* (2000) points out that allegiance to the king was often voiced as a continuity of feelings of belonging which were inculcated through family ties, a “will to return” (to France) (*un esprit de retour*), as well as through the proving of service to the King and the Crown, or contributions to the “public good”. He concludes that subjecthood in France was marked by a notion of allegiance which was more political than personal (Sahlins *et al*, 2000). So, it seems, in France, who belonged was primarily about birth and ownership, and the requisites for belonging were drawn along the lines of a will to contribute to the Crown. This appears to contrast with the UK: as set out in the *Calvin’s* case, who belonged was primarily about birth and enshrined a personal link between the individual and the Crown, a link which was, also, transcendental.

3.3.3 Equal subjection to the laws?

Crucially, rights and entitlements for French subjects and foreigners (aside from the capacity to inherit) depended on their positions within one of the three casts of the regime: the clergy, the nobility, and

⁵ The decision follows the victory of François I in Marignan in 1515 during the “Italian wars” and permitted the King to extend his power of his subjects.

⁶ On 7th September 1567, a court found that a young girl, born in England of two French parents, was French (Mabile). For full analysis see: Weil (2008). In the UK, the *jus sanguine* was introduced throughout the 19th century and gained statutory recognition in 1914 (the British Nationality and Status of Aliens Act 1914).

⁷ As Sahlins shows, the rule was applied unequally, however, as members of kingdoms which had signed treaties with the King were exempted from the incapacity, whereas Jews born in France were not entitled to possess land in the first place.

⁸ In France, it was possible to naturalise through letters which were delivered by the king. In the UK these were the product of separate Acts of Parliament, and historically the procedure was a gateway for Protestants who were fleeing persecution to be offered protection. Brooks (2016).

the Tiers-Etat (Noiriel, 2001).⁹ The Tiers Etat was the biggest group, and yet, one which was constantly refused privileges and suffered heavy taxation. In a series of rhetorical questions, the political thinker Emmanuel Joseph Sieyès (2002) captures well the situation of the Tiers Etat pre-Revolution: “What has the Tiers Etat been until now? Nothing. ... What does it ask for? To become something.” In essence, as Brubaker demonstrates (1989), the whole legal structure of the Ancien Régime was inegalitarian. At no point were French subjects during the Ancien Régime in an equal situation with the state and with each other. This seems to contrast with the UK where equality under the law was assumed much earlier, although in a way which did not account for the deeply embedded inequality of class or gender, nor, as Lino (2018) shows, in a way which was equally applied in the colonies. The “rule of law” commonly refers to the institution of the equal subjection of all subjects to the laws. In his book of the same name, the late British judge Lord Bingham (2011) points to what could count as some of the historical moments which facilitated this process, such as, for example, the Magna Carta (1215), which laid the foundations for a government under law, although he notes that its significance lies not in what it actually said – for it was the product of a specific historical context – but in what later generations claimed and believed it had said (Bingham, 2011: 10–33).

What this section has evidenced is that under pre-imperial subjecthood in both contexts, who belongs and what is required to belong were primarily determined through birth in the territory and potentially different forms of allegiances, personal in the UK and political in France. Crucially, while the subjects of the Crown in the UK were equally subjected to the same laws, this was not the case in France where birth determined the social condition of the individual and his/her positioning in the society. The Revolution of 1789 broke free from this inegalitarian regime and replaced “subjecthood” by equal citizenship, an unmediated status between the individuals and the state and between each other. But subjecthood was reintroduced in some of the French colonies and similarly enclosed individuals in a specific discriminatory status from birth. In the next section, I engage with what seemed to motivate the creation of different statuses under the French second period of colonial expansion, despite the promise of the Revolution.

3.4 The French imperial image of the “national subject”

Although the French colonial experience was neither linear nor uniform, in this section I primarily focus on the example of Algeria because it is revelatory of exclusions from French citizenship on grounds of the purported non-belonging of individuals because of their different ethnicity(ies).

⁹ The Tiers-Etat then referred to the common people of France.

3.4.1 The “national subjects”: the case of Algeria

The French colonisation of Algeria was a later one, which happened after the Revolution of 1789. In Algeria, the French government did not impose full French legislation and institutions on individuals, although Algeria was established as a “department” in 1848.¹⁰ The laws applicable to the individuals were governed by their “personal status”, as well as French laws. The personal status was, as a colonial jurist of the time explains, the “law applicable to each individual according to the race that individual belongs to” (Asmis, 1910). The choice of subjection to one legal system over another (*ie* to be under French law or “personal” law) was not left to the individuals and had important consequences in practice: it prevented access to citizenship. Legally, this view is supported by a judicial decision from the Court of Appeal of Alger in 1862. In this decision, the court said that the “natives” (later called the “indigenous” – and also referred to as Muslims and Israelites) are French nationals, but, while nationals, they were not “French citizens”. Rather, the court created the hybrid status of French national subjects.¹¹ Core to the distinction between citizens and subject was the way in which state power was exercised (Saada, 2017). The subjects were under a derogatory criminal legislation, “the code of indigenous people” (1874) which created 27 specific offences implemented by the administration. One such offence was the impossibility to travel outside of their “douar” (localities) without a special pass. Alongside criminal law, Algerian subjects were also under specific restrictions in family law and trust law and excluded from all the other rights which were then attached to French citizenship.

But the dichotomy between the subjects and the citizens was not impermeable: the French colonial administration kept the power to move the goalposts and decide when one could become a French citizen. In 1870, the “Crémieux” decree granted citizenship to all native Jews in Algeria (who were also French subjects). It reiterated that the provision did not apply to Algerian Muslims, who remained subjects. Full citizenship was also granted to individuals living in four cities in Senegal in 1916, despite them being still subjected to their personal laws. Blévis (2003) suggests that a potential explanation for the citizenship decrees in the four cities of Senegal lies in the desire of the French state to enshrine its influence in these regions against a growing number of foreigners, including from European origin. However, as Saada (2003) shows, the decrees triggered heightened debates in the French Parliament.

¹⁰ Algeria was a French department from 1848 to 1962. So too were (and still are) the “old colonies” of the Antilles (Guadeloupe, Martinique *etc*), but not other territories under colonial rule, such as West-African countries or Madagascar.

¹¹ In French: « Les israélites algériens sont Français, bien que ne possédant pas la qualité de citoyen. » Journal de la jurisprudence de la cour impériale d'Alger, 24 février 1862. This was later enshrined in legislation, through the Senatus consulte of 1865.

As she reports, opponents stressed the absurdity of conferring the possibility (and thus, the power) to individuals to be elected to Parliament and modify legislation when they themselves were not subjected to it. Crucially, for those who were still treated in law as “indigenous subjects”, a procedure was opened for them to become French citizens: the procedure of naturalisation (*senatus consultum* of 1865). To naturalise, the subjects needed to prove their “assimilation” to France.

3.4.2 Assimilable and non-assimilable “national subjects” in Algeria

Assimilation was a core concept of the French first period of colonial expansion (from 1534 to 1830). Assimilation, in essence, is about uniformising the conditions of membership. It is a violent process which leaves aside the differences of the individual for that of the dominant group. Sayad (1994: 10–11) describes assimilation under the French colonial rule as “anthropophagic”: a process which consumed everything, groups, individuals, ethnicities, cultures, languages, *etc.*, into the habits prescribed by French colonial rule. Assimilation was also present in the UK, but less stringently enforced (Bleich, 2005). But, as Hajjat (2012) demonstrates, assimilation under French colonial rule was multifaced and historically put individuals in different relations with the state. As he expounds, the term was first politicised in the territories of the Antilles (first period of colonial expansion) and defined in light of the racial categories which were institutionalised in slavery. At that time, he explains, assimilation meant applying French cultural, institutional and legal rules to slaves and former slaves (the *affranchis*). Soon after, however, Hajjat shows that assimilation became a political issue for the colonials because it was relativising the social hierarchies of slavery: it became a political claim to equal rights and status for the slaves. Later, during the (second) abolition of the slave trade in 1848, Hajjat indicates that assimilation justified the granting of citizenship to the former slaves (Hajjat, 2012). However, as noted, the politics of assimilation previously framed (imposing upon individuals French laws, institutions and so on) were not enforced in Algeria. In Algeria, assimilation became a requisite to belonging to the state, to “naturalise” as a French citizen. Blévis (2003) shows that the questions used for checking the “assimilation” of the “indigenous” looked at whether an individual spoke French, held a French diploma and had relations, through work or friendships, with “Europeans” rather than “indigenous people”. She gives the example of a young man, “MG” who was

“a man of good education (he dresses in the continental way) and has an irreproachable behaviour. He doesn’t hang out with indigenous people – or only just for the needs of his school – but he actually looks for the company of French people” (Blévis, 2003: 42).

What this suggests is that the requisite of belonging for “national subjects” was about sharing culture, religion and values. It also indicates, as Hajjat argues, that assimilation shifted from a politic of

expansion to a politic of exclusion (Hajjat, 2012). What explains this different approach to assimilation? In her work on French colonialism in Algeria, Saada (2009) contends that a possible explanation for this change links to the limited human and financial resources of the conquering power at the beginning of the 19th century. For Hajjat (2012), it linked to a shift in racial theories, where some “races” were considered as “un”-assimilable because they were “too different”. Both explanations, when combined, offer a broadening account of the imperial image of French citizenship.

What the status and content of subjecthood under French imperialism reveals is that the relationship between individuals and the state was mediated by ethnic and racial requisites of belonging. The Algerian “national subjects” could only become full citizens and be considered as equals if they proved that they had “assimilated” the features of the French hegemonic cultural rules. The fact that the category between the “national subject” and the “citizen” was still open, although not easily permeable, suggests that there was a belief in citizenship as something which could transcend the “nature” of the subjects. An example of this, other than the procedure of naturalisation, potentially lies in the fate of the children of “mixed” unions, between French women and “indigenous” people. In her work, Saada reveals that, while women in continental France lost their citizenship when they married a foreigner, they couldn’t lose their citizenship status when they married an “indigenous” person in the colonies and they transmitted their status of French citizen to their children (Saada, 2003: 20). By contrast, prior to the uniformisation of the category of “subjecthood” to all individuals in the British Empire in 1948, British women faced revocation of their status following interracial marriage (*eg* under the Naturalisation Act 1870 and, later, s10 of the BNSAA 1914).

3.4.3 Post Second World War: ongoing exclusions despite formal status

This ethnic and racial mediation of legal statuses during the French empire was abandoned in the aftermath of the Second World War. The *ordonnance* of 2nd November 1945 recognised the former “national subjects”, including Algerians, as citizens and instituted, in law, unconditional right of access to continental France¹² as well as equal access to the civil service. In other words, the legislation instituted formal equality for all the holders of citizenship status. However, Spire’s (2003) archival study unveils administrative practices which challenged this formal equality. He demonstrates that former colonial subjects were being discriminated against in the areas of access to civil service employment, certain policing practices (*eg* stop and search policies, especially after the beginning of the Algerian war), access to metropolitan France and access to social services and benefits (Spire,

¹² In the case of Algeria, this preferential immigration went on until after the Independence of 1962. Under current law, Algerians benefit from a derogatory regime to other foreigners when claiming residency status. These include, for example, a shorter length of previous years’ legal stay in France and, often, free application.

2003). These administrative practices indicate that the citizens – former colonised subjects – were still perceived as undesirable or, at least, as not full equals.

In the aftermath of the Second World War, the constitution of the 4th Republic in 1946 also created the status of “citizenship of the French Union” for individuals in former French colonies other than Algeria, overseas departments,¹³ and overseas territories.¹⁴ This imperial citizenship moved away from assimilation and purported to preserve the territories and nations’ identities, to institute a “cooperation” between independent states. The preamble of the Constitution of 1946 wrote that:

“France formed with the overseas people a Union grounded on the equality in rights and duties without distinction of race or religion. The French Union is composed of nationals and people which put in common or coordinate their resources and efforts to develop their respective civilisations and increase their wellbeing and ensure their security”.

The citizenship of the French Union did not grant an unconditional right of access to France, but it allowed individuals to vindicate the rights enshrined in the preamble and body of the Constitution of 1946, which included socio-economic rights. Access to rights thus derived from the holding of the status of citizenship rather than territorial presence in France. In practice, however, the “citizens of the Union” were being discriminated against in their access to rights. As Cartroux pointed out at the time, all power was in fact centralised and exercised from France and the implementation of rights between France and the independent countries differed (Catroux, 1953: 245). The Union was short-lived and replaced by the “French community” in the Constitution of the 5th Republic (1958) which fully disappeared in 1995 (Constitutional Act no 95-880).

This section demonstrates that the French history of colonial citizenship was marked by different forms of exclusions through the creation of different statuses which were grounded in ethnic and racial requisites for belonging. It also shows that these exclusions were carried out after the Second World War in the practices of the state, despite the institution of formal equality. In the next section, I turn to the UK’s approach to post Second World War membership, which also created different statuses for different individuals within the empire and discriminated against former colonial subjects.

3.5 The UK imperial image of the “citizen subject”

In this section, I focus on the post-World War Two context from which the image of the “citizen-subject” emerged and subsequent state practices of exclusion through immigration law.

¹³ Guadeloupe, Martinique, the Reunion, and French Guyana.

¹⁴ Madagascar, the Comoros, French institutions in India, New Caledonia, Saint Pierre et Miquelon, French Occidental Africa, French Equatorial Africa.

3.5.1 The British Nationality Act 1948: the citizen subject

As noted, subjecthood was the primary status which mediated the relationship between individuals within the empire and the Crown. But, in the aftermath of the Second World War, independent dominions within the Commonwealth were starting to introduce their own citizenship laws, while colonies were starting to claim their independence. In response, the British Nationality Act 1948 (BNA 1948) introduced two important new legal statuses: that of the citizenship of the UK and colonies (CUKC) and of the citizen of the independent Commonwealth countries (CICC). The restructuring of subjecthood through the statuses of CUKCs and CICC established identical rights for all British subjects in the UK, the Commonwealth and the colonies. Core to these rights was an unrestricted right of abode in the UK. Prior to 1948, immigration control existed but at the local level: subjecthood did not necessarily guarantee a free pass to some dominions, especially for colonised subjects (Karatani, 2003). Therefore, although subjecthood in 1948 was “parasitic” on the primary acquisition of citizenship, it entailed rights of its own (to move freely within the empire and, especially, to the UK). The requisite for belonging under this political association was thus still grounded in personal allegiance to the Crown through birth in a territory of the British empire. The debates which surrounded the introduction of the BNA 1948 are revelatory of this mystical and imperial approach to subjecthood. For example, the then Home Secretary James Chuter Ede said in the Commons on 11th November 1947, when the bill was read a second time, that the “true meaning” of “British subject” did not mean a person belonging to Great Britain but “a person belonging to any country of the Commonwealth who is a subject of the King” (HC deb 7th July 1948: c387). And, further, that it (subjecthood) was a term “we all hold in honour as something which signifies a great deal of history and tradition” (c392). He referred to a status which would be beneficial to the “wide family of ‘British subject[s]’” (c388), and to the UK as the “Mother country” (c394). He also used the metaphor of the family to talk about the content of the status of CUKCs, as one which “recognise[s] the right of the colonial peoples to be regarded as men and brothers with the people of this country” (c394).

Also important was the fact that the CUKC and CICC statuses did not introduce any regulatory measures with regard to local rights and obligations. In relation to the Dominions, Alan Gomme-Duncan, a Unionist MP and colonel of the army, said that Parliament “ought to make perfectly clear ... that being a British subject implies no form of subjection at all in the way of repression”(c 484). Further, it is clear from the debates that the purpose was not to culturally assimilate individuals. As the conservative MP David Maxwell Fyfe put it: “The Attorney-General will know from his experience of cases in the Privy Council that we go a long distance towards preserving local religious or cultural matters whether we agree with them on these bases or not; we accept that they are allowed to

continue” (c403). And, further, that “allegiance is not to a political system; it is to the King in person” (c403). In essence, then, the Act enshrined, as a requisite of belonging, shared allegiance to the Crown but, by contrast with France, no demand of cultural assimilation to the UK. British imperial citizenship was conceived in terms of transcendental, post-national citizenship, which meant different things according to where the individual stood. However, although culturally inclusive, the similar statuses of “subject” did not prejudice the power relations which existed within the empire. Therefore, the movement of people was still conditioned by the social and economic ability to travel to the UK. In scrutinising the historical context of the BNA 1948, Hansen argues that the kind of migratory pattern considered and advocated for was a permanent movement from old Dominions’ citizens and a temporary movement from colonial subjects (Hansen, 1999: 89). In other words, that the inclusivity of the law was primarily to safeguard the empire and the UK position as the head of the structure, the “motherland”. But, by 1962, a considerable number of individuals had travelled to the UK, mostly from non-white countries, which led in 1962, 1968 and 1971 to the introduction of different immigration legislation to curtail this movement. Similar to France, the UK later precluded access to the country and rights to imperial citizens, and the requisites of belonging became about shared ethnicity.

3.5.2 Exclusion through immigration law: the Immigration Acts 1962, 1968 and 1971

In the debates pre-dating the introduction of the Immigration Act 1962, an image which comes back time and again is that of an island being “submerged”. In the words of the then Home Secretary, Richard Austen Butler:

“the justification for the control which is included in this bill ... is that a sizeable part of the entire population of the earth is at present legally entitled to come and stay in this already densely populated country. It amounts altogether to one-quarter of the population of the globe and at present there are no factors visible which might lead us to expect a reversal or even a modification of the immigration trend ...” (HC deb 16th November 1961: c687).

The individuals coming to the UK were referred to as “immigrants” rather than fellow subjects. The criterion for distinguishing from those among the immigrants who could still travel freely was that of “persons who in common parlance belong to the United Kingdom” (Butler, HC deb 16th November 1961: c695). These included, as Butler explains, “first, persons born in the UK, and, secondly, persons holding passports issued by the UK government” (c695). The requisites for belonging were thus drafted along the lines of having close ties with the country. According to Butler, the criterion had been chosen “primarily for ease of identification by the immigration officer at the port of entry” (c695). The immigration officer was also given discretion to refuse entry and to deport those who

would not be exempted from control, namely, those who were not “connected with the UK by birth, parentage, naturalisation or marriage” (Butler, HC deb 16th November 1961: c703). In effect, this meant that unconditional entry was in practice granted to individuals born in the UK of white descent (Sawyer and Wray, 2014). Since the rights in the UK are territorially grounded, this means that a significant proportion of those who were legally CUKCs were treated less favourably, and that the criterion for distinction was one based on ethno-cultural (racial) characteristics. In her research, Karatani (2003) argues that the Acts of 1962, 1968 and 1971, although legislation which had racist intentions, represented a more continuous historical process: the fact that it had always been the case within the British empire that the formal and substantive aspects of citizenship could be separated out by immigration control. In other words, the reality that rights and obligation were primarily granted by being present in the territory rather than through citizenship and, therefore, contingent on immigration legislation. But this does not minimise the racial effect of the 1962 legislation nor the fact that this “colour bar” was considered and acknowledged by parliamentarians. For the Labour MP Gordon Walker: “the net effect of the Bill is that a negligible number of white people will be kept out and almost all those kept out by the Bill will be coloured people” (c709). Charles Royle said that any member who voted for the bill should make no mistake that s/he will be: “voting for a colour bar in this country and this legislation will be based on racial factors alone” (c748), while Harold Hayman asked Cyril Osborne if he was saying that: “he believes in the brotherhood of all men or merely in the brotherhood of white men?”(c719). For Osborne, the control was inevitable “because of the enormous flood of people wanting to come into this country and because of the tremendous social problems which this is creating in Birmingham, Nottingham, Coventry, Wolverhampton and London” (c 728). Indeed, the Conservative MP Harold Gurden was even clearer when he said that “this flood of immigrants has set us back considerably. We hear all sorts of stories about how, in the coloured countries, the white man is told to go home, but we here are not allowed to tell the black man to go home” (c736). And, Robert Hugh Turton, when he argued that “if immigrants commit crimes, they should be returned to their own country, because they are abusing the hospitality of the mother country” (c756). These views also indicate that colonial citizen–subjects were under heightened duties to conform in the UK, otherwise, if they failed to do so, they could be deported like any other foreigner. Eventually, the bill went through, although, that day, with a significant opposition (283 ayes:200 noes).

The exclusion of colonial citizen–subjects was furthered by the Commonwealth Immigrant Act 1968. At the time, a number of East-African countries, such as Kenya, Uganda and Tanzania, had gained independence from British rule. Since the passports of their citizens had been issued by the British High Commission they were, under the 1962 Act, allowed to come to the UK (Clayton, 2014: 10). The 1968 Act set entry controls upon CUKCs, who were holders of British passports but did not have a

parent who was born, naturalised, adopted, or registered in the UK, thereby furthering the racial ban. For the then labour Prime Minister James Callaghan, however, the “test that [was] adopted is geographical, not racial” (HC deb 27th February 1968: c1251). The question in 1968 had become one of “numbers”, as Callaghan put it: “... how many should we admit to our country”? (c1256). There was much less opposition to the bill in 1968 than in 1962. Few, such as the Labour MP Dingle Foot, argued that the measure was one “under which the state will betray the citizen” (c1270), for the status of CUKCs created obligations for the individuals (the primary of which being allegiance) without access to rights. He also noted that the effect of the bill was to create “a whole new class of stateless persons. We are transforming these British citizens into refugees, and the most pathetic kind of refugees, refugees with nowhere to go” (c1270). And, further, that: “My right hon. Friend said that this was not racist legislation. It may not be racist in intention, but it will certainly be racist in effect” (c1271). Echoing Dingle Foot, a direct effect of this “policy of numbers” was the exclusion of British nationals living in East Africa, who were descendants from people from South Asia who had been sent to live and work in East Africa under British rule. Those who did not ask for citizenship of the newly independent East-African countries but preferred to retain their British passports thus ended up in the critical legal limbo of statelessness as they were precluded from going to the UK under the new Immigration legislation.¹⁵ For the conservative MP Duncan Sandy, these individuals, “if they wish to leave Kenya ... they should return to their countries of origin – India and Pakistan, which certainly would not refuse them admission”(c1278), for it was “not reasonable to expect us to open our doors to a vast number of people who have no direct connection with Britain and who do not in any way belong here” (c1278). In the case of *East African Asians v UK*, the European Commission on Human Rights, by contrast with the Callaghan policy of numbers argument, found that that the Act, by subjecting to immigration control citizens of the UK and colonies in East Africa who were of Asian origin, discriminated against this group of people on the grounds of their colour or race, which was found to be in violation of article 3 of the European Convention on Human Rights.¹⁶ A direct consequence of the case was the modification of the legislation in 1971 (Immigration Act 1971). The Act subsequently divided those freed from immigration checks and those who were not into two categories: the “patrials”¹⁷ and the “non-patrials”. Non-patrials were individuals who had no

¹⁵ See for example: “The Lost Indians of Kenya”, *The New York Review of Books*, Salim Lone, 1971 <https://www.nybooks.com/articles/1971/10/07/the-lost-indians-of-kenya/> (17/12/2019).

¹⁶ *East African Asians v UK* (1973) [1981] 3 EHRR 76: “... this condition would normally be fulfilled by the so-called white settlers, but not by the members of the Asian communities in East Africa” (para 202). The case never went to the European Court of Human Rights, however, as the British government dealt separately with the individuals who had brought the case.

¹⁷ According to the legislation, patrials were:

– CUKCs who had that citizenship by birth, adoption, naturalisation or registration in the UK;

connection with the UK. It vested the power of making a decision of entry/of stay or of deportation in the Home Office and the categorisation was later introduced in the British Nationality Act 1981 which created a single British citizenship. What the story of imperial British citizenship shows, read through the lens of immigration legislation, is that it has been, as Tyler (2010) put it, “designed to fail” certain categories of individuals on racial grounds, although deeper scrutiny into the debates shows important disagreement and anti-racist stances within Parliament. In the same way that French imperial legal citizenship was never inclusive of all members, as the example of the colonial subjects shows, so too was the UK imperial citizenship. In the next section, I turn to what the images of the UK and French citizenship entail from a non-imperial perspective, as developed during the Revolution in France and throughout the 20th century in the UK.

3.6 The images of citizenship in revolutionary France and 20th-century UK

3.6.1 20th-century UK citizenship

A critical feature of the UK’s approach to imperial citizenship is that there was no incentive to become a “citizen of the UK” through naturalisation. This is because, as Karatani (2003) demonstrates, rights in the UK are territorially enshrined and, as previously examined, access to the UK was initially made unconditional for imperial citizens in 1948. What these rights encompassed was famously expounded in the work of the sociologist TH Marshall. Marshall (1950), from an empirical study of the evolution of rights in the UK, attaches to citizenship three kinds of rights: 18th-century civil rights, 19th-century political rights, and 20th-century social rights. But in the work of Marshall, citizenship is more than just access to rights, it is also about equality between individuals, in the sense of equal access to rights and equal subjection to the law (Marshall, 1950: 150–151). Shafir explains that social rights are especially important in the development of a sense of a community of membership for Marshall: they allowed individuals to engage with others and vindicate their previously held rights, as well as new ones (Shafir, 1998). It helped to move from an image of membership, through shared allegiance to the Crown to one which horizontally connected individuals. However, Marshall’s empirical study of citizenship has been criticised because his work focuses on class inequality rather than gender or ethnicity as axes of inequality within society (Young, 1989; Orloff, 1993). Civil and political rights, for example, were not opened to woman until the 20th century for reasons based on gender

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- CUKCs whose parents or grand-parents had that citizenship by those means at the time of birth of the individual;
 - CUKCs with five years’ ordinary residence in the UK;
 - Commonwealth citizens whose parent was born or adopted in the UK before their birth;
 - Commonwealth citizens married to a patrilial man.

discrimination. Maybe this is because, as Lister (2005) points out, although empirically grounded, Marshall's definition was essentially normative: citizenship is presented as an element of social change, as what integrates society, and social rights and the welfare state are core elements in this process. Marshall's approach to citizenship is also critical because it has transnational features: it does not derive rights from the holding of the status but from territorial presence in the UK, thereby reflecting the broader context in which it was formulated, where imperial subjecthood was the predominant status. His analyses – of citizenship as rights and equal access to rights beyond legal status – find support in some of the speeches of parliamentarians in 1947. For example, the Labour Attorney-General Hartley Shawcross said that there was an expectation that equal rights would be conferred upon colonial and Commonwealth citizen–subjects: "... here as the metropolitan centre of the Commonwealth and the historical Motherland I hope that we shall always accord to the citizens of other Commonwealth countries the full rights and privileges that we are prepared to extend to our own citizens" (HC deb 11th November 1947: c495). At present, the consequence of imperial subjecthood and citizenship, as enshrined in the British Nationality Act 1981, is that important rights are not conferred by nationality law. Some of these rights usually excluded to non-citizens, such as the right to vote, to stand for election or to enter the country without immigration checks, are open to former Commonwealth citizens. Entry without immigration checks is also still open to EU citizens who have until the 30th June 2021 to apply for "settled status" or "pre-settled status", which gives unconditional right to access to the UK (save for long-term absences).¹⁸ The outcomes of Brexit and of the *Windrush* scandal in 2014,¹⁹ which deported Commonwealth citizens who had been living in the UK for years, indicate that these preferential treatments and rights may no longer be so secure.

In sum, what the evidence developed throughout this section has shown is that citizenship in the UK is not legislated as a statement of rights and has never been made up of a set of clear principles. As Fransman (2011) writes, perhaps it is that citizenship as a statement of rights does not encompass anything other than the right of abode in the UK. The evidence presented also reveals expectations that equal access to rights and equal subjection to the laws would be granted to non-UK citizens, provided that they can enter the country. This expectation of equality is currently enshrined in the Human Rights Act 1998 and the Equality Act 2010, which confers an equal enjoyment of rights and protection against discrimination to individuals irrespective of their nationalities. Historical and more

¹⁸ "Apply to the EU Settlement Scheme (settled and pre-settled status", Gov, 2019 <https://www.gov.uk/settled-status-eu-citizens-families> (16/12/2019)

¹⁹Immigration Acts (2014 and 2016) introduced under the then Conservative government's "hostile environment" policy, created obligations on private individuals – such as private landlords – to check the immigration status of individuals some of whom had been residing in the UK for years. It resulted in some individuals being denied access to rent, employment, healthcare, etc – if not, in some cases, being deported. For a critical inquiry see, Prabhat (2019) and Yuval-Davis, Wemyss, Cassidy (2019).

recent practices of exclusion through immigration legislation show that these expectations are not so secure, and that entitlements to rights and belonging have been disconnected from citizenship.

3.6.2 The narrative of citizenship of the French Revolution

By contrast, since the time of the Revolution, French citizenship, as historically developed in a non-colonial context, is perceived as consisting of more substantive content. A common framing of the image of citizenship introduced by the Revolution is that of a political community based on voluntary membership and reciprocal rights and obligations: a community of free and equal citizens (Schnapper, 1998; Janoski and Gran, 2002). The gist of the image of revolutionary citizenship lies in the existence of a “public sphere” where free and equal citizens are able to debate, agree on the rules of their membership, and be equally granted the protection of the rights enshrined in the Declaration of the Rights of Man and of the Citizen (DRMC). This abstract public sphere supports the “community of citizens” and institutes an unmediated relationship between the individuals and between the individuals and the state. It is purported to be accessible to all (to be “universal”) and to transcend the particularities of the individuals: it is what “emancipates” individuals from previous inequalities acquired from birth. To that extent, it is conceived as neutral – in the sense that it is blind to the particularities of its members (race, ethnicity, gender and so on), and as the entity that ensures the equal relation between formally neutral citizens and between the citizens and the state. Article 6 of the DRMC, for example, states that:

“The law is the expression of the general will. All the citizens have the right of contributing personally or through their representatives to its formation. All the citizens, being equal in its eyes, are equally admissible to all public dignities, places and employments, according to their capacity and without distinction other than that of their virtues and of their talents”.

From this image, then, the only condition on becoming a citizen and participating in the community of citizens is to adhere to the political project of universal inclusion and to accept being “neutral” in the public sphere (and relegate one’s diversity to the “private” sphere), so as to pursue the common good for all. The extent to which this view – citizenship as an equal access to rights and citizens being in an equal relationship with the state – was supported by law and practice is very limited.

3.6.3 Limited universal and equal citizenship under the French Revolution

In her historical account of the Revolution, Wahnich (2012) explains that, initially, everybody who supported the Revolution was considered a citizen, irrespective of their national origin or former positioning within the Ancien Régime. This transpired in law through a decree of 19th November 1792,

which said that: “The republic will grant brotherhood and help to every person who would like to recover their liberty”. Similarly, a decree of 30th April–2nd May 1790 (*le décret Target*) said that individuals born outside of France could become citizens provided that they would take a “civic oath, have resided in France for 5 years, and acquired properties or married a French woman”. Weil (2008: 17), in his history of the laws and practices which constituted French nationality, mentions a few particular cases where individuals were declared French by a court without express formal consent, though the condition of the civic oath was reinstated as a compulsory requirement by the Constitution of September 1791 (Title II). Crucially, article 4 of the Constitution of 1791 granted the National Assembly power to confer naturalisation irrespective of other conditions, save for residence in France and the swearing of the civic oath. Thomas Paine, Jeremy Bentham and George Washington, for example, were nominated for citizenship.²⁰ For Weil, this attribution of honorary citizenship marked the “Republic’s universal dimension”, one which “has powerful symbolic value [as it] signif[ies] openness to foreigners” (Weil, 2008: 15–16). However, not all citizens could participate in the making of the laws and in public life. The “citizens” to whom these legal instruments referred were “active citizens”. The Constitution of 1791 differentiated between French “active” and “passive” citizens on grounds of age, wealth and criminal conviction. Also excluded from active citizenship were women and slaves.²¹ The members of the privileged orders, too, were kept out of citizenship, both active and passive. As Wahnich explains, they were considered as “foreigners” because their privileges put them outside of the “sovereign people” (Wahnich, 2012: 260). The Constitution said that participation in any kind of foreign privileged order (eg knighthood, nobility, distinctions from birth or religious vows) entailed the “loss” of citizenship. Loss of citizenship was also possible for reasons of naturalisation in a foreign country or condemnation for crimes entailing “civic degradation”.²² From 1793, in the context of war and threats to the Revolution, the initial openness of citizenship towards foreigners was challenged. Wahnich demonstrates that the face of the “traitor” came to meld with that of a foreigner and brought suspicion of lack of patriotism. Foreigners from countries at war with France were detained and, in December 1793, lost the right to represent the French people (Wahnich, 2012: 262). A legislative proposal in August 1793 stated that foreigners who were living under French hospitality “had to wear a tricolour armband on the left arm with the word hospitality and the nation from which they originate”. Thus, as Wahnich contends, from 1793 the idea that it is possible for

²⁰ Only Payne was granted citizenship, as the others were neither residing in France nor did they swear the civil oath.

²¹ While the Revolutionaries abolished slavery in the colonies in 1794 (law of 4th February 1794 – “16 pluviöse an II”), it was reintroduced by Napoleon Bonaparte on 20th May 1802 and only finally abolished in 1848. The right to vote for women was introduced in 1944. In 1848 the *suffrage censitaire* was also abolished (right to vote for all men).

²² Article 4 of Title II of the Constitution of 1971.

individuals to cut free from their origins and live in a place where the people are free was abandoned (Wahnich, 2012).

What this shows is that, despite the revolutionary narrative of universal equal citizenship and permissible requisites for belonging (political values), the practical implementation of the principles sheds light upon important complexities. Equal access to rights, especially political ones, was grounded on gender and wealth exclusion. In addition, the purported universal inclusion of wealthy men was later conditional on the individuals' degree of attachment to France. Individuals coming from "abroad" and/or privileged men who had cut links with their privileges were viewed with suspicion, and their political commitment to the community of citizens challenged. This is illustrated in the case of the Prussian-born Anacharsis Cloots. Cloots had been granted French citizenship on grounds of his revolutionary political views. He was excluded and later executed because he was advocating for the universalism of the Revolution and was increasingly considered as an anti-patriot. As Robespierre is reported to have said: "[Cloots] prefers the status of citizen of the world to that of French citizen", he becomes a "traitor that must be put under surveillance" (Masure, 2014: 65). For Brubaker, the turning from "xenophilia" to "xenophobia" of the French Revolution in fact links to the logic of the nation state (1989: 43). Schnapper draws a similar conclusion when she says that, save for the direct aftermath of the Revolution, the "universality of citizenship was exercised within national limits" (Schnapper, 2017: 62). In other words, what both suggest is that, at some point, the political project of the revolutionaries drew criteria for exclusion and that these criteria were "national" ones, *ie* grounded on shared language, history and values; although both only refer to the forms of exclusions for the "outsiders", the foreigners, and not for the women, the poor or the colonial subjects.

The images of citizenship in France and the UK thus far reveal that equality and rights have similarly been presented as core features of citizenship, but denied to some individuals, formal members of the state, on grounds of wealth, gender and ethnicity. The requisites for belonging have differed in the different contexts, at times requesting allegiance to the Crown or the political community of membership, at others full assimilation into the cultural habits of the dominant group, as well as, at other times still, common descent and shared political values. In the next section, I turn to the image of "national citizenship" which permeated France and the UK and what this image entails in terms of potentially exclusionary requisites of belonging.

3.7 National citizenship

"National" citizenship refers to the process whereby citizenship became confined to the boundaries of the nation state. Academics have demonstrated that the logic of the nation state links to issues of "togetherness" (*ie* what brings people together and ensures the conditions for living together), but

that these issues of “togetherness” are grounded in shared cultures, language, histories and the like. Benedict Anderson (1983), for example, in one of the most important works on the nation, says that “nationality” or “nation-ness” are “cultural artefacts of a particular kind” (Anderson, 1983: 4). He defines the nation as “an imagined political community”, which is, he writes, “imagined as both inherently limited and sovereign” (Anderson, 1983: 5). In other words, this suggests that the confining of citizenship within national limits purports to demonstrate that there is essentially something “French” or “British”, something different and peculiar about each state which makes someone not a citizen from anywhere but a French or a British citizen – in a way which is supposed to mean something to other nation state. As Yuval Davis (2006) writes, these requirements of nation-ness are there for individual nationals to decide if their fellow nationals are “in” or “out”, if they are “us” or “them”. In this section, I review some of the narratives and practices which laid out criteria for inclusion and exclusion of “Britishness” and “French-ness” and what requisites of common culture and belonging they entail.

3.7.1 The nationalisation of French citizenship

At the end of the 19th century, the French political thinker Ernest Renan was referring to the French nation as a “daily plebiscite” (Renan, 1997). For Renan, the nation encapsulates a form of political belonging, one which he framed in answer to the purported German model of “ethnic” nationhood. He seems to believe that the primary condition for inclusion, in order to belong to the nation, is to accept the principles and the history of the country. To that extent he did not think that the nation was culture- or ethnic-free. Rather, he considers the nation as an abstract principle, “a soul”, which is constituted of “past and present”(Renan, 1997: 19),²³although he has a selective approach to the past, one which is grounded on the “shared amnesia” of divisive episodes. As he summarised it: “We are what you were – we will be what you are”(1997: 19).²⁴In other words, in the work of Renan, the political nation is historically bounded and can only be furthered in light of this historical frame, while the requisites for belonging are located in common culture, history, language and shared political values.

Renan was writing at a time of national construction in France. Several laws had homogenised and centralised the conditions for participating in social and political life. For example, the extension of

²³ In French: « L’une est la possession en commun d’un riche legs de souvenirs ; l’autre est le consentement actuel, le désir de vivre ensemble, la volonté de continuer à faire valoir l’héritage qu’on a reçu indivis. »

²⁴ In French: « nous sommes ce que vous fûtes ; nous serons ce que vous êtes. »

the right to vote to all men in 1848 (women were excluded until 1944),²⁵ the institution of education as free, compulsory, and secular (*laïque*) and, crucially, the institution of the “*jus soli*”, of direct acquisition of citizenship at birth, for the children of foreigners (law of 1889). The law of 1889 couched these conditions for acquisition under “nationality” in the Civil Code. It was the first time that nationality was introduced as a legal condition for citizenship. The law of 1889 is important in the French narrative of political nationhood. Weil (2008) says that it marks a turn because “being French” is no longer based on personal allegiance to the king (such as during the Ancien Régime) but upon upbringing within French society. As he writes, the law “took socialization rather than a voluntary and contractual act as the foundation for nationality” (Weil, 2008: 53). In other words, the law, allegedly, enshrined the idea that everybody could become a French citizen. However, Weil also acknowledges that the framing of the law answered specific contextual cues. This is because the previous law of 1851 had left open the possibility for individuals born in France of foreign parents to renounce their citizenship, which created problems for military conscription (Weil, 2008). In his work, Hajjat reveals that another purpose behind the law of 1889 was to avoid the possibility that the children of foreigners, at that time primarily from European countries, would stay foreign. As he shows, the assimilation of the children through school and the military was used to mitigate the suspicion towards the foreign adults: it was conceived as a war through pacific means (Hajjat, 2012: 88–90). However, here again the rationale and the law only fully operated in the context of France, but not in the colonies. Children of Algerian subjects were subjects from birth, while children of foreigners and children from the category of “French protected persons” could acquire French citizenship per the law of 1889. With regards to the “French protected persons”, primarily Tunisians and Moroccans, Blévis (2003: 32) explains that the equal application of the law of 1889 resulted from a series of decisions from the *Cour de Cassation* which repeatedly found that no legal text justified an exception to the application of the 1889 law. The fate of the children of colonial “subjects” and the unwillingness to initially apply the legislation to “protected persons” is another example of the racial exclusions which pervaded the history of French national citizenship. Taken together, the provisions for the legal implementation of a “national citizenship” tell us something about how adherence to the values and history of the majority became a condition for being part of the citizenry and about the role of the state in deciding who could claim this membership in the first place.

In theorising the nation, Schnapper says that, if it is true that nations are historically and politically located, or culturally biased, this is the “price to pay” to ensure that virtually all individuals can become

²⁵ The Constitution of 1848 (of the Second Republic 1848–70), article 1, says that “sovereignty resides in the universality of the French citizens” and at article 24 that “suffrage is universal”.

nationals of the state. For Schnapper, who (re)produces a dominant view in the French context,²⁶ the confining of the nation into a historical and cultural frame is an acceptable compromise if the values under which the nation rests are universal (Schnapper, 1995; Schnapper, 1998). At the core of her writing lies the principle of integration. Schnapper differentiates between two kinds of “integration”: there is, first, as she writes, the integration “of” society, in the sense of the degree of cohesion which supports it and allows it to function, and the integration “to” society, of the individuals who want to become members. In her proposition, the integration of the individual, who is primarily seen as foreign, is fulfilled through the acquisition of citizenship which, she contends, rests on universal principles and values. As for the integration of society, she writes that the national project can be redrafted according to the will of the equal members in the community of citizens. Since the conditions for inclusion in the citizenry are not grounded on the ethnic characteristics of the individuals but on the idea that virtually all could be incorporated so long as they shared similar political values, and since the political project of the state can be redefined, she writes that national citizenship is the most “inclusive” of all systems. According to her, integration through citizenship also protects individuals from discrimination, especially on grounds of race, because the political narrative of the Revolution, as embedded in the subsequent constitutional architecture of France, rests on the formal equality of the citizens (Schnapper, 1998). This view of citizenship, which means membership in a homogenous nation-state, and integration, has important institutional (and constitutional) grounding. For example, at the end of the 1980s, the High Commission of Integration (HCI) was created (and replaced, in 2012, by the *Observatoire de la laïcité*) to give advice to the government on issues linked to the integration of foreign residents. According to the HCI, policies on integration should be built on “similarities and convergences” and, further,

“... so that , in respect of the principle of formal equality, the different ethnic and cultural components of our society can become solidary and to give the opportunity to each of them, irrespective of their origin, to live together in a society in which the individual has accepted the rules and becomes one of its constitutive elements”.²⁷

What this definition stresses is that the process of integration is borne out by the individual: the individual must accept the rules of the dominant society to be considered a member. Social cohesion lies in the ability of individuals to leave aside their ethnic and cultural affiliations and adopt the rules of the dominant culture.

²⁶ For an analysis of other views see: Laborde (2001); Wieviorka (2008); Chabal (2010).

²⁷ Haut Conseil à l’intégration, « 1990–2010. 20 ans au service de l’intégration », 2010, 64pp, at p8 http://archives.hci.gouv.fr/IMG/pdf/20_ANS_HCI_V6.pdf (04/12/2019)

One of the critical flaws of the discourse of integration in France, which, as Sayad (1994) demonstrates, is a rebranded discourse of assimilation, is that it does not account for the monopoly which the majority in the French state purports to hold on what is “universal” or “neutral”, a point which Balibar (1997) also expounds in his work. In other words, this view does not acknowledge that the equal relation with the state is mediated by the duty to conform to what the majority in the state dictates. For Schnapper, this is acceptable because the community of citizens rests on the “horizon” of the universal liberal values of autonomy and dignity of all individuals. In other words, as she indicates, this is acceptable because the values on which the community of citizens rests are held to be “good” and shared by all and can be redrafted by the citizens themselves. But, as Young (1989; 2002) shows, this abstract possibility of redrafting the conditions for membership, in turn, does not account for the inequalities of access to the public sphere and how socio-economic, cultural and gender characteristics impede the process, characteristics which limit the representativeness of the community of citizens. Young also points out that the requirement of neutrality in the public sphere and its limited access create a “dilemma of difference” for individuals. This is because, as she demonstrates, individual citizens have to set aside their differences to access the public sphere, but since this access is not equally ensured individuals are called to affirm their difference from others to show that formal equal treatment puts them at disadvantage (Young, 2002). What this shows is that discourses on integration, based on purported universalism and formal equality, can become exclusionary when they negate the differences of the individuals for those of the majority in the citizenry. An important strand of the French literature provides empirical support for these exclusionary processes of liberal egalitarianism (Lochak, 2006; Hajjat, 2010; Lochak, 2011; Hajjat and Mohammed, 2016; Mazouz, 2017).²⁸ For example, in her empirical study of the implementation of anti-discrimination policies and naturalisation proceedings, Mazouz (2017) expounds how the French narrative of formal equality and abstract universalism tends to essentialise an origin, real or ascribed, and to radicalise the otherness of the individual (*ie* Young’s “dilemma of difference”). As Mazouz shows, this leads to two paradoxes: discriminations grounded on group identities are not taken into account because of the principle of abstract universalism, but this universalism, in turn, contributes “otherness” to individuals who are purported not to comply with the exigences of universalism (Mazouz, 2017: 213).

What this shows is that the neglect of difference in the narrative of uniformity has important exclusionary effects. Or, to put it differently, that despite the state’s politics of belonging being framed in permissible terms (liberal equalitarianism), it can favour processes of othering and exclusion.

²⁸ See also Guénif-Souilamas on more theoretical accounts: Guénif-Souilamas (2002; 2003).

3.7.2 The nationalisation of UK citizenship

By comparison to France, in the UK, the language of shared values, national identity and integration is relatively new. As Meer and Modood (2009) demonstrate, the UK has long rejected large-scale integration projects, in the sense of projects fostering a sense of national identity. It is possible that the definition of citizenship in light of imperial subjecthood had an important influence in “slowing” the process of nationalisation of the UK citizenship. For example, in the debates in 1947, the Labour MP Ronald Mackay argued against a specific “UK [national] citizenship” – one which he linked to unwarranted claims of nationhood: “We have five or six of the Dominions all wanting to be, not British first, but Canadian or Australian first ... We have been British for several hundred years. Why should we become United Kingdom people?” (HC deb 11th November 1947: c431). In fact, the rationale was that the meaning of being British differed from one place to the other. In the words of Labour MP Aidan Crawley:

“... to an Englishman the word ‘British’ conjures up various images, perhaps beginning with the colour of red which is so often seen on the map, Trafalgar Square, a game of some sort, and a passport, of which he is very proud, on leaving these shores; but to an Indian who has spent his life fighting against the British Raj and has spent many years in prison, the word ‘British’ means something entirely different ...” (HC Deb 11th November 1947: c436).

At the time of these debates, as noted and evidenced in the work of Marshall, the expectation, for those who had made it to the UK, was that of a political inclusion through rights. The narrative of togetherness did not talk about inclusion through the acceptance of shared cultures and histories of the majority in the state. Rather, it led to the institutionalisation of anti-discrimination policies to address racial inequalities in different areas of UK public life and to grant equal citizenship to individuals with the ability to overcome institutionalised racial barriers. Examples of the legal translation of this narrative are the Race Relations Acts (RRAs) (1965, 1968, 1976) and the creation of the Commission for Racial Equality to assist and monitor the implementation of the Acts. By contrast, anti-discrimination policies only appeared at the beginning of the 2000s in France, through a combined process of European Directives (Geddes and Guiraudon, 2004) and the “realisation” that French institutions did not “integrate” anymore, but differentiated, and discriminated (Mazouz, 2017: 32). In the UK, these policies are examples of what political theorists and sociologists have framed as “multiculturalism”: a model of social cohesion grounded in the recognition of diversity and difference of the individuals within the public sphere (Modood, 2005; 2007). Essentially, what this means is that, by contrast to the then dominant narrative in France, there is, at least theoretically, no expectation of sameness. As Brooks frames it, what being British is about is “... being able to function in British

society” (2016: 78). Integration is also advocated for, but in a way which respects group difference – whereby both the members of the majority community and those of the immigrant minorities are required to adopt a positive attitude towards each other and to behave with mutual respect – and thus does not ask the state to be neutral (Modood, 2011).

But, increasingly, commentators have pointed out the fact that the language of values and identity as a condition for inclusion has been politically invested (McGhee, 2010). A recurring theme in the literature and public debate in the context of the 21st century, which intensified post 9/11, is that of a “failure” of multiculturalism. As Bauböck (2002) notes, what is brought into question is the affirmation that diversity (of cultural practices and ways of life) extends into the realm of morality and politics (*ie* the public sphere). The kind of measures then envisioned to enhance “feelings of membership” and define “Britishness” were political ones: the introduction of citizenship tests and ceremonies (Byrne, 2012; 2017). In other words, knowledge of the state institutions and “ways of functioning” became a condition for entry into the citizenship. Many note that the tests encompass a monolithic view of history and culture and, in practice, exclude poorer or less educated migrants from non-English speaking countries (Brooks, 2016; Prabhat, 2018: 14).

Fundamentally, then, the coupling of nation and citizenship has had a broad reach: the requirements of togetherness, when manufactured from the top and asking sameness, can become exclusionary of those who are not seen as meeting these requirements. This account does not deny, however, that there are important differences between and within these narratives, which therefore adds complexity for the analyses. In the next chapter, I turn to the current practices and framings of citizenship deprivation and ask what critical factors can potentially explain the distinction between different kinds of citizens. For example, in light of the analysis in this section, could it be that heightened duties to conform or requirements to integrate persist, despite the acquisition of citizenship, and determine the framing of deprivation powers?

3.8 Conclusion

In this chapter I have presented elements which demystify the views about French and UK citizenship. At the beginning of this chapter, I asked if a strong commitment to equal citizenship in France could explain why France did not go as far as the UK in extending citizenship deprivation to birthright citizens, dual nationality holders. I found that this approach may not have as much substantive content as is commonly thought. Rather, I demonstrated that the equal relationship of citizens with the state is an ideal which is, historically, both supported and contradicted empirically. I have shown that different politics of belonging have permeated the states’ histories of citizenship and had different

exclusionary effects. Specifically, I explained how the discontinuous history of equal citizenship is underpinned by a differentiation amongst citizens on grounds of wealth, gender and race. Increasingly, it is subjected to a requirement of integration which can be more or less inclusive of the differences of the individuals. To deny these historical accounts can only offer an incomplete reading of the images which coalesce in today's state practices of citizenship deprivation. In chapter 4, I turn to these present-day state practices and discuss potential explanations of the distinction between minority citizens and multiple nationality holders.

Chapter 4: Cancellation of citizenship and equal citizenship

“The amendment will allow the key consideration to be whether the person’s actions are consistent with the values we all attach to British citizenship. We may all have a slightly different interpretation of what they might be, but I am confident that Members of this House would agree that this is encapsulated by the oath that naturalised citizens take when they attend their citizenship ceremonies” (Theresa May, HC deb 30th January 2014: c1042).

“When one shoots at an agent from the armed forces, one is no longer worthy of being French... French citizenship must be earned, and people need to prove worthy of it”.¹ Nicolas Sarkozy, 2010

Bruno Le Roux argued that “one cannot belong to a national community that one seeks to destroy” (JO, AN, 5th February 2015, 1027).

4.1 Introduction

In the previous chapter, I expounded practices which demystify the views about equal citizenship in France and the UK. I found that equality and belonging did not necessarily constitute automatic features of formal citizenship. In this chapter, I turn to the current policies and practices of citizenship deprivation and their effects on equal citizenship. The present framing of deprivation powers in France and the UK distinguishes between different kinds of citizens, such as those holding single or multiple nationalities or naturalised and birthright citizens, for the purposes of citizenship deprivation on national security grounds. Given that multiple national connections and/or the mode of entry into citizenship do not seem to matter in other aspects of the relationship between the states and their citizens, I ask what critical factors can explain such differences in treatment in the context of deprivation. I argue that there are at least three critical factors which, singly or in combination, can explain the states’ different treatments of different citizens. These are: the prohibition against statelessness; different expectations of conduct for people who naturalise as citizens; and doubts about the political belonging of second-generation migrants who became citizens. From this analysis, I elaborate on what that tells us about the content of equal citizenship and belonging in both countries. I contend that these three critical factors work together to create an effect of foreignness for minority

¹Nicolas Sarkozy, « Le discours de Grenoble du 30 Juillet 2010 », *Le Figaro*, 2014, <http://www.lefigaro.fr/politique/le-scan/2014/03/27/25001-20140327ARTFIG00084-le-discours-de-grenoble-de-nicolas-sarkozy.php> (06/03/2019).

citizens which undermines equal citizenship. Before turning to each of these critical factors in greater depth and how this effect plays out, I present the context in which these emerge from the literature and the legal frameworks and practices of France and the UK.

4.2 Equal citizenship and citizenship deprivation

The chronologies of citizenship deprivation which I presented in chapter 2 revealed that the legal scope of the powers has never uniformly applied to all citizens. Rather, at different periods of time, the states distinguished between single and multiple nationality holders, and/or naturalised and birthright citizens, and/or, within the group of naturalised citizens, between short-term and long-term naturalisations. What this shows is that the states treat ethnic minorities differently from the majority of the citizenry, a fact which challenges equal citizenship.² In this section, I first examine the frictions with regard to equal citizenship by briefly setting out the legal frameworks and current practices of the states. I then turn to what can potentially explain the distinction between different kinds of citizens by drawing upon critical factors behind the states' actions from the academic literature which has addressed the overhaul of citizenship rights in France and the UK.

4.2.1 Legal frameworks and current practices

At present, both sets of legislation differentiate between their citizens according to the individual's holding of multiple nationalities and the mode of entry into citizenship. Article 25 of the French Civil Code only applies to naturalised citizens who hold a second nationality because the legislation specifically states that an individual cannot be made stateless. Birthright citizens and naturalised citizens who have only one nationality are excluded from the scope of the legislation. In the UK, section 40(4A)(a–b) of the British Nationality Act (BNA) 1981 applies to naturalised citizens, even if that would put such individuals at risk of statelessness. Statelessness, however, is precluded for birthright citizens: section 40(4) of the BNA applies to birthright citizens who hold a second nationality. Citizenship deprivation thus seems to have broader reach in the UK: it is only birthright citizens who have just one nationality who are excluded from the scope of the legislation. But there is another critical difference between the two sets of legislation. Article 25–1 of the French Civil Code includes two time-limits which restrict the reach of the powers and the distinction between citizens. The article states that: the state can deprive naturalised citizens of their citizenship only if they have been naturalised for less than 10 years; *and* that the state has 10 years to issue a deprivation order after the perpetration of the wrongful acts. The time-limits are extended to 15 years for deprivation on grounds of terrorism

² In the sense of equal relation with the state and equal access to rights for people similarly situated in law.

(article 25–1 of the Civil Code). What this means is that if the state does not act within the time frame and/or if the individual has been naturalised for more than 10–15 years, citizenship becomes irrevocable. These time frames are far-reaching, however. In the worst-case scenario, an individual could be deprived up to 30 years after the acquisition of citizenship.

More recent state practice suggests that both states seek to extend the powers to birthright citizens even if that would put them at risk of statelessness, if not in law, at least in practice.³ In the UK, the case of Shamima Begum evidences an extensive interpretation of the legislation to cover UK-born citizens of a different minority ethnicity. Although the full facts of the case have not yet been disclosed, it is unlikely that Begum is a naturalised citizen because she was actually born in the UK. It is also unclear whether she is a multiple nationality holder by reason of her Bangladeshi heritage. To date, because Bangladesh has issued a statement refusing to recognise her as its citizen and grant her entry into the country,⁴ it seems that she is left *de facto* stateless. What the *Begum* case seems to indicate is that cancellation of citizenship can have greater effects on ethnic minorities and/or that the state considers Begum as different from other birthright citizens, single nationality holders, because of her minority ethnicity. Commenting on the case when it first appeared in the news, Prabhat submits that the practice creates an additional duty for minority citizens: to claim the nationalities to which they are legally entitled, in order to avoid being stateless *de jure*, in law.⁵ In her words: “the fallout of this situation should be greater awareness in British communities of naturalised citizens that their heritage may continue to matter in the UK”, and, further, that “citizenship rights appear to have become conditional on the heritage of British citizens”.⁶ In the French context of 2015–16, the government, at some point in the debates, proposed to expand the powers to birthright citizens who are single nationality holders. It argued that the framing of the powers should not make any distinction between different kinds of citizens. Had it succeeded, it would have removed the idea of having an irrevocable citizenship, risked increasing statelessness (in law), and/or only applied to dual nationality holders in practice and risked increasing statelessness *de facto*. In the last two scenarios, the state practice would have treated individuals differently according to their foreign heritage.

³ Here I refer to the distinction between *de jure* and *de facto* statelessness which I presented in chapter 2.

⁴ “Shamima Begum will not be allowed here, says Bangladesh”, *The Guardian*, February 2019 <https://www.theguardian.com/uk-news/2019/feb/20/rights-of-shamima-begums-son-not-affected-says-javid> (22/07/2019).

⁵ D Prabhat, “Shamima Begum: legality of revoking British citizenship of Islamic State teenager hangs on her heritage”, *The Conversation*, February 2019 <https://theconversation.com/shamima-begum-legality-of-revoking-british-citizenship-of-islamic-state-teenager-hangs-on-her-heritage-112163> (22/07/2019).

⁶ *Ibid.*

In chapter 3, I evidenced different contexts in which equal citizenship was undermined. There were times in the countries' histories where individuals who were similarly placed in law had been treated less favourably according to their ethnicities, gender, or wealth. This was especially salient in the context of the colonies and the break-up of the empires. But since the time of empire, equal citizenship, in the sense of equal subjection to the laws and equal favourable treatment from the state for individuals irrespective of their differences, has been reinforced in the constitutional frameworks of both countries. In France, the first article of the Constitution (1958) provides that the Republic "shall ensure the equality of all citizens before the law, without distinction of origin, race or religion". The French Constitution is the superior norm of the French legal system, which means that ordinary legislation and state action must comply with article 1, as interpreted by the Constitutional Council. The French legal and institutional framework also precludes direct and indirect forms of discrimination on grounds of origin (Latraverse, 2018).⁷ In the UK, the protection of equality is also important. O'Connell (2011), for example, discusses the extent to which equality constitutes a well-established constitutional principle of the state's constitutional structures. Drawing on the existing legal framework, which also precludes discrimination,⁸ and relevant judicial practices, he finds that equality is a core value of the UK constitutional order, although perhaps one which enjoys ambiguous constitutional status (O'Connell, 2011). Equality, then, is a critical feature of both constitutional frameworks. To that extent, the legal frameworks on citizenship deprivation are strikingly at odds with this. What they seem to indicate is that there is an exception to equal citizenship for the purposes of security protection; and/or that the state considers minority citizens to be in a different relationship with it; and/or that the states consider minority ethnicity to be a relevant factor for the purposes of security protection. The deeper question thus becomes why this is so: what critical factors seem to drive the states' distinctions in this context and what effect do these distinctions have on citizenship? I draw these factors (about what seems to power the design of citizenship deprivation) from academic works which critically engaged with the recent overhaul of the practice. By putting this literature into the dialogue and deepening and refining its analysis through a different set of data, this chapter purports to contribute to broader debates about equal citizenship and minority citizens.

⁷ Direct discrimination is treating less favourably those who are similarly situated, for example, on grounds of race, age, origin, ethnicity *etc.* Indirect discrimination is about treating equally those who are situated differently before the law and comes in when this equal treatment puts individuals in a less favourable position because of their holding of a protected characteristic.

See also: Défenseur des Droits, « 10 ans de droit de la non-discrimination », Colloque, Défenseur des Droits, 2015, 153pp

<https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/colloque-10ans-droits-discri.pdf> (12/07/2019).

⁸ See, for example, the Equality Act 2010, which prohibits direct discrimination and subjects indirect discrimination to proportionality, and the Human Rights Act 1998 (article 14).

4.2.2 Critical factors behind the states' distinctions

Mills (2016) contends that citizenship deprivation in France, prior to the overhaul of 2015–16, has been framed in the public discourses as an extension of the state's naturalisation regime. Her work is an inquiry into how citizenship deprivation has been conceptualised and how it has been legitimated or contested in the public debates in France and the UK. What she suggests, drawing from parliamentary debates and media articles,⁹ is that the justifications for citizenship deprivation in the French context are tailored to an ongoing monitoring of people who naturalise. At the time of her writing, then President Nicolas Sarkozy had failed to lower the grounds of deprivation for naturalised citizens for common crimes against "public officials". The UK had enacted the 2014 Immigration Act, which reintroduced a distinction between birthright and naturalised citizens and allowed for statelessness in limited circumstances. Her work is primarily focused on explaining the difference in the states' practices, namely the UK's more far-reaching approach than that of France in denationalising birthright citizens and/or allowing for statelessness. By contrast with France, she argues that the UK's conceptualisation of deprivation powers is embedded within the extension of the country's deportation regime. She concludes that a potential explanation behind the states' different behaviours links to the framing of the powers within different immigration control regimes (Mills, 2016: 4). Put differently, her work indicates that deprivation in the UK is about expelling people who are alleged to be criminals to protect the security of the state, whereas in France it is about reversing the effect of naturalisation if the individual fails to conform to the initial standards of naturalisation (*ie* if the individual demonstrates a "failed" integration). However, her analysis does not extend to the French proposals of 2015–16, which purported to similarly expel alleged criminals who are birthright citizens through deprivation to protect the security of the state.

But, given that both sets of legislation still differentiate between naturalised and birthright citizens, Mills' insights remain critical for connecting the mode of entry into citizenship with its mode of exit. In other words, could it be that what potentially drives the states' distinctions between birthright and naturalised citizens links to different expectations of conduct for people who naturalise? To take this a step further, her work is also important for shedding light on the extent to which the politics of belonging, politics which are about exclusion beyond legal citizenship, seem to power public representations of deprivation of citizenship. For example, in the context of the UK, she writes that, if citizenship deprivation is presented as a necessary step for deportation, the individual's citizenship must be framed as contingent and a mere technicality to get support for the measure. She draws on

⁹ In the context of her study, primarily through media articles from 2000 to 2015 and parliamentary debates from 2000 to 2014.

the example of Abu Hamza, an Egyptian-born citizen who naturalised as British and was deprived of his citizenship on grounds of national security, to evidence that Hamza was portrayed in the media less as a terrorist than as the inassimilable Muslim and scrounging immigrant. As she writes, Hamza was presented as “foreign” which determined *how* he had to be punished: through deprivation and deportation (Mills, 2016: 17–18). Mill’s analytical insights, that citizenship deprivation connects to the mode of entry into citizenship and that the politics of belonging provide supporting discourses to extend the reach of the powers, can be further deepened by looking at the contributions made by the French sociology of immigration¹⁰ on the public representations of immigration and minority citizenship.

For example, in his work, Sayad (1999a; 1999b) demonstrates the heightened conduct requirements to which immigrants are allegedly exposed and how these filter through after the legal acquisition of citizenship. His research indicates that immigrants are subjected to increased warranting and scrutiny, as the actions they perform in the receiving state perceived as “multiplied” because of their very presence in the territory. He draws on the experiences of Algerians during and after independence from France to evidence the extent to which Algerians in France suffer from a “double incrimination” (*double faute*): from one of being in a territory where they objectively should not be – a fault of historical situation; and from one of actual wrongful behaviour (Sayad, 1999a: 7–8). He employs Bourdieu’s (1977) concept of the “doxa”, of deeply embedded social judgement, to demonstrate how the portrayal of immigration as a fault – an anomaly – exists in the minds of the nationals of a state. In other words, he suggests that the “double incrimination” exists objectively in the individuals’ ways of thinking – even before individuals start to make it exist under an objectivised form (for example, through the sanction of a court). He finds that immigrants are held to a form of “social hypercorrection” where they feel obliged to – and, indeed, may be called upon to – demonstrate their good faith and good will as they are socially, if not morally, more likely to be suspected (Sayad, 1999a: 10). His work is critical for exposing how these perceptions might continue despite naturalisation. He talks about “naturalisation” as creating an incomplete citizen, a category which does not equate to that of birthright citizens: it creates “naturalised” citizens (*les naturalisés*), not birthright citizens (Sayad, 1993). Crucially, Sayad writes that these heightened conduct requirements and perceptions in the doxa might also apply to second-generation citizens. Sayad (1999a) refers to second-generation

¹⁰ Abdelmalek Sayad is often referred to as the initiator of this branch of French sociology. For an introduction to Sayad’s sociology of immigration and how it differs from what was being discussed at the time, see Saada (2000). Saada explains that the gist of Sayad’s sociology of immigration is that it is reflexive: it looks at the effect on sociology of the way immigration is construed by different social actors (p29). It also innovates by looking at immigration in its totality: as encompassing both the process of emigrating and being an immigrant in a different country.

citizens as “blurred agents” who, he argues, distort the frontiers of the national order because of their different ethnic backgrounds but similar processes of socialisation to the ethnic majority in the state. In the context of Sayad’s writings, the blurred agents are the children of Algerians, former colonised subjects, who were born French and Algerian under the operation of both states’ laws. Sayad notes that although a product of French society, the blurred agents are portrayed as illegitimate, both by their parents, who do not recognise themselves in them, and by French society which questions their “French-ness”.¹¹ He argues that they are exposed to similar forms of “double incrimination” and social hypercorrection as their parents or grandparents because they have inherited the genetic fault of immigration. To that extent, he writes that they become “expellable” (or deportable) in the doxa, since the expulsion of foreigners is one of the core prerogatives of the sovereign state (Sayad, 1999a: 13). Given that the exercise of deprivation powers increasingly seems to apply to minority citizens of a different ethnic background, his analytical insights suggest that doubts about the political belonging of second-generation migrants who have become citizens power the state’s approach to citizenship deprivation. Mazouz (2016) and Geisser (2015) interpret the 2015–16 French proposed extension of citizenship deprivation in that sense, as forming part of a broader process of disqualification of the citizenship of minority citizens.

These analyses, however, do not explain the distinction between single and multiple nationality holders, other than through ideas of foreignness which are difficult to evidence. To that extent, they can be consolidated by looking at the laws and debates on statelessness and how these have driven legal change. For example, Mantu evaluates the extent to which human rights standards, including the prevention against statelessness, limit state powers of deprivation in the UK (2014) and in the UK and France (Mantu, 2018). In what follows, I evaluate and compare these critical factors of state conduct, of statelessness, of different expectations of conduct for individuals who have become citizens, and doubts about the political belonging of birthright minorities with a different ethnic heritage, in both France and the UK. Together these comparative insights present a complex picture of the exercise of deprivation powers and their effect on equal citizenship.

4.3 The prohibition against statelessness

To evaluate the extent to which statelessness drives the distinction between single and multiple nationality holders in the practices of the states, I first turn to the “legal force” of the prevention of statelessness in each constitutional framework. I then look at the implementation of statelessness

¹¹ Sayad does not engage with other kinds of immigrants, such as, for example, Italians or Spanish in the French context, which would have been useful to evidence the extent to which a different ethnicity plays a role in the potential different expectation of conduct from the state.

protection in practice, through a scrutiny of the courts' behaviour, before examining the current political debates on statelessness prohibition. As I indicated in chapter 2, it is possible that the Conventions and the exceptions they entail might trigger contested ideas as to what states can and cannot do.

4.3.1 The legal force of the prevention of statelessness provisions

In chapter 2, I highlighted two important international Conventions for the purposes of deprivation and statelessness: the 1961 Convention on the Reduction of Statelessness and the European Convention on Nationality (ECN) 1997. At the international level, the legal force of these Conventions depends on their signature, ratification and/or the existence of derogatory clauses. Despite the Conventions being a valuable gateway through which to protect statelessness, it is the incompleteness of the protection which can lead to the increase of statelessness. At present, as noted in chapter 2, both countries can make individuals stateless in limited circumstances, on the grounds of national security and disloyalty. This is because they have issued derogations from the full protection of the 1961 Convention under article 8(3) and are not fully bound by the ECN.¹² Up until now, however, compliance with the international frameworks of statelessness protection played a critical role in the framing and exercise of deprivation powers in both states (Mantu, 2018). For example, when the UK extended citizenship deprivation to birthright citizens as well as naturalised citizens in 2002, it introduced a provision against statelessness which emulated the wordings of article 7(1) of the ECN because it was considering signing it. In France, the government also introduced the preclusion of statelessness for deprivation purposes at a time when it was considering signing the ECN (the law of 16th March 1998 (no 98-170)) (Mantu, 2018). In essence, then, the Conventions on statelessness played a decisive role in driving the legislation and distinguishing between citizens, despite the countries not being fully bound by them.

4.3.2 The courts' role in preventing statelessness

A review of the cases suggests that the courts have played a critical role as drivers of the legislation by upholding the legality of the states' actions in the face of their statelessness obligations. This is salient in the UK where there is more case law. In *Al Jedda v Secretary of State for the Home Department* [2013] UKSC 62 for example, the Supreme Court stepped in to prevent *de jure* statelessness. Al Jedda is an Iraqi citizen by birth who acquired British citizenship in 2000. The effect of this acquisition was that he automatically lost his Iraqi citizenship. Following suspicions of Al Jedda's

¹² The UK signed and ratified the 1961 Convention in 1966 but did not sign or ratify the ECN. France signed both conventions but did not ratify them (see chapter 2).

involvement in terrorist-related activities, the Home Secretary deprived Al Jedda of his British citizenship in 2007 on grounds that she was satisfied that it would be conducive to the public good. The legal issue was whether the deprivation order had left Al Jedda stateless. The court disagreed with the government's argument that what had left Mr Jedda stateless was not the order from the Home Secretary but his own decision in not restoring his lapsed Iraqi citizenship. The actions of the Home Secretary were thus illegal because the words of the BNA 1981 require the individual to have another nationality – not to have the possibility open to “acquire” another nationality (para 33). As the court argued, “a person might have good reason for not wishing to acquire a nationality available to him (or possibly even to re acquire a nationality previously held by him)” (para 32). In other words, the court rejected the government's adding of a separate duty for the citizen to claim their other citizenship when entitled to one. In the case of France, a decision from the Constitutional Council in 2015 suggests that the constitutionality of the legislation on citizenship deprivation, *ie* its validity within the legal system, is contingent on the preclusion of statelessness. In the ruling, the Council found that cancellation of citizenship on grounds of terrorism was compatible with the rights and liberties protected by the Constitution (no 2014-439 QPC, 23rd January 2015, *Ahmed S*). However, when balancing the necessity of the measure with infringements on constitutional rights, the Council pointed to the fact that the law currently does not allow for statelessness in its justification of the proportionality of the measure (*cons* 19).¹³ A contrary reading of the decision could thus say that, absent the preclusion against statelessness, deprivation powers could be found incompatible with the Constitution.

What this indicates is that the courts, when able, have stepped in to preclude *de jure* statelessness. This, in turn, has judicially maintained the distinction between single and multiple nationality holders. But the courts' findings in a specific case or interpretation of a specific legislation are always prone to reversal. This is simply because the judiciary does not have “the last word” in the constitutional frameworks of either France or the UK. I engage with these issues in chapter 6, but for the present it is important to note that recent states' practices of France and the UK have sought to reverse the courts' decisions by changing the law and emulating the wording of their declarations to the 1961 Convention.

4.3.3 Most minimal compliance with statelessness in the national security context

In the case of *Al Jedda*, the Supreme Court pointed to the derogation from the 1961 Convention which allows the UK to create statelessness in limited circumstances and found that the UK was going beyond

¹³ “*Cons*” (in French “*considérant*”) refers to the different paragraphs of the decision from the Constitutional Council or the Conseil d'Etat. I thus use it in lieu of “*para*” for the French cases.

what was necessary to honour its international obligations (para 22). The direct consequence of the decision of the Supreme Court in *Al Jedda* was a proposal to modify the legislation to emulate the 1961 derogation. In the words of Theresa May, then Home Secretary:

“I wish to reiterate—this is an important point—that that is the position the United Kingdom had prior to 2003, when the law was changed. It is the position that we are required to have under the United Nations convention. All that we are doing is returning our position to the scope of our declaration under that convention. It goes no further” (HC deb 30th January 2014: c1044).

There was strong opposition in the House of Lords.¹⁴ For example, Lord Deben referred to statelessness as “one of the most terrible things that can befall anyone” (HL deb 19th March 2014: c212), as something which can preclude life in society: “If you do not belong and cannot come to belong, you are placed in an impossible position” (c212). Lord Macdonald of Riven Glaven made a similar comment. He used Arendt’s (1958) image that statelessness deprives the individual of the “right to have rights” to argue that the extension would have a “positively terminal impact” on the individual, because it precludes “the rightless to function in a way that is even remotely human in the modern world” (HL deb 17th March 2014: c53). These criticisms led to the addition of a requirement for the Home Secretary that s/he must reasonably believe that the individual could acquire another nationality.¹⁵ In France, too, in the political context of 2015–16, the government proposed the removal of the prohibition of statelessness for citizenship deprivation, which led to heightened criticisms. Since the modification was to be introduced in the Constitution directly, it would have supplanted the decision from the Constitutional Council. When questioned before the Senate, the then Prime Minister said that the state would emulate the wording of the declaration to the 1961 Convention and assume to only create stateless people in limited instances.¹⁶ For some parliamentarians, this was impossible. Phillipe Bas, for example, said it would put the “honour of France” in question (JO, Sénat, 17th March 2016, 4289), and, further, that this limit applied “whatever the gravity of the crimes committed by the individual” (4182). Michel Mercier also referred to statelessness as the penultimate limit to state action: “No Statelessness! Hannah Arendt explained that statelessness enabled the worst

¹⁴ Both Harvey and McGuinness & Gower provide thorough accounts of the debates in the House of Lords with regards to statelessness: Harvey (2014); McGuinness and Gower (2017).

¹⁵ Current s40(4Ac) of the BNA 1981 states that, to deprive naturalised citizens of their citizenship, the Home Secretary must have “reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such country or territory”.

¹⁶ Sénat, Comptes Rendus de la Commission des Lois, « Protection de la Nation – Audition de M. Manuel Valls, Premier ministre », 8 mars 2016, [no page Numbers]

<http://www.senat.fr/compte-rendu-commissions/20160307/lois.html> (06/03/2019).

infringements to the human rights of the individual. We won't go that far!" (JO, Sénat, 16th March 2016, 4190). For reasons which I further investigate in chapter 6, the French government gave up on the proposal.

The developments described in this section demonstrate that the prohibition against statelessness adds complexity to the distinction between different citizens – single and multiple nationality holders. A first level of analysis based on the “legal force” of the Conventions shows that both states are not legally precluded from creating statelessness and, therefore, not compelled to differentiate between single and multiple nationality holders. A deeper level of analysis, however, reveals that in the past the Conventions created strong political incentives to comply, which have been juridically upheld. But the recent states’ practices illustrate that, in the context of national security protection, the states have been willing to operate the most minimal compliance with international law. This did not go unchallenged, which shows that there are contested ideas as to what states can or cannot do, even if the increased measures went through in the context of the UK but not of France. In his work on deportation, Walters (2002: 276) contends that the historical association of deportation with police and practices of expulsions means that deportation is constantly running the risk of losing its legitimacy as a practice. In the context of statelessness, Walters’ insights seem particularly relevant because the practice of statelessness, as evidenced in the data, is often linked to the illiberal practices of the Second World War. I engage with the extent to which these contested ideas operated as limits to the states’ actions in chapter 6 but, for the present, it is important to note that the prohibition against statelessness does not explain why the states differentiate between naturalised and birthright citizens. Neither of the Conventions mention the mode of entry into citizenship for the purposes of deprivation on national security grounds. Why then, in the case of the UK (but not of France), does the derogation to the 1961 Convention only apply to naturalised citizens? Goodwin-Gill reports that the aim of the UK at the time was to “freeze” existing legislation, which then differentiated between the modes of entry into citizenship, to ensure that the state would go no further in the future.¹⁷ But that, in turn, does not explain the initial distinction of the existing legislation.

In the next sections, I evaluate the extent to which the second critical factor, namely that naturalised citizens are under different expectations of conduct, powers the states’ distinction between naturalised and birthright citizens for the purpose of deprivation. To naturalise, individuals must prove that they have integrated into the dominant features of the citizenry to be granted legal status. It could be that deprivation powers evidence the fact that naturalised citizens still suffer from a lack of

¹⁷ ILPA, “Deprivation of citizenship resulting in statelessness and its implications in international law: Opinion”, G Goodwin-Gill, 2014, 21pp
<file:///C:/Users/rp12249/Downloads/14.03.00-GSGG-DeprivationCitizenshipIntLawFinal-2.pdf> (10/12/2019).

belonging in the eyes of the state and are conditioned to adhere to heightened expectations of conduct – an ongoing duty to integrate. To fully grasp the specificity of each contexts, I first engage with the current modes of naturalisation in both countries as these can shed important light onto what is expected from citizens who naturalise. I then return to the moments in history when the distinction between the citizens on the grounds of criminal conduct or security protection were introduced, to look for patterns which could illuminate current state practices.

4.4 Current modes of naturalisation: expectations of conduct

In order to analyse expectations about conduct, in this section, I examine what the current requirements are for naturalising in both countries and draw on existing academic work which investigated citizenship ceremonies to discover what seems to be important for the state when individuals are turned into citizens.

4.4.1 Evidencing citizenship: requirements and practices

At present, the processes of naturalisation in both countries are about proving close connections with the country (through, for example, continuous legal residence,¹⁸ income, family links and so on); an attitude to citizenship that includes being able to demonstrate “good character”¹⁹ (absence of criminal conviction or instances of “bad behaviour”) and knowledge of the institutions and values of the state. In the UK, knowledge of the institutions of the state is checked through the taking of a test, whereas in France it is included in the condition of “assimilation” which requires an interview with a state agent.²⁰ Historically, the requirement of assimilation in France (but not in the then French colonies) had been understood as linguistic assimilation, but since at least the beginning of the 2000s it also includes knowledge and adherence to the values of the state (Hajjat, 2010; 2012). What these legal requirements expose is that integration underpins acquisition of citizenship: it is the process which turns foreigners into full citizens (in terms of rights and duties). Despite the fact that integration is what seems to be getting the most political and academic attention (see, for example, Joppke, 2010) this is not necessarily the condition which influences the process the most. For example, in the UK, recent practice shows an increased investment in the good character requirement (Yeo, 2017).

¹⁸ The condition for residence is roughly of five years prior to the acquisition of citizenship in both countries.

¹⁹ Art 21-17 C. Civ; British Nationality Act 1981, schedule 1, 1(1)(b).

²⁰ The citizenship tests were introduced in 2005 and the requirement is enshrined in British Nationality Act 1981, schedule 1, para 1(1)(ca); the condition for assimilation is listed in article 21-24 for naturalisations and 21-4 for acquisition by marriage.

Crucially, in both countries, the final decision which acknowledges the full transformation of the individual into a citizen in law reverts to the state and its agents: naturalisation is a discretionary action.²¹ The good character and assimilation conditions give wide discretion to the states' agents to refuse naturalisation if the individuals have not convinced the state of their integration or good conduct. In the UK, conduct requirements are also applicable to children above the age of 10 when they register as British citizens, which is not the case in France.²² The discretion left to the agents in naturalisation proceedings is an important factor because it emphasises the role of the individuals in the process: they need to convince the states (through their agents) that they have integrated the main features of the states' citizenship requirements. From this perspective, as expounded in chapter 3, integration is a process which is primarily borne out by the individuals themselves. The states do participate in the process of integration of newcomers, for example, at least in the case of France, by providing language lessons and "training" in the values of the state,²³ which potentially rebalances the obligations in the process leading up to the application of citizenship. But all this does not change the situation with regards to a discretionary decision of refusal. In his work, Sayad (1999b) reminds us of the important social signification of the decisions of refusal of naturalisation. As he notes, in the context of France, decisions of refusal, especially when they are grounded in a purported lack of assimilation, allow the state to be "vigilant" to what French-ness entails, to who can come in. It is also possible, as he contends, that the decisions of refusal and the exercise of discretion turn the granting

²¹ This means that fulfilling the legal requirements for naturalisation does not give a *right* to naturalise – a principle long enshrined by the Conseil d'Etat in the *Abecassis* case of 30th March 1984 and in s6 of the BNA 1981.

²² The evaluation of the good character of the child is at the discretion of the state agent.

Home Office, "Nationality: good character requirement", 2019, 53 pp

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770960/good-character-guidance.pdf (18/12/2019)

For an academic discussion of the practice, see Prabhat and Hambly (2018).

In France: « Nationalité française d'un enfant né en France de parents étrangers », *Service-Public*, 2019

<https://www.service-public.fr/particuliers/vosdroits/F295> (18/12/2019)

²³ See: « 72 propositions pour une politique ambitieuse d'intégration des étrangers arrivant en France », Rapport au Premier Ministre, Aurélien Taché, Parlementaire en mission auprès du ministère de l'intérieur, Février 2018 <http://aurelientache.fr/wp-content/uploads/2018/02/72-propositions-pour-lint%C3%A9gration.pdf> (29/07/2019).

« Intégration des immigrés : priorité à l'emploi et au français », *Lemonde*, 2019

https://www.lemonde.fr/gouvernement-philippe/article/2018/06/05/integration-des-immigres-priorite-a-l-emploi-et-au-francais_5309862_5129180.html (29/07/2019).

The UK government also recently published a report which proposes to emphasise the role of the state in the process of integration of newcomers. As the UK Green Paper states, the government considers "providing information to prospective migrants before they arrive to the UK", as well as a "package of information" for those already here, launch a community based English language programme, foster language teaching in integration areas *etc* (p14): "Integrated Communities. Strategy Green Paper: Summary of Consultation Responses and Government Response" February 2019

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777160/Integrated_Communities_Strategy_Government_Response.pdf (29/07/2019).

of citizenship into a “favour” from the state, one which the citizen must live up to and be proved “worthy” of (Sayad, 1999b). To that extent, the granting of citizenship is also a tribute to the state. Byrne adds to this image the fact that strict requirements to enter the citizenry – in her analysis of the example of citizenship tests in the UK – are part of a broader process of reassuring those who are already “in”, *ie* the current citizens, that not everybody can gain entry and that the state has a strong handle on the process (Byrne, 2017: 331).

4.4.2 Citizenship ceremonies: naturalisation as an unfinished process

In studying citizenship ceremonies,²⁴ sociologists in France and the UK have demonstrated that these images are omnipresent (Fassin and Mazouz, 2007; Byrne, 2012; Mazouz, 2017). The state formally “welcomes” the applicant into the citizenry at the end of the procedure. The content of the speeches during the ceremonies also indicates a certain vision of nationhood. In the UK, Byrne (2012: 541) notes that the ceremonies do not really engage with what citizenship means beyond rights and responsibilities. In the case of France, Mazouz suggests that the automatic reference to gender equality, as a core value of the French state, and secularism indicate a “democratic identity” of France which is built in opposition to other non-democratic countries (Mazouz, 2017: 185). The sociologists also demonstrate that citizenship acquisition is portrayed as an unfinished process in some of the speeches of the agents. For example, in one of the ceremonies in France, one *préfet* (one of the official authorities entitled to perform the ceremonies) says that “the acceptance of your application shows that you have sufficiently adopted the way of life and costumes of our country, *not to the point of resembling fully birthright citizens but still enough to be at ease amongst us*” (Fassin and Mazouz, 2007: 725, my emphasis). In the case of the UK, an official in West Sussex is reported to have said that:

“It [naturalisation] is also the real beginning of a new life with a new status. And the new status brings with it more responsibilities. If you are to *be really British*, it will involve much more ... If you do that, it will not only make your own newly-acquired citizenship more meaningful for you, *but will also enable others to see that you really do want to be part of us*” (Byrne, 2012: 540, my emphasis).

These quotes are only two examples of many speeches which were delivered around the same period (beginning of the 21st century) and the studies also reference discourse which tends to enhance the candidate with his/her diversity. But they remain particularly telling of naturalisation as an unfinished

²⁴ Citizenship ceremonies were introduced at the beginning of the 2000s in both France and in the UK, as well as in most other European countries, they are the product of Commissions (the Cantle Commission in the UK, 2001, and the Long Commission in France, 1989) whose purpose was to propose ways to enhance feelings of membership and belonging to the state.

process: they reveal that additional requisites for belonging are expected from the newly naturalised. In both instances, the officials of the state distanced themselves from the newly naturalised who appear to be still exposed to heightened expectations of conduct. This links back to the potential facticity of the category of the “naturalised” in the doxa which Sayad evokes. Put differently, it is possible that, in the eyes of some representatives of the state, the “naturalised” individual never fully equates to a birthright citizen. This is especially salient in the discourse of the French *préfet* who explicitly referred to “us” (the majority in the citizenry) to exclude “them” (the naturalised citizens). In the case of France, this view, that naturalised citizens are in a different relationship with the state, is legally supported for a limited time. This is because the state can annul a certificate of naturalisation for up to two years after the granting if the individual later proves to be “unassimilated”, for example, in the case of the acquisition of citizenship when it is by marriage (article 21-4 C Civ). Recently, in 2018, the Conseil d’Etat confirmed the decision to cancel the naturalisation, on the grounds of article 21-4, of a woman who had been naturalised in 2016, for “lack of assimilation” (no 412.462, 11th April 2018). In this case, the woman had refused to shake the hands of two male representatives of the state during the citizenship ceremony which was, according to the government, a signifier of a lack of assimilation in such a “symbolic time and in a symbolic place” (*cons* 4 of the judgment). The court found that the decision struck the right balance between the right for the individual to hold her religious beliefs and the law of 1905 which enshrined the separation of the state from the Church (*cons* 5). What this example shows, and the speeches in the ceremonies more broadly, is that naturalised citizens seem to be under a heightened expectation of conduct, under an ongoing duty to demonstrate that they have “integrated” the dominant features of the citizenry. The question then becomes whether the distinction which citizenship deprivation operates reflects this – *ie* an ongoing monitoring of people who naturalise – or if it reflects something else. Before engaging with the current practices, I come back to the historical moments which led to the introduction of the distinction between citizens on the ground of security protection, in 1918 in the UK, and 1927 in France.²⁵

4.5 The historical context of the distinction between naturalised and birthright citizens

In the UK, a modification of the regime of cancellation in the aftermath of the First World War drastically increased the reach of the powers. Initially reserved for naturalised citizens on grounds of fraud (under the British Nationality and Status of Aliens Act (BNSAA) 1914), the powers were expanded to cover disloyalty, long residence abroad, being from a country at war with the UK, and committing

²⁵ As noted in chapter 2, deprivation already existed, but it was not necessarily tooled as a measure to address the purported safety of the state.

crimes after the acquisition of citizenship. In France, an important extension of the powers came about during the interwar period, in 1927. Previously, the French laws on deprivation were about “denaturalising” individuals whose countries of origin were at war with France (see chapter 2). From 1927, deprivation could be triggered for crimes committed against the state. So, in both states, the modifications of the 20th century were about extending the powers of the state to sanction the conduct of naturalised citizens. In this section, I investigate the context of the laws and their justification and focus on the extensions, for crimes in the UK and security in France. A critical feature of these provisions is that both distinguished between short-term and long-term naturalised citizens: only short-term naturalised citizens could be deprived of their citizenship. What this seems to indicate is that naturalised citizens were exposed to a “trial period” of heightened conduct requirement after which immunity was acquired.

4.5.1 The British Nationality and Status of Aliens Act 1914

The UK’s extension of the reach of deprivation powers in 1918 was marked by strong feelings of Germanophobia and fear of German spies (Gibney, 2013). Section 7(2)(b) of the BNSAA 1914, which was in force until 2002, stated that individuals who had been naturalised for less than five years and sentenced to a prison term of one year within the date of the acquisition could be deprived of their citizenship.²⁶ Save for this ground, all other grounds could always trigger denaturalisation. At the time, naturalisation could be acquired after proof of residence in the Dominions (within which at least one year had to be in the UK), intention of future residence in the Dominions, good character (absence of criminal conviction), adequate knowledge of English, and after being subjected to an oath of allegiance (BNSAA 1914, part 2(2)1)). The BNSAA 1914 was the first standardised provision on naturalisation across the empire and the Commonwealth, which is relevant because it had to accommodate the views of the self-governing colonies as well as those of the UK.

According to the then government, the “theory” behind the conditionality of citizenship acquisition for the purposes of criminality was to enshrine a mechanism of review, to double check for a given time period whether naturalisation had been granted to a suitable individual. In the words of George Cave:

“... if he [the convict] commits an offence within a short period after naturalisation, then obviously he is not a person of good character to whom a certificate should have been given, and therefore that certificate may be reviewed. But if he commits an offence, say, twenty

²⁶The provision and the distinction it enshrined was applied until 2002. From 1964, this would only apply to naturalised, dual nationality holders, as a provision against statelessness was included for this specific ground (British Nationality Act (No 2) 1964).

years later, then you would not be able to deprive him of his citizenship” (HC Deb 17th July 1918: c1130).

Deprivation on grounds of crime was thus an ongoing monitoring of people who naturalise, for at least five years after naturalisation.

The clause triggered heightened criticisms, primarily because MPs opposed the idea of “irrevocability” of citizenship and considered that the clause was not going far enough. For example, the Conservative MP Gershom Stewart asked to put the threshold of criminality at six months rather than 12 (HC deb 17th July 1918: vol 108 c1135). For Henry Craik (a Scottish unionist MP), the whole five-years clause should be removed. He regretted that a man convicted “5 years and a month after his naturalisation” could not be “put out” of the country as a “most undesirable alien”(c1128). Craik did not think that the individual convicted “ought to be allowed to retain his rights of citizenship here after he has proved his *real* character” (1128, my emphasis). I have emphasised “real” because it suggests that the “character” requirement entails more than criminal behaviour. In studying the imperial conferences leading up to the BNSAA 1914, Troy (2019: 310) contends that this requirement was introduced in lieu of race to distinguish between colonial subjects for immigration purposes. In chapter 3, I showed that, until 1948, the Dominions had their own immigration legislation and modes of regulating who could come in and out. These laws were explicitly couched in terms of race and often excluded non-white subjects (Karatani, 2003). In seeking to find a common framework for naturalisation and migration within the empire, Troy reports that Joseph Chamberlain proposed a new way to “phrase” those whom the Dominions sought to exclude. Rather than legislating on grounds of colour, the Dominions should target the “character” of the immigrant. As he is reported to have said:

“It is not because a man is of a different colour from ourselves that he is necessarily an undesirable immigrant, but it is because he is dirty, or he is immoral, or he is a pauper, or he has some other objection which can be defined in an Act of Parliament ...” (Troy, 2019: 310).

Therefore, as it seems, originally “character” went beyond criminal behaviour to exclude all undesirables: from the immoral to the poor. It is possible, then, that some of the challenges to the idea of having an irrevocable citizenship were grounded in racial prejudices and suspicions towards those who were seeking to naturalise. For some, the extent to which naturalised citizens could ever be “good” citizens was contested. This was made explicit by John Robert Pretyman Newman, a Conservative MP, who said that the 12-month sentencing clause should be replaced by a standard of “good citizenship”. According to him, the wording of the clause should be that, by “reason of character, action, or mode of living [s/he] has not shown himself to be a good citizen” (HC deb 17th July 1918: c1140). For Newman, citizenship deprivation was the beginning of a “series of measures

that are going to make British citizenship worth something having, and that to get it one must have shown himself worthy of it, and having got it, shows himself worthy of keeping it” (c1140). Newman was deeply concerned about the purported behaviour of the then British government which “allow[ed] any man or woman to come to this country on the very flimsiest excuse without examination of their character, antecedents, and mode of living” (c1141). For Newman, naturalised citizens should thus be under a lifelong duty to conform to a standard of “good citizenship”. There are other elements in the debates which suggest that the distinction between naturalised and birthright citizens went beyond a five-year limit in the eyes of the representatives of the state. For example, the Conservative MP Geoffrey Peto referred to “real British citizens” as opposed to naturalised citizens: “if he breaks them [the laws] then he ceases to be a naturalised British citizen, because we have had, and probably shall have, quite enough difficulty with those of British *origin*, *real British citizens* who do not abide by the laws of this country” (c1132, my emphasis).

Taken together, these oppositions to the clause link back to Sayad’s point about the facticity of the category of the “naturalised citizen” and echo more recent speeches in citizenship ceremonies. They suggest that naturalised citizens were different from birthright citizens because their “real character” was perceived as not being likely to change which, for some, seemed to justify the permanent conditionality of citizenship and/or a life-long duty to integrate. But despite these views, the majority at the time framed deprivation on grounds of criminality as a mechanism of review, to “double check” over five years that naturalisation had not been wrongly attributed.

4.5.2 The French law of 1927

In France, the possibility to deprive naturalised citizens on security grounds was introduced by the nationality law of 1927 and remained open for 10 years (articles 9 and 10 of the law). The context of the law of 1927 is important. From the aftermath of the First World War, a major political concern for French politicians had been the lack of increase in the French population (Weil, 2008: 63–66). Among the short-term solutions available, immigration was the one preferred. But, as Weil (2008) reports, very few people were naturalising as French. The law of 1927 was introduced to encourage naturalisation: it simplified administrative procedures to naturalise and allowed naturalisation after only three years of residence in France.²⁷ Both Weil (2008: 68) and Zalc (2017: 50) contend that the law created a significant shift in the state’s logic of naturalisation: from what “celebrated” successful assimilation through long-term socialisation in France, it became a “bet” on the future assimilation of the individual, a lever for future socialisation. In other words, naturalisation marked an unfinished

²⁷ Previously, the length of residence required was 10 years (law of 1889).

process. And, indeed, this “bet” was conditioned by three important safeguards which purported to help the state monitor its population, *ie* to remain vigilant with regard to who comes in. First, as noted, the state extended citizenship deprivation. The second safeguard of the law was the introduction of the condition of assimilation for naturalisation in continental France,²⁸ and, the third, a restriction on the rights of newly naturalised citizens.²⁹ It is, therefore, within this broader framework that the extension of the reach of deprivation powers must be analysed.

The debates in 1927 in the “Chamber of deputies” (former National Assembly) reveal that citizenship deprivation was interpreted as a measure of “national safety” in light of the broad reach of the law. As the then *rapporteur* to the law put it “we are very lenient towards them [the naturalised] and I don’t know the extent to which the future will show us the danger of such liberalism” (JO, Chambre des députés, 5th April 1927, 1218). And, in the words of Secretary of State for Justice: “we did everything to facilitate naturalisation. But this exceptional *favour* [naturalisation] must have its counterpart. We might have been mistaken on the feelings of those who were naturalised. It is thus understandable that the French state claims and exercises its sovereign power” (1217) [my emphasis]. Read through these lenses, the distinction between different kinds of citizens in 1927 was a counterpart to a favourable regime of naturalisation, which was there to meet France’s demographic aims. The logic of the majority at the time was thus quite similar to that of the UK government: it was about making it possible for the state to monitor its population for at least 10 years after the granting of naturalisation. In this context, Boulbès (1957) analyses the proposals, concluding that the 10-year time-limit had the characteristic of a test, after which immunity is acquired. But, by contrast to the UK, there was little opposition to the idea of having an irrevocable category of citizenship. Rather, the few critics pointed to the creation of “second-class French citizens” who would have conditional citizenship for 10 years (André Berthon, 1218). There also seemed to be an additional reason behind the 10-year time-limit which does not come through in the debates in the UK: a strong belief in “assimilation” as something that could prevent wrongful behaviour in the future. In the words of the Secretary of State for Justice: “if this favour [citizenship] has been granted in such conditions that it would be imprudent or dangerous for the state, if the naturalised individual accomplished specific acts which *demonstrate that s/he has not acquired the French feeling [ie sentiment français]* ... this quality

²⁸ The condition already existed in colonial legislation (see chapter 3). It was introduced in continental France by an interpretative note (10th August 1927). In his work on assimilation, Hajjat dismissed the hypothesis of a transfer of the concept from the colonies to continental France, although he highlighted the important influence of the colonial deputies in the debates of 1927: Hajjat (2012).

²⁹ Naturalised citizens were prevented from exercising some of their citizenship rights in the first 10 years after obtaining legal citizenship, such as, for example, being ineligible for elective function and mandates for 10 years; later, in 1934, came the loss of the right to hold civil service posts or to practice law; and, in 1938, the inability to vote for five years. Two laws in 1983 removed the civil incapacities and the restriction on voting was repealed in 1978.

[that of being French] can be removed” (1217, my emphasis). What is interesting from this quote is that the Secretary of State for Justice seems to consider that there is something quite “un-French” about committing crimes against the state, and, conversely, that once individuals have acquired that “feeling” they are less likely to commit crimes against the state and/or against their fellow citizens. It is thus possible, as Zalc contends, that the 10-year time-limit was there to put individuals in a “temporary internship of French-ness” (Zalc, 2017: 56).

In essence, then, the emergence of the distinction between naturalised and birthright citizens in both contexts, for deprivation on grounds of criminal behaviour, seems to feed into Sayad’s (1999a; 1999b) analysis of the “social hypercorrection” under which migrants who became citizens are put. Deprivation was there to allow the states to “double check” that they had not made mistakes in naturalising individuals who were of “bad character”. It evidences the “double incrimination” which Sayad refers to, whereby the actions of the individuals are multiplied because of their presence in the territory. But the contexts of both laws were specific: the laws on naturalisation were very liberal in that they made it easy to naturalise as French or British at the time. The question then becomes whether the current distinction between naturalised and birthright citizens for the purposes of deprivation and security protection reflects this – namely that individuals who naturalise are under heightened expectations of conduct – or if it reflects something else.

4.6 The security context and naturalised citizens

In chapter 2, I demonstrated that the security context at the beginning of the 21st century extended the power of the state to deprive naturalised citizens on security grounds. In the French context it was implemented in two ways: through proposals to lower the standard to deprive and through the extension of the conditionality of citizenship to 15 years after its acquisition. In the UK, the Nationality, Immigration and Asylum Act 2002 extended the reach of deprivation to all British citizens, irrespective of their mode of entry into citizenship, and replaced the previous grounds for deprivation (disloyalty and criminality, then section 40(3)) with a single standard: proof that the individual acted in a way which is “seriously prejudicial to the vital interest” of the state. But in 2014, the Immigration Act reintroduced a distinction between naturalised and birthright citizens for the purposes of deprivation. At present, only naturalised citizens can be left stateless on the “vital interest” ground. In this section, I first engage with the rationale for the reintroduction of the distinction in the UK before addressing the French proposed extensions.

4.6.1 The UK 2014 amendment: citizenship as a privilege for naturalised citizens

The main reason for the (re)introduction of the distinction between different citizens in 2014 was because the UK government was disappointed at the Supreme Court's decision in *Al Jedda* and purported to reverse its findings (Theresa May, HC Deb 28th January 2014: c1041). In both the Commons and the Lords, some MPs raised concerns about the re-institution of different kinds of citizens. For example, Jacob Rees-Mogg talked about the risk of creating different classes of citizens (HC deb 30th January 2014: c1086), a feeling echoed by Yasmin Qureshi (HC deb 30th January 2014: c1092), and Baroness Smith of Basildon in the Lords (HL deb 7th April 2014: c1189). From the debates, there are some indications that the then government considered naturalised citizens to be in a different situation in relation to the state than birthright citizens. For example, Theresa May argued in the Commons that the amendment was there to check if the individual's actions were consistent with the values attached to citizenship:

“The amendment will allow the key consideration to be whether the person's actions are consistent with the values we all attach to British citizenship. We may all have a slightly different interpretation of what they might be, but I am confident that Members of this House would agree that this is encapsulated by the oath that naturalised citizens take when they attend their citizenship ceremonies” (HC deb 30th January 2014: c1042).

Some accounts in the debates also indicate that the government purported to justify the application of a different regime through the fact that only naturalised citizens entered into a relationship with the state of their own will. For example, Lord Taylor of Holbeach before the Lords said that:

“Sadly, a minority of individuals choose to become British citizens and then, later, seek to threaten our security, subvert our values and laws, and fight against our Armed Forces. It would be perverse if such people, while attacking our forces or terrorising civilians, could invoke our protection. People who have chosen to become British have taken an oath in which they pledge to respect the UK's rights and freedoms, uphold the UK's democratic values and fulfil their duties and obligations as British citizens. Despite this oath, some act in a way that is seriously prejudicial to the vital interests of the United Kingdom” (HL deb 7th April 2014: c1170).

I have included this quote in full because it suggests that the naturalised citizens referred to here are already considered as foreign in the eyes of the state. Lord Taylor talks about “they” (the naturalised alleged terrorists), “such people”, subvert “our values and laws”, “our Armed Forces”. The clear reference to an “us” and “them” rhetoric furthers the idea that naturalised citizens, in contrast to birthright citizens, are in a different relationship with the state because they have “chosen” to become

British, pledged allegiance and loyalty to the values of the state and should “stick by their words”.³⁰ This view is further supported by the bill’s memorandum on the compatibility with the rights protected by the Human Rights Act 1998. With regards to article 14 (non-discrimination), the government said that: “naturalised citizens have chosen British values and have been granted citizenship on the basis of their good character. It is therefore appropriate to restrict a measure with such serious consequence as becoming stateless to naturalised citizens” (point 15).³¹ One potential issue with such rationale and exclusionary rhetoric is that it creates an effect of foreignness for naturalised citizens (single and multiple nationality holders) who are put under a heightened duty to conform – a constant duty to “integrate” and demonstrate adherence to the state’s values. In the debates of 2014, Simon Danczuk asked Theresa May if the bill would make it easier to deport the alleged threats to the security of the state to their “county of origin” (HC Deb 30th January 2014: c1053). Danczuk was specifically asking if the powers could be used against a group of men who had been convicted in 2012 of a range of offences involving the grooming, sexual abuse and trafficking of girls in Rochdale, thereby pointing to usages of deprivation powers which would not entail issues of national security protection. As noted in chapter 2, in 2006 the government lowered the standard for depriving multiple nationality holders, naturalised and birthright citizens, on the ground that it would be “conducive to the public good” to do so, a standard which is implemented for immigration controls to deport foreign nationals (Majid, 2008). In answer, Theresa May said she could not give any specific guarantee on specific cases, but reassured him that “the bill will make it easier for us to deport foreign criminals” and that it “ensure[d] that foreign criminals can be deported first ... and appeal against their deportation afterwards” (c1053). The members of the “Rochdale gang” were deprived of their citizenships in 2018 and subsequently appealed the decision. The three men in this case were dual nationality holders, originally from Pakistan, and had children under the age of 18 living in the UK. The Court of Appeal validated the decision of the Home Secretary to deprive them of their citizenship, despite the potential effect of the deportation on their private and family life (*Aziz and others v the Secretary of State for the Home Department* [2018] EWCA Civ 1884, paras 31–32).

This case and the discussion in Parliament in 2014 are important on several accounts: first, they evidence the “spill-over” effect of deprivation powers, their normalisation in state practice and discourses. The frame of the justification advanced by the government in 2014, though limited to

³⁰ See for example Bertram’s criticism of the expansion of deprivation powers in the UK. C Bertram, “Who’s next? The case of Shamima Begum”, *London Review of Books*, February 2019 <https://www.lrb.co.uk/blog/2019/february/who-s-next> (02/12/2019)

³¹ Home Office, “Immigration Bill: European Convention on Human Rights Supplementary Memorandum”, 2014 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276660/Deprivation_ECHR_memo.pdf (27/11/2019).

naturalised single nationality holders and to grave conduct against the national security of the state, can (and was) extended to cover all naturalised citizens and a state sanction against common crimes (although grave ones). As it appears from the case of *Aziz and others*, and because the “conducive to the public good” ground does not require criminal conviction, naturalised citizens are exposed to a standard of “good citizenship”, as was advocated for in the debates in 1918 by John Robert Pretyman Newman. Second, the case and the extract from the debates further the portrayal of naturalised multiple nationality individuals as criminals and already foreign. Theresa May, referred to such purported individuals as “foreign criminals”, irrespective of whether the individuals have yet been exposed to a deprivation order or not, and the clear “us and them” rhetoric of Lord Taylor is another example. In sum, what this rhetoric, developed in the context of security protection, enshrines and normalises is a perception that naturalised legal status entails an ongoing requirement to comply with the conditions set out for naturalisation. Or, put differently, that citizenship is a “privilege” rather than a right for naturalised citizens, a privilege which is conditional on future good conduct. Such images also emerged in the French debates on the extension of the powers in 2005 and in the failed attempt of 2011.

4.6.2 Extensions of the duty to conform: the French debates of 2005 and 2011

In 2005, the French government proposed to extend the powers to deprive individuals who committed terrorist actions prior to or within the first 15 years after citizenship acquisition. It also said that the state should have up to 15 years to make an order of deprivation. The extension of the time frame before citizenship becomes irrevocable was implemented at a time of heightened security concerns. It was part of a broader counter-terrorism bill which aimed to reinforce pre-emptive counter-terrorism measures after the terrorist attacks in London, Madrid, and Bali in 2005 (later law no 2006-64 of 23rd January 2006). The year 2005 was also marked by riots in the French “suburbs” (*banlieues*)³² and the triggering of the derogatory procedure of the state of emergency to end the riots. In the debates, some of the justifications from the government did not just link to issues of security protection but connected naturalisation with integration. For example, the then government said that the extension of the time-limits was to fight against terrorists’ networks which aimed to “recruit well integrated individuals in their host societies in order to avoid suspicion”.³³ The “degree” of integration of the individual was thus considered a relevant factor for security purposes which, in turn, suggests that

³² The riots were triggered by the death of two teenagers, Bouna Traoré and Zyed Benna, who had sought refuge in an electrical sub-station in an attempt to hide from police.

³³ Assemblée Nationale, rapport no 2615, « après déclaration d’urgence, relatif à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers », Commission des lois de l’Assemblée Nationale, Alain Marsaud, Novembre 2005, 167pp, p24 <http://www.assemblee-nationale.fr/12/pdf/rapports/r2681.pdf> (29/07/2019).

suspicion of the conduct of those not perceived as compliant with the standards of sameness was legitimate in the eyes of the state. For Alain Marsaud, speaking for the Commission of Laws of the National Assembly, the measure could be justified because it was symbolic and “sent a message”: “since more and more nationals are implicated in terrorism acts within the territory, it can be justified to send a message” (JO, AN, 24th November, 7535). In its report, the Commission also made an explicit connection between security challenges and naturalisation. According to the Commission, the terrorist attacks in Madrid and London in July 2005 demonstrate that “individuals who have acquired citizenship in countries where they reside are frequently implicated in terrorism”.³⁴ In the eyes of the Commission, an additional justification for distinguishing between naturalised citizens and birthright citizens seemed to be the fact that naturalised citizens are “frequently implicated in terrorism”, even though none of the terrorists of the London bombings in 2005 were naturalised citizens. Taken together these justifications, which directly connected naturalisation, integration and security, imply that in the eyes of the state there are different expectations of conduct for people who naturalise. The (very) few critics to the bill pointed to the stigmatisation which the bill induced. For example, Noël Mamère (Green MP) argued that the measure produced a “dangerous and detestable amalgam between terrorism and immigration” and noted the “stigmatization of a certain category of the population whose attachment to France is constantly questioned” (JO, AN, 24th November 2005, 7535). The support for the measure was overwhelming, 373 in favour against 27 in the National Assembly and the Senate also agreed the bill. It was followed, a few years later in 2010, by a proposal which similarly challenged the security of the status of citizenship for naturalised citizens.

The context of the 2010s is important. The then government launched several versions of the politics of belonging, including a national debate on “national identity” which concluded that it needed to “reinforce [its] politics of integration for the immigrants which settle in France”,³⁵ and the banning of the full-face veils in public areas (law of the 20th October 2010). The context was thus marked by a fear of plural identities and cultures and the state’s desire to reinvest the meaning of French citizenship.

It is in this context that Nicolas Sarkozy, then president, proposed to extend citizenship deprivation to crimes committed against public officials. The measure was introduced in response to anti-social behaviours in the city of Grenoble after individuals had fired at a policeman. In the speech he delivered after the incidents, Sarkozy said that citizenship should be removed from all “individuals of foreign

³⁴ *Ibid* p86.

³⁵ It was in these words that the then Secretary of state for “immigration, integration, national identity and solidary development” talked about the context which surrounded the 2011 bill which included the provision on citizenship deprivation: *op cit* 33, p68.

origin who have voluntarily taken the life of a policeman or a member of the military or any other public officials”.³⁶ According to Sarkozy, “when one shoots at an agent from the armed forces, one is no longer worthy of being French”,³⁷ and, further that: “French citizenship must be earned, and people need to prove worthy of it”. Here, too, in the eyes of the then president, the citizenship of naturalised citizens – or “all individuals of foreign origin” – seemed contingent on integration and absence of wrongful conduct, *ie* contingent on a purported image of good citizenship.

The proposal was enshrined in article 3 *bis* of the immigration integration and nationality bill of October 2010, and the “foreign origin” which Sarkozy was referring to was limited to naturalisation. In Parliament, those in favour of the lowering of the standards fed back into the anxieties of the government towards pluralism, and portrayed France as a “stream”, where its “affluent can enrich it but must not modify its trajectory” (Christian Vanneste, JO, AN, 28th of September 2011, 6341). Critics argued that it went against “republican” principles of equality because it distinguished between formal citizens according to their mode of entry into citizenship (Sandrine Mazetier, 6305). According to Serge Blisko, the measure put the “French in an internship of citizenship” (,6309). The provision on citizenship deprivation was adopted by a tight majority in the National Assembly (294 votes against 239). It was later refused by the Senate, at the time of a socialist majority. The main arguments against the provision were also grounded in formal equality. For example, Yvon Collin rejected a “philosophy which introduces two categories of French”: the “good” and “the others”, those “whose foreign origin put them at risk of losing their citizenship if they have committed certain crimes”, because it was “contrary to the most fundamental principle of our Republic, the unity of the French people and the equality of all without distinctions” (JO, Sénat, 2nd of February 2011, 780).³⁸ What the context of 2011 reveals is that ongoing duties of integration were asked of individuals who naturalise. To paraphrase Sureau who commented on the debates at the time, the failed proposal mirrored unwarranted images of “national purity” (a fear of pluralism) and enshrined a “nationality with points” (2011: 183) for naturalised citizens, in reference to the points on a driving licence. But the lowering of the standards to common crimes proved disproportionate to the majority in Parliament. Perhaps it is, as Mills suggests, that the 2011 proposals were so explicitly couched in a logic of extension of the naturalisation process that they eventually proved unacceptable to the majority of parliamentarians at the time (Mills, 2016: 16). However, despite this strong statement of the value of equality, the opposition to the bill accepted that there could be an exception for acts of terrorism. For example,

³⁶ Nicolas Sarkozy, « Le discours de Grenoble du 30 Juillet 2010 », *Le Figaro*, 2014, <http://www.lefigaro.fr/politique/le-scan/2014/03/27/25001-20140327ARTFIG00084-le-discours-de-grenoble-de-nicolas-sarkozy.php> (06/03/2019).

³⁷ *Ibid.*

³⁸ See also: David Assouline JO, Sénat, 2 Février 2011, 799.

Jean Marc Ayrault (who would become Prime minister during the first years of Hollande's presidency) said that:

“If the legislator and the Constitutional Council accepted a derogation to the principle [of equal citizenship] in the context of terrorism acts it is because of the particular nature of acts of terrorism which clearly manifest the intention of the individuals which commit them, not only to put themselves outside of the Republic but also as enemies of the Republic. For common crimes, we cannot accept any derogation: a crime is a crime, a criminal is a criminal and French is French – whatever its origin, the sentencing must be the same” (JO, AN, 29th September 2011, 6390).

In sum, the developments described in these sections reveal that different expectations of conduct for individuals who naturalise appear to motivate the states' distinctions between naturalised and birthright citizens. Put differently, it is possible for individuals who naturalise to be under a probation period before and after acquiring citizenship. This was especially salient in the context of the beginning of the 20th century, where the states used deprivation as a tool to monitor their populations in the face of favourable naturalisation regimes. More recent state practices and debates demonstrate that, despite the re-tooling of deprivation powers as a counterterrorism measure, there are elements in the states' justifications which do not link to the protection of the state. Rather, the states have couched the proposed extensions under framings which require naturalised citizens to comply with the standards of integration they had to meet when they naturalised. Taken together, these views connect to Sayad's analysis of the “double incrimination” to which immigrants-turned-citizens seem to be exposed: their wrongful behaviour is multiplied by the fact that they are portrayed as being in a territory where they objectively should not be.

A critical feature of the security concerns post 9/11 is that, in both France in 2015 and the UK in 2002, security arguments proposed to “level down” the protection of citizenship and make deprivation applicable to all. The statelessness commitments of the states mean that the measure would risk only applying to multiple nationality holders and/or ethnic minorities who could potentially acquire another citizenship, thereby potentially extending the form of social hypercorrection from naturalised citizens to ethnic minorities. In the next section, I turn to the third potential critical factor behind the states' distinctions: that second-generation citizens suffer from a lack of belonging in the eyes of the state and are similarly exposed to heightened conduct requirements, to a “duty to integrate”.

4.7 Security, foreignness, and citizenship as a privilege for birthright citizens

4.7.1 Formal equality and the “levelling down” of citizenship rights

In the UK, the government justified the extension of citizenship deprivation to birthright citizens who were multiple nationality holders on the ground that the “nature of the threat” did not justify a distinction grounded on the route to citizenship (Lord Filkin, HL deb 8th July 2002: c503). According to Lord Filkin, the aim was to show “public abhorrence at such treasonable conduct and to demonstrate that the disloyalty shown is incompatible with being regarded as a member of the British family” (c280). In other words, for the government, the idea was not to differentiate between single and multiple nationality holders, but between the citizens and the terrorist “others” who, by their actions, betrayed the “British family”. In essence, what the security concerns created, to paraphrase Lord Dholakia, was an extreme example of equality by “levelling down” (HL deb 9th October 2002: c273). It also extended the view of citizenship as a “privilege” for other kinds of citizens. This is made explicit by Lord Filkin who argued that the measure reflected the government’s approach to citizenship, namely, that it is an “extremely important privilege”, one which should “be respected without discrimination as to the route by which people received citizenship” (c281). The legislative proposal of 2015–16 in France emulated a similar argument. When questioned before the Commission of Laws of the National Assembly, Manuel Valls said that the difference did not lie between multiple nationality holders and other citizens but between the terrorists and the other. As he put it: “This is the clarification that we propose: the real difference separates those who breach the national pact, with what we are as French, and with France and its values”.³⁹ Ibrahim Aboubacar also referred to the levelling down of citizenship protection as a “strong affirmation of the constitutional principle of equality” (JO, AN, 5th February 2015, 1043). There were also several references to the fact of “deserving” French citizenship and how the commission of terrorist actions meant that individuals did not deserve to be French anymore. For example, Guillaume Larrivé said that: “The French who kill other French because they are French do not deserve to be French: they exclude themselves from the national community, and the Republic has the duty to sanction it” (1050). In a similar fashion, Bruno Le Roux argued that “one cannot belong to a national community that one seeks to destroy” (1027). But what these arguments do not engage with is that the measures have broader reach: they tap into the feelings in society that, for some citizens, citizenship is a right, when for others it is a privilege. And

³⁹ Assemblée Nationale, rapport no 3451, « Au nom de la Commission des lois constitutionnelles, de la législation et de l’administration générale de la République sur le projet de loi constitutionnelle no 3381 de protection de la Nation », Dominique Raimbourg, 28 Janvier 2015, 191pp, p.47
<http://www.assemblee-nationale.fr/14/rapports/r3451.asp> (04/12/2019)

since the measures are only reserved to citizens who have foreign connections, for example, through multiple nationalities, they risk creating an effect of foreignness which undermines equal citizenship.

4.7.2 Foreignness and the extension of the duty to integrate

In her analysis of the context of the 2015–16 proposal, Mazouz (2016) interprets the French extension as part of a broader process of disqualification of the citizenship of ethnic minority citizens from the 1980s onwards. As she demonstrates, discourses in the public debates have increasingly challenged the “integration” of French-born citizens of a different ethnic heritage, although integration and its politics are normally reserved to foreigners prior to acquiring citizenship. As she notes, minority citizens have been put under a duty to evidence their citizenship, in the same way that their parents/grand-parents did when acquiring it in the first place (Mazouz, 2016: 162). Her claims have important empirical support. For example, the role of the High Council for Integration (HCI) (mentioned in chapter 3) was to advise the government on both potential policies of integration of foreign resident *and* of second-generation citizens.⁴⁰ At the time as the creation of the HCI in the 1990s, the legislation on citizenship acquisition was also modified and cancelled the direct *jus soli* for those individuals born in France of foreign parents. The “Long” Commission set up to debate the proposed changes referred to the change in the immigrant population (primarily from non-white countries), which differed from that of the 1930s which was primarily (white) European (Long, 1988: 39–55). The new law required a “declaration of will” for foreign-born individuals to acquire French citizenship when they turned 18, allegedly, as Freedman (2004) notes, because their belonging to France could not be presumed. The anxieties which the law enshrined are best captured by Patrick Braouezec’s criticism of the provision in the debates in 1998 which cancelled it: “since 1993, with the right wing in power, nationality appears as the condition of a future integration. To other injustices was added the doubt, for a child born in France of foreign parents, to ‘maybe’ one day become French when turning 18.” (JO, AN, 4th March 1998, 19).

Though the HCI was suppressed in 2012 and the condition of will removed in 1998, the stigmatisation of the purported “failed” integration of second-generation migrants, and, especially, of Muslim minorities, is a recurrent theme of the French political discourse. In 2012, for example, in response to the killings of Mohamed Merah in Toulouse and Montauban, in a French newspaper, Marine Le Pen, the leader of the “National Gathering”, who finished second in the presidential elections of 2017, asked: “How many Mohamed Merah in the boats, planes, which arrive every day in France full of

⁴⁰ Haut Conseil à l’intégration, « 1990–2010. 20 ans au service de l’intégration », 2010, 64pp, p1 [http://archives.hci.gouv.fr/IMG/pdf/20_ANS_HCI_V6.pdf\(02/12/2019\)](http://archives.hci.gouv.fr/IMG/pdf/20_ANS_HCI_V6.pdf(02/12/2019))

immigrants? How many Mohamed Merah amongst the children of non-assimilated immigrants?”⁴¹ Drawing on these elements, Mazouz’s argument that the recent overhaul of citizenship deprivation contributes to a previous process of disqualification of the citizenship of ethnic minorities has important credentials. In the UK, too, from 2001 there have been calls for the integration of second-generation citizens in the context of an alleged backlash on multiculturalism as a state-led political discourse. McGhee (2010: 120–127) shows how this “duty to integrate” was made explicit in the political discourses of Prime Ministers or Home Secretaries in the aftermath of terror attacks and indirectly targeting Muslim citizens. This was especially striking in the discourse of the then Prime Minister David Cameron in Munich in 2011 (Klug, 2011). In his speech, Cameron, after pointing to the fact that the security threat was coming “overwhelmingly from young men who follow a completely perverse, warped interpretation of Islam”, blamed political discourses on multiculturalism and proposed to replace it by a “muscular liberalism”. Zedner (2010: 383) demonstrates that these calls, triggered a new architecture of preventive measures which were designed to promote compliance and conformity to “British values”. Critics to these measures have pointed to the entanglement between issues of community cohesion, integration and security and their disproportionate effect on Muslim communities (O’Toole *et al*, 2012; Alam and Husband, 2013).

Fundamentally, the supporting national security context which frames the extension of deprivation powers risks normalising these discourses on integration for minority citizens. Put another way, there is a clear sense that, if it is difficult to establish that the extension of citizenship deprivation is driven by suspected lack of belonging on the part of minority citizens, it is, however, possible to fear that the overhaul of deprivation powers risk normalising and legitimising a two-tier citizenship. The analysis feeds into Sayad’s depiction of minority citizens as “blurred agents” who still appear to be exposed to social hypercorrection and forms of double incrimination, in the same way as their parents or grandparents who originally emigrated to France and the UK. In essence, then, citizenship deprivation creates different kinds of citizenship for different people, which triggers an effect of foreignness and indirectly discriminates against individual citizens by failing to treat terrorist suspects as a separate group, *ie* differently than on the basis of the nationality. These features, in turn, have the effect of undermining equal citizenship by enforcing a different set of rules to that of formal equals.

4.8 Conclusion

⁴¹« Marine Le Pen fait l’amalgame entre immigration et terrorisme », *Libération*, 25 mars 2012 https://www.liberation.fr/france/2012/03/25/marine-le-pen-fait-l-amalgame-entre-immigration-et-terrorisme_805592 (06/03/2019).

In this chapter, I engaged with three critical factors behind the variations in treatment of different kinds of citizens evident in the two states in question. If statelessness can explain what has driven the changes in the law, it does not answer the deeper question of why these states treat differently migrants who become citizens and birthright citizens with a different ethnic heritage. I have demonstrated, through an examination of parliamentary debates, that historically it was about continuing to monitor people in the face of liberal legislation. More recent state practices reveal that, if this specific historical context is no longer applicable, the rationale remains: naturalised citizens are under heightened conduct requirements and often have their citizenship portrayed as a privilege rather than a right. It is possible that this perception passes down to their children who are exposed to the same forms of treatment and have their citizenship disqualified as a privilege that they have not earned. Equal citizenship thus becomes a right for some, namely birthright citizens who do not have a foreign heritage or second nationality, and a privilege for others. I found that these factors, of statelessness, naturalisation and doubts about the political belonging of second-generation citizens, work together in both countries to create an effect of foreignness for ethnic minorities and undermine equal citizenship.

In chapter 5, I ask how this effect plays out with other liberal principles of equality and/or citizenship as a core feature of the identity of the people when the issues are brought before the courts. From similarities and differences in the judicial scrutiny of the states' practices, I ask if these can tell us anything about why the UK has introduced more far-reaching measures than France and/or about the extent to which the contexts of deprivation (re)define the boundaries of citizenship.

Chapter 5: Judicial approaches to citizenship deprivation

“The right to nationality is an important and weighty right. It is properly described as the right to have other rights, such as the right to reside in the country of residence and to consular protection and so on. But it is a right which carries obligations: it derives from feudal law where the obligation of the liege was to protect, and the obligation of the subject was to be faithful” *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 206, Lady Arden, para 49

“[Despite MM, TG and C having stronger claims to infringement of their personal identity] it is worth noting that the actions for which they were sentenced reveal [different] allegiances as well as the little role that their allegiance to France and its values played in the development of their personal identity” Conclusions of the *rapporteur public*, on case no 394348, *Conseil d’Etat*, of 8th June 2016 (p11)

5.1 Introduction

In chapter 4, I presented evidence to the effect that citizenship deprivation in France and the UK abrogates from equal citizenship, in the sense of equal treatment from the state and subjections to the law for individuals holding the same legal status of being a citizen. Citizenship appears to be a right for birthright citizens without foreign heritage and a privilege for naturalised citizens and ethnic minorities who have some foreign connection (such as ancestry from some other country). In this chapter, I examine how this effect plays out in the courts: how do the courts approach these challenges to equal citizenship and, more broadly, to liberal principles of rights protection? I argue that the extent to which the courts grapple with these principles of equality and rights give insights into how citizenship is conceived and into the extent to which the political context of national security permeates the structures of judicial reasoning in deprivation cases. This fits within the broader set of questions which this thesis addresses: drawing from similarities and differences, answers to the questions can explain why the UK introduced more far-reaching measures than France with regard to deprivation (*ie* whether there is a more intensive judicial scrutiny of executive action in the case of France) and/or, if there are similarities in approaches, to what extent the national security context (re)defines the contours of citizenship protection and why this is so. Before turning to these critical questions, I come back to the tensions between citizenship deprivation and rights and position the

judiciary within this debate. I then move on to briefly set out the kinds of scrutiny¹ which are open to the courts in order to challenge the legality of citizenship deprivation in each context, before fully engaging with how this has operated in practice and why citizenship deprivation persists, despite its retrogressive features.

5.2 The contexts of citizenship deprivation and the judiciary

The expansion of the powers of citizenship deprivation has developed over the last few years to affect a greater number of citizens. As I expounded in chapter 4, citizenship deprivation creates the conditions for rightlessness and/or an effect of foreignness for minority citizens which undermines equal citizenship. The data which I examined, parliamentary debates and official documents, revealed that the primary justification put forward by the governments was in relation to national security protection in recent times. The data also exposed that deeper questions of allegiance and loyalty, especially for “new” citizens, came into play. The questions of allegiance and loyalty were important features in the era when France and the UK were colonial empires, and it is surprising that these justifications are now emerging again in the present day. But whatever its justification, the different contexts which surround deprivation – of security and allegiance – must comply with the existing legal frameworks of procedural fairness and rights in France and the UK. There might be differences in what these frameworks encompass in both states, but, at their core, the principles of the “rule of law” in the UK or the “*état de droit*” in France establish that the law regulates state action and that all state action must be authorised by law and that individuals be equally exposed to it (Loughlin, 2010).² In other words, it is what sets the conditions for legitimate state action. The role of the judges in this context is critical: the rule of law merely remains as black-letter law if it is not being upheld by an independent and impartial body.

But the role of the law and the judges in securing liberties in the face of national security claims is far from unambiguous. Some legal instruments include limits to the scope of the rights they protect and/or allow the states to fully derogate from them in certain circumstances of, for example, threats to the security of the state.³ What the derogations or limitations entail is extensive leeway for states in implementing security policies under the scrutiny of the judges. For example, Rivers (2006) indicates two kinds of juridical self-imposed limitations to legal protection of rights or other matters which have

¹ I refer to judicial “scrutiny” rather than “judicial review” primarily because judicial review is a specific procedure in the context of the UK which does not apply to other kinds of judicial scrutiny which are available in France. I engage with these issues of terminology in more depth in section 5.3.3. However, in most of the references I am using, “review” is the term commonly used to refer to judicialised processes of scrutiny of state action.

² In what follows I use the “rule of law” to refer to this common core.

³ For a discussion see: Gross and Ní Aoláin (2006) and Dyzenhaus (2006).

special salience in cases of national security protection: issues of deference and restraint. Deference operates when the judges refuse to engage in full analysis of the case because of the subject matter at hand. In some instances, such as national security cases, the courts can – rightly or wrongly – assume that they lack the relevant knowledge or expertise to substitute their views for those of the decision-maker. Judicial restraint links to the state’s constitutional arrangements and to the judge’s understandings of their own positioning within this framework. Because judges in most legal systems, including in France and the UK, are not elected, they are perceived as lacking the democratic mandate required to take important decisions, or think of themselves as such, which is heightened in national security cases (Rivers, 2006). What deference and restraint suggest is that the judges operate within definite constitutional contexts and that their courtrooms are not immune from the broader political debates which permeate societies. Taken together, what these show, to paraphrase Davis and De Londras in their work on counter-terrorism judicial review, is that the subject is “murky”: in counter-terrorism cases, the stakes are high for the law, the legal system and the normative integrity of the state more broadly (2014: 10).

It is in this context that, in this chapter, I investigate the judicial approach to cancellation of citizenship cases. It is possible that in deprivation cases, this “murky” debate is exacerbated. What is “murky” about citizenship deprivation is that, beyond issues of security protection, the powers touch upon core prerogatives of the state (the setting-up of the contours of its political community), prerogatives on which the state enjoys broad discretion. It is also murky because it challenges the state’s liberal constitutional foundations, by differentiating between different citizens, reviving issues of loyalty and allegiance, and creating the conditions for arbitrariness and rightlessness. Could it be that the prevalent behaviour of the UK in terms of citizenship deprivation links to stronger judicial scrutiny of executive power in the case of France? Or, if there are similarities in the states’ approaches, what does that tell us about citizenship protection and national security more broadly? To fully account for similarities and differences in the states’ practices, I locate these questions within the broader structures of judicial scrutiny of the states, *ie* as to what is available to the claimant to challenge a decision and to the judges in granting remedies. The chapter also builds on existing literature on judicial scrutiny of executive action in the context of citizenship deprivation. In France, save for some limited doctrinal commentaries on a court case from the Constitutional Council, it is non-existent. Only Fargues takes a socio-legal approach to the decision-making processes of “bureaucrats” (in which he includes the judges) through interviews, by looking at the kinds of “norms and emotions” which seep into decision-making, but his analyses focuses on citizenship deprivation for fraud (Fargues, 2019: 359). In the UK, where the case law is more important, academics have reviewed critical cases as they were decided until 2015 (Sawyer, 2013; Fripp, 2015; Thwaites, 2015), but only Prabhat takes a socio-

legal approach to the subject (2016a; 2016b). I thus purport to build on existing literature in the UK, extend the analysis to the current practices, and fill the gap in France by engaging in thorough socio-legal analyses of both contexts. I limit the analysis to challenges against two sets of rights: equality and private and family life because both issues have come before the French and UK judges. By bringing comparative insights, the chapter seeks to add a critical view to what seems important in cancellation of citizenship cases and to the literature on counter-terrorism judicial scrutiny more broadly.

5.3 The structures of judicial scrutiny in cancellation cases

In this section I examine the procedures which are open for an individual to challenge a cancellation order in both legal frameworks. I locate these procedures within the broader constitutional contexts of the state, as these can tell us something about the options available to the judges. I argue that the scope of what the courts can do differs, in that the French system provides more scope for judicial scrutiny and, on the face of it, protection to individuals. I describe the procedure in each country separately as the structural differences of the states and the difficulty to find comparable analytical factors evidence the messiness of doing comparative work.

5.3.1 The French procedure

The primary gateway to challenge a deprivation order in France is before the Conseil d'Etat, within one month after being notified of the decision (*Décret* no 93-1362, 30th December 1993, article 59). Subsequent to the notification, the individual can seek an interim relief to prevent the decision from being implemented (*référé suspension*) and/or appeal to the Conseil d'Etat after the decision has already taken effect. The Conseil d'Etat in these cases is the court of both first instance and appeal.⁴ This role is different from its pre-emptive role, as a counsellor to the government.⁵ Before the Conseil d'Etat, the claimant can ask for the quashing of the order through the special procedure of the *recours pour excès de pouvoir* (the equivalent of judicial review in the French system) but not the award of damages through the procedure of the *contentieux de pleine juridiction*.⁶ This feature, of one

⁴ This is because the challenge is directed at an order from a minister, here, the Secretary of State for the Home Department.

⁵ As noted in chapter 2, the Conseil d'Etat must give a positive opinion prior to the making of a deprivation order. The Conseil d'Etat is bound to ensure that the members who give an opinion on the government's action are different from those who will sit in the challenges of the decision (see, for example: CE, 8th June 2016, no 394348, MA).

⁶ Under the French legal system, "administrative law" is a special separate area of law for administrative contracts and the liability of public organs, which means that there is no need to invoke private law to obtain damages. Under the procedure of the *contentieux de pleine juridiction* the claimant can ask for both the quashing of the decision and damages. See Steiner (2018: 267).

procedure being open but not the other, is not straightforward and the conclusions from the special *rapporteur* to the Conseil d'Etat in recent deprivation cases evidence that it has raised some perplexing questions.⁷ The quashing of the decision can be argued under both procedural (*eg* the incompetence of the decision-maker) and substantive grounds. Substantive grounds can include rights violations, such as of those protected under the law of the European Union (EU) and/or other relevant international instruments (*eg* the European Convention on Human Rights (ECHR)). The scrutiny of executive action against the international framework of rights protection is referred to as the *contrôle de conventionnalité* and does not include the scrutiny of the rights enshrined in the Constitution. In this instance, the matter is referred to the Constitutional Council. Since 2008 (law no 2008-724, 23rd of July 2008), there is a special procedure which allows the claimant to argue that the legislation on which the executive action was based is incompatible with the Constitution and to ask the Conseil d'Etat to refer the question to the Constitutional Council: namely, the question of priority preliminary ruling (*Question prioritaire de constitutionnalité* (QPC)).

5.3.1.1 *The QPC procedure of constitutional scrutiny*

The QPC can be raised by a claimant in any civil or administrative instance (without the need to exhaust other judicial remedies) and suspends the proceedings (article 61-1 of the Constitution). The highest courts of the judicial system, in this case, the Conseil d'Etat, operate a “filtering” of the constitutional questions: it needs to accept the referral of the question to the Council in full or in part. The questions must be “new”, directly applicable to the case and “serious” (*loi organique*, no 2009-1523, 9th December 2009). The Constitutional Council does not itself have the power to “grab” a question of constitutional compatibility, an arrangement which seeks to keep the institutional balance with the other organs of the state (Maugüé, 2015). Under article 62 of the Constitution, if a provision is declared “unconstitutional” it is abrogated from the day of the publication of the decision of the Council – or to an ulterior date fixed by the Council. The Council rules in “abstract” (*ie* not on a specific

⁷ The *rapporteur public* is a member of the Conseil d'Etat who presents “conclusions” before the Court (*ie* his/her opinion on the case and its solution). S/he reviews the facts of the case, the arguments from the parties, the relevant legal framework and jurisprudence, and her/his opinion on the outcome of the case. The *rapporteur* does not take part in the final decision. See: Conseil d'Etat, « Quel est le rôle du rapporteur public ? », fiches pédagogiques « pour en savoir plus »

<https://www.conseil-etat.fr/actualites/fiches-pedagogiques-pour-en-savoir-plus/quel-est-le-role-du-rapporteur-public> (11/09/2019).

In the conclusions of the *rapporteur* in the cases of *MT* (no 394.348), *M.A* (no 394.350), *ME* (no 394.352), *MG* (no 394.354) and *MC* (no 394. 356), of 8th June 2016, which were treated in the same document and in the same terms, the *rapporteur* noted that citizenship deprivation amounts to an administrative sanction and that for administrative sanctions, the individuals can normally ask for damages (CE, Assemblée, 16th February 2009, no 274000 Société ATOM). However, he argued that there were exceptions to the principle and that deprivation should be counted as one of them. Conclusions of the *rapporteur public*, M Xavier Domino, on CE, 8th June 2016, no 394.348, MA.

case) and can also decide that a legislative provision is constitutional only if subject to a certain interpretation (the *réserve d'interprétation*) which is binding on the supreme courts (the Conseil d'Etat and the *Cour de Cassation*) (Deumier, 2015).

The QPC procedure is thus a “civic shield” for citizens (Rousseau and Bonnet, 2009). Now fully enshrined in the state’s practice, this constitutional remedy is critical in the context of deprivation because it allows citizens to enforce their rights through a fast-track procedure at the point where the right itself to claim rights is in danger of being taken away. Chamussy (2015: 46) talks about the QPC as a “juridical revolution” in the French constitutional framework. And, indeed, there appears to be something quite revolutionary in the introduction of this form of *ex post facto* scrutiny in a constitutional system which, for a long time, operated under parliamentary supremacy and a fear of government by judges. The creeping of constitutional review and, through it, an increase in the powers of the Constitutional Council, has been extensively referenced by academic literature (Bell, 1992; Stone Sweet, 2000; Boyron, 2013; Paris, 2016). The literature identifies different critical moments in the expansion of constitutional review, aside from the constitutional reform of 2008. One such moment is the decision of the Constitutional Council in 1971 which contended that the scrutiny of legislation could be enforced against both the formal and substantive features of the Constitution (Cons Const, 16th July 1971, no 71-44, *Liberté d’association*). In this case, the Council granted “legal force” to the preamble of the Constitution, which includes the Declaration of the Rights of the Man and of the Citizen (DRMC) and the preamble to the Constitution of 1946, thereby extending its scrutiny to issues of rights and positing itself as a defender of rights (Paris, 2016). In his analysis of the case, Stone Sweet (2007: 80) talks about a “juridical coup d’état” because the framers of the Constitution in 1958 explicitly ruled out the possibility of granting the Council jurisdiction over rights. Indeed, the role of the Council, as conceived by the drafters of the 5th Republic, was to be a “watchdog” of the interests of the executive against the excesses of parliamentary supremacy under the 3rd and the 4th Republics (Bell, 1992). Under the constitutional arrangements of these Republics, the Constitution, though entrenched, in that it was not amendable through ordinary legislation, was competing with an understanding of “statute” law (*la loi*) as representing the “general will” (Boyron, 2011). This philosophy is often attributed to Rousseau (1976) and states that legitimate political order is one

where the sovereign is the people who are governed by their own general will.⁸ The judges, according to this argument, are only there to interpret the law: as the “mouthpiece” of the law.⁹

Despite this history of scepticism towards the judges and constitutional review, Stone Sweet (2000; 2007) demonstrates that the interpretation of the Constitutional Council in 1971 did not trigger many challenges from the legal doctrine or the political organs. He contends that what potentially explains this is the fact that the mode of referral to the Council was extended in 1974 to members of the opposition. Prior to the QPC, the only form of constitutional scrutiny of legislation was *ex ante*, *ie* prior to its enactment as law. In 1974 (law no 74-904, 29th of October 1974), this procedure was opened to 60 senators or 60 deputies.¹⁰ As Stone Sweet notes, this led to an increase in referrals to the Council, on both substantive and formal grounds, and reinforced the status of the Council as a counter-majoritarian check on state action (Stone Sweet, 2000; 2007).

These historical accounts suggest that the authority and legitimacy of the Council as a “protector of rights” in the French constitutional framework is relatively unchallenged. Arguing in a similar vein, Carcassone (2011) refers to the “QPC” as the “daughter” of Parliament, because, as he notes, the reach of the procedure was extended by parliamentarians during the debates in 2008 beyond what was originally planned in the bill. He reports that, despite Parliament being the “primary target” of the procedure, it was considered as “progress in the protection of fundamental rights” by the majority in Parliament (Carcassone, 2011). Taken together, these different historical accounts and current procedures present a complex picture for the potential scrutiny of deprivation powers. An historic approach to the role of the judges suggests that both deference and restraint are likely to play an important role in the exercise of scrutiny. The institution of a strong procedure of rights-based scrutiny, however, indicates that there might be something akin to a culture of rights protection in France in which the judges – and, especially, the Constitutional Council – are assumed to play a critical role. The implications for cancellation of citizenship are likely to be significant, given the connotations of the measure on rights. Alternatively, if little or no connection to rights is made, it might reveal the extent to which the political context of national security intrudes into the courtroom and into judicial reasoning.

⁸ Rousseau’s account of the “general will” is itself ambiguous. Bertram explains that, in Rousseau’s writing, the “general will” can be read as both democratic (the decision that people make together in their legislative assembly) and transcendent (something that transcends popular decision, that can contradict the empirical judgement of the citizens): Bertram (2012).

⁹ This view is attributed to Montesquieu and has had important legal recognition in the aftermath of the revolution, whereby articles 10 and 12 of the law of 16–24th August 1790 forbade the intervention of the judges in the legislative process and in the interpretation of the laws.

¹⁰ Alongside the president, the prime minister, the president of the National Assembly or the president of the Senate.

5.3.2 The UK procedure

In the UK, the claimants can appeal the deprivation order before the Special Immigration Appeals Commission (SIAC),¹¹ a court which hears immigration cases with national security dimensions on facts and operates under both closed material proceedings and Special Advocates. What this means is that neither the claimant nor his/her lawyer will have access to all of the evidence on which the decision was based (Yeo, 2019: 147). Here too, the individuals can rely on procedural and substantive grounds to challenge the lawfulness of the order. Procedural grounds include, for example, issues of natural justice (*eg* procedural fairness, procedural *ultra vires*), or access to courts. Substantive grounds cover purported violation of rights protected under both the common law and the Human Rights Act 1998 (HRA). Since the introduction of the HRA (which integrated most of the rights protected under the ECHR), all executive action must be compliant with rights (section 6 of the Act), which creates a potential far-reaching ground of challenge for individuals. Individuals exposed to deprivation powers can rely on this provision to argue that the executive acted *ultra vires* (outside of the law) if it is found that the action disproportionately infringed upon one of their protected rights.

Section 3 and section 4 of the HRA also introduced a form of rights-based scrutiny of the legislation, but the breadth of the power of the courts is narrower than in France. Under section 3, the courts are under an obligation to construct past and new legislation in a way which is compatible with rights.¹² This obligation is a powerful one and past judicial practice shows that the courts have been willing to emulate its effects. For example, in the case of *Ghaidan v Godin-Mendoza* [2004] UKHL 30, the House of Lords interpreted the word “spouse” in the Rent Act 1977 as including same-sex couples. What is important from this case is that the court departed from the clear and unambiguous wording of the legislation to construct an interpretation which would be compatible with Convention rights. Previously, under the principle of legality, the position of the court was that fundamental rights could not be overridden by general or ambiguous words (*R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131, see Lord Hoffmann, para 115). In *Ghaidan*, the court argued that the underlying “thrust” of the legislation, its social policy, was to give secure tenancies to the couple, rather than to exclude same-sex couples (see, for example, Lord Nicholls, para 33) and found that it would be contrary to article 14 taken together with article 8 to deny the right to succeed to the surviving spouse. Given the potential for citizenship deprivation to interfere with articles 8 and 14 and

¹¹ S.2B of the Special Immigration Appeals Commission Act 1997 and s40A(2) of the British Nationality Act 1981.

¹² “Rights brought home: the Human Rights bill”, presented to Parliament by the Secretary of State for the Home Department by command of her Majesty, October 1997, CM 3782, pp21, paras 2.7 and 2.8 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf (11/09/2019).

given that the courts have been willing to interpret legislation to emulate the effect of a full protection of the rights in the past, here too an absence thereof would require explanation. If it finds itself unable to interpret legislation compatibly with rights, the HRA also granted the power to the court to declare a statute to be incompatible with Convention rights (section 4). These declarations do not affect the legality of the legislation, but the Act incorporates a “fast-track” remedial order under section 10 for Parliament to address the declaration, if it so wishes. Declarations of incompatibility can be sought before different courts (*eg* in England and Wales, the High Court, the Court of Appeal and the Supreme court (s4(5) HRA 1998)), but, in comparison with France, the remedies of sections 3 and 4 of the HRA emerge from concrete cases. As Chandrachud and Kavanagh (2016: 82) note, the UK Supreme Court has refused to make hypothetical declarations of incompatibility in the absence of identifiable victims whose rights have been affected in some way. In addition, it is possible, as some academics have claimed, that the process under section 4 allows the courts to “raise the alarm”¹³ but leave it to Parliament to make up its mind about it. In other words, in the context of deprivation, this means that, even if the judges do find that the legislation is incompatible with rights, it does not interfere with the validity of the legislation. As Masterman suggests, one of the core feature of the HRA is that, at least in its current form, it is respectful of parliamentary sovereignty, the first principle of the UK uncodified constitution (Masterman, 2009). The absence of a power of override and the character of the Supreme Court as a court of last appeal in concrete cases places the court in a weaker position than the French Constitutional Council in terms of rights protection. The UK Supreme Court, as Masterman and Khushal Murkens (2013) contend, is a “proto-constitutional” court in relation to the ECHR and other important constitutional matters. The kind of scrutiny it operates is, in essence, a “weak” form of judicial scrutiny with potentially strong effects, given that declarations of incompatibility under section 4 are almost always followed (Tushnet, 2003),¹⁴ as are sectional interpretations which have not been overruled (Masterman and Khushal Murkens, 2013). These preliminary accounts thus also paint a complex picture, of constitutionally enshrined deference to Parliament but increasing powers and systems of rights protection, whereby rights protection becomes a joint responsibility between Parliament and the courts.

So, it seems that both mechanisms – namely sections 3 and 4 of the HRA and the QPC procedure – have potentially far-reaching impacts on citizenship deprivation, for they allow the courts to deploy (and uphold) rights around citizenship. However, on the face of it, the procedures in France are superior because the courts have more scope to scrutinise issues of rights; they are more easily

¹³ I take this expression from De Londras and Davis in a critical debate in 2010, at p25: De Londras and Davis (2010).

¹⁴ This system of scrutiny has also been framed as a “third”, middle, way of rights protection (Klug 2001); as well as a “commonwealth” type of review (Gardbaum 2013).

available to the claimant (the QPC is a fast-track procedure); and they entail more important consequences (the quashing-down of the executive action or the legislation).

5.3.3 The messiness of the comparison

These structural differences trigger more general comments about the lack of clarity of the comparative enterprise. The work is messy because the systems do not match up in the same way which makes it more difficult to systematise the data and the analysis under common procedures. For example, it is not possible to separate the analysis of the data under different degrees of jurisdiction, of first hearings and appeal processes, because these are combined in France. It is also difficult to organise the analysis under two orders of legality: one which would entail a constitutional scrutiny of the legislation and the other a scrutiny of the executive action. If both exist in France and the UK, to the extent that sections 3 and 4 of the HRA allow for a form of rights-based review of the legislation, they are unfit for such categorisation. The broader categories which have been developed by comparative scholars, of administrative or constitutional law, also appear limited. For example, Tushnet (2019) when discussing the structures of constitutional review, lists “diffuse, generalist, strong-form review”, “centralized and specialized review”, and a “weak form of judicial review”. In France it is centralised (or at least semi-centralised since the Conseil d’Etat operates a filtering mechanism) and specialised to constitutional questions only, whereas in the UK the Supreme Court appears to enjoy powers of “quasi” constitutional review in relation to some limited areas. But the Supreme Court is also and arguably primarily an ordinary court which supervises ordinary judicial review cases and, in that sense, strongly differs from the Constitutional Council. Tushnet (2019) also discusses “weak” constitutional review powers against “strong” ones, which include power to override. From this perspective, the UK Supreme Court is marked out as a “weak” court whereas the French one is “strong”, because the French Constitutional Council can disapply primary legislation which the UK Supreme Court cannot do. Therefore, to account for this complexity, I will organise the data in a way which clearly differentiates between the practices of France and the UK, and between forms of constitutional scrutiny as compared with the scrutiny of the other courts. The critical questions which I address in the next sections are whether these structural differences and limitations of reach matter for deprivation purposes in the cases that have come before the courts and, if not, why not.

5.4 Judicial views on citizenship

In this section, to refine the terms of the analyses about what is important in deprivation cases, I first turn to judicial views of citizenship as they have come up in non-deprivation cases. One potential issue

for the judges when faced with deprivation cases is that citizenship is not dealt with by legislation in both contexts other than through its modes of acquisition.¹⁵ To that extent, it is unclear what individuals lose when they lose their citizenship. I then examine whether the different contexts of citizenship deprivation, of security, allegiance and rights, permeate the courtrooms of France and the UK, before turning to how the courts balance these different claims. I draw on existing literature which has analysed deprivation cases in the UK in the recent past, extend the analyses to the French context, and compare both approaches with recent cases in France and the UK.

5.4.1 Judicial approaches to citizenship in non-deprivation cases

The analysis of the previous chapters evidenced that citizenship has important substantive features: it affords rights and/or it is the primary gateway to operate these rights. If it is true that immigration statuses avail rights to individuals – such as, in the UK, the right for Commonwealth citizens to vote – citizenship remains critical because it is the most secured immigration status to operationalise these rights and it is the only status which precludes deportation. It also secures access to citizenship of the EU,¹⁶ although the UK's withdrawal from the EU leaves this access uncertain. Alongside rights, citizenship encompasses duties (to pay taxes and/or to participate in the army), a dimension which is often referred to institutional reports.¹⁷ When subjecthood was the defining bond which attached individuals to the state, these duties were also of allegiance and loyalty and sanctioned under treason laws. As I expounded in chapter 2, the offence of treason still exists in both frameworks but is largely falling in desuetude and/or limited to intelligence-sharing.

A minimal judicial approach to citizenship as a statement of rights would thus focus on the right of abode because that right allows individuals to actionize other territorially grounded rights which are not linked to statutory citizenship, a point which Fransman (2011) makes in the UK. By contrast, Prabhat (2016a), also in the context of the UK, writes that a more maximal approach to citizenship would acknowledge that citizenship is more than a legal status: it is a core element of the individual and its connection to rights is there to facilitate life in society. She contends that a maximal approach

¹⁵ This critical feature has been acknowledged by institutional reports in both countries: in France, see Conseil d'Etat, « La citoyenneté. Être (un) citoyen aujourd'hui », Les rapports du Conseil d'Etat (ancienne collection études et documents du Conseil d'Etat), 2018, 211pp, at p32;

<https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/184000629.pdf> (29/07/2019).

And in the UK, "Citizenship: our common bond", Lord Goldsmith QC, Citizenship Review, March 2008, 138 pp, at p6

<http://image.guardian.co.uk/sys-files/Politics/documents/2008/03/11/citizenship-report-full.pdf> (11/09/2019).

¹⁶ Initially, the rights which European citizenship protects were reserved to workers within the EU and required a cross-border element, but increasingly the jurisprudence of the EU tends to extend them to all EU citizens. See Hoogenboom (2015); de Groot and Luk (2014) .

¹⁷ *Op cit* 15.

to citizenship would manifest itself in the court judgments through discussions of how the loss of citizenship impacts citizens and engage with the unequal application of the law to different kinds of citizens (Prabhat, 2016a: 11). In non-deprivation cases, the judgments suggest that the courts have been willing to recognise a maximal view of citizenship rights. For example, the Court of Appeal of England and Wales, in the case of *Fayed (R v Secretary of State for the Home Department ex parte Mohammed Fayed [1996] EWCA Civ 946)*, said that

“... apart from the damaging effect on their reputation of having their application refused the refusal has deprived them of the benefits of citizenship. The benefits are substantial. Besides the intangible benefit of being a citizen of a country which is their and their families’ home, there are the tangible benefits which include freedom from immigration control, citizenship of the European Union and the rights which accompany that citizenship, the right to vote and the right to stand in Parliamentary elections” (para 773).

The case dealt with two applicants who had been refused naturalisation and not been given reasons for the decision, and the court clearly established a connection to the substantive features of citizenship: civil, political and socio-economic rights, and those deriving from European citizenship.

In the French context, there are few, if any, judicial decisions which frame the contours of citizenship. In a report, the Conseil d’Etat says that this is because it would be inappropriate to enclose a “complex idea into a judicial decision”, where a “restrictive approach could be cleaving and/or exclusionary”.¹⁸ Perhaps this acknowledges the historical legacy of judicial interpretation in France, whereby the judges as “mouthpiece of the law” have fewer interpretative powers than in the UK. Insights into what the status of being a citizen encompasses exist but in more specific case law. For example, the cases which discuss the extent to which equality in accessing rights applies to citizens and non-citizens alike reveal that statutory citizenship is not juridically analysed as encompassing anything more than the right to vote and to hold core public functions (Schwartz, 2013). What this shows, then, is that a similar connection to citizenship as a statement of rights has been made in France and the UK. In deprivation cases, however, these views fail to permeate in full.

5.4.2 Judicial views in deprivation cases in the (recent) past

In the UK, the case of *Pham (Pham v Secretary of State for the Home Department [2015] UKSC 19)* before the Supreme Court marked a potentially critical moment for the future of deprivation cases. Pham is a Vietnamese-born individual who had later acquired British citizenship and had been issued

¹⁸ Institutional report from the Conseil d’Etat *op.cit* 15 at p32.

a deprivation order in 2011 on grounds that he was involved in terrorist-related activities. In this case, the lawyers argued that the decision was unlawful on several grounds. They contended that it left Pham stateless, if not in law at least in practice, and that EU rights issues arose (para 30 of the judgment). Because the issue of European citizenship rights was only raised before the Supreme Court, the court refused to engage with any other issue than statelessness and found against Pham. According to the court, Pham was not made stateless in law and, even if he was potentially left stateless in practice, *de facto* statelessness was not precluded by the legislation. The Supreme Court did, however, find that citizenship was a status “fundamental at common law as it is in European and international law” (Lord Mance, para 97). But perhaps the *Pham* case before the Supreme Court is critical for what it failed to establish: a full connection with rights. In the Supreme Court case of *Al Jedda (Al Jedda v Secretary of State for the Home Department [2013] UKSC 62)*, a case which was adjudicated before *Pham*, the Supreme Court also did not deploy rights around citizenship. It did, however, rule against the government in that it found that the order had left Al Jedda stateless and was, therefore, unlawful (para 33 of the judgment).

In France, up until recently, the Conseil d’Etat also made very few connections to rights. In the cases of *MY* (no 171.879, 15th March 1999), *MX* (no 251.299, 18th June 2003) and *MA* (no 301.967, 26th September 2007), the Conseil d’Etat refused all connections to article 8 ECHR (private and family life). The first paragraph of article 8 states that “everyone has the right to respect for his private and family life, his home and his correspondence”. The reasons for such refusal are explicated in the case of *MA*. In this case, the Conseil d’Etat argued that, since an order of cancellation of citizenship does not necessarily entail the future deportation of the individual, article 8 (family life) was not engaged. The interpretation of the Conseil d’Etat thus emulated a “minimal” approach to citizenship, one which focuses on citizenship as a protective immigration status. In *MX* as well as in *MQ* (no 383.664, 11th May 2015) the court also refused to consider that article 14 ECHR (non-discrimination) was engaged because article 14 is not a free-standing right and the right to acquire a nationality is not under the rights protected by the Convention (*MQ*, cons 9 of the judgment).¹⁹

5.4.2.1 Formalism

In her analysis of the deprivation case law until *Pham*, Prabhat (2016a; 2016b) points out critical factors which can explain why rights issues have been evaded in the context of the UK. She demonstrates that one such factor links to mobilisation from the lawyers who overly relied on formal, procedural, grounds to challenge the legality of the powers, thereby precluding full substantive review

¹⁹ “Cons” (in French: “*considérant*”) refers to the different paragraphs of the decision from the Constitutional Council or the Conseil d’Etat. I thus use it in lieu of “para” for the French cases.

from the courts. Typical examples of procedural arguments addressed issues of statelessness and EU legislation – arguments which were also present in *Pham*. Through interviews with the lawyers, she explains that their aim was always to attempt to bring forth the strongest issue which, in these instances, was statelessness. This is because, from the case of *G1 (G1 v Secretary of State for the Home Department [2012] EWCA Civ 867, see Laws LJ, para 38)* – and since it has not been yet settled – the application of EU legislation to citizenship deprivation cases remains contested. Arguments about rights were considered “weak” because there was no clear precedent about the loss of citizenship rights (Prabhat, 2016a: 10). Prabhat also reports that some lawyers found this approach, of arguing narrow, procedural grounds, more “professional” (Prabhat, 2016a: 17). This appeal to formalism (*ie* of arguing narrow, procedural grounds) is a critical feature of the juridical cultures in systems of parliamentary sovereignty more broadly. In his work on comparative constitutional interpretation, Goldsworthy demonstrates that Canadian, Australian and Indian judges are “imbibed” with the “British constitutional tradition of parliamentary sovereignty” which calls for “legislative rectitude” and “deference to the legislative will” (Goldsworthy, 2012: 712). To that extent, it is possible, as Prabhat evidences in her work, that the formal structures of the legal system and constitutional principles narrow the range of arguments which lawyers can put forward. It could also be, as Prabhat contends, that the sanction of someone’s conduct for reasons of security is only strong when it is balanced against rightlessness, and/or that national security concerns suspend ordinary rights and protection, and/or that these features might be exacerbated in cases involving minority clients. As she notes, minority citizens who are alleged to have committed wrongful acts against the state may not be considered as deserving of equal citizenship anymore. To that extent, she hypothesises that it could explain why lawyers would first seek to establish the eligibility of their clients for basic legal safeguards, here, through statelessness considerations, *ie* a claim to vindicate their rights (Prabhat, 2016a: 17–18).

Prabhat’s analyses, which account for a minimal view of citizenship in deprivation cases, seem equally relevant to the French cases previously mentioned. Although French lawyers have made more connections to rights through article 8, it is possible that formalism permeated and restricted the scope of the scrutiny of the court. Although the data is missing here to fully establish this potential connection, broader comments can be made about the French approach to formalism. In France, judicial reasoning about rights or other matters is primarily approached through “deduction” and syllogism, whereby a conclusion is drawn from two premises: a “major” premise (the legal rule or principle) and a “minor” one (the facts). The decisions are very short, give little justification of the reasoning and do not fully engage with the facts (at least in the decision). For example, in the case of *MA*, the Conseil d’Etat argued that citizenship deprivation does not include deportation, therefore

article 8 – to the extent that it deals with the individual’s family life – is not engaged. This approach to reasoning is, arguably, there to preclude arbitrary decisions of judge-made law and to foster “objectivity” (Steiner, 2018: 141). This approach seems to leave little scope for rights issues to permeate and can potentially explain why, here too, judicial views on citizenship were minimal.

5.4.2.2 *The 1996 and 2014 constitutional reviews in France*

The Constitutional Council has been more generous in connecting citizenship with rights and, especially, with the principle of equality. The Constitutional Council, in an interpretative note on the principle of equality, talks about the French “passion for equality”, one which has multiple “anchorage” in the Constitution.²⁰ Historically, equality in the French context means formal equality: article 6 of the DRMC states that “the law must be the same for all”. But the principle has since been “eased”.²¹ The claim that citizenship deprivation interfered with the principle of equality protected by the Constitution came up before the Constitutional Council at the end of the 1990s, when the government added terrorism as a ground for deprivation. The form of constitutional scrutiny exercised at the time was *ex ante*, ie prior to the incorporation of the law. In 1996, the Council argued that it would be possible to derogate from the constitutional principle of equality in two specific situations: either because the individuals are in “different situations”, or because there is a reason of “general interest” which justifies a departure from formal equality (DC 96-377, 16th July 1996):

“... the principle of equality does not prevent the legislator from treating differently different situations, nor from derogating from the principle of equality in the public interest; provided that in both instances there is a rationale connection between the measure implemented and the difference in treatment” (*cons* 22).

The Council argued that naturalised citizens and birthright citizens are in a similar situation under French law but it accepted that the fight against terrorism was a relevant justification to depart from the formal equality of citizens, so long as it is for a short period of time (*cons* 23). The Council thus introduces a nuanced view of citizenship: although it is making a statement that citizenship *means* equal citizenship irrespective of the mode of entry into the citizenry, thereby, reproducing the narratives of the Revolution presented in chapter 3, it accepts that national security protection suspends, for a limited period, this fundamental recognition.

²⁰ Conseil Constitutionnel, « ‘Le principe d’égalité’, exposé présenté lors de la visite du Conseil constitutionnel, le 18 septembre 2001, d’un groupe d’universitaires britanniques » 46pp, p5
https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/pdf/Conseil/princeg2.pdf
(24/10/2019).

²¹ *Ibid.*

More recently, in 2014, a QPC was issued before the Constitutional Council which challenged the constitutionality of citizenship deprivation (Constitutional Council, no 2014-439 QPC of 23rd January 2015, *Ahmed S*). The claimant, Ahmed S, was born in Morocco and deprived of his citizenship by an order issued in May 2014. He had obtained French citizenship by registration in 2002 and kept both nationalities. In 2013, he was sentenced to a prison term of seven years for participating in an organisation with terrorist motives. Although he was released in 2015, he was subsequently deported to Morocco. The claimant and his lawyers argued that citizenship deprivation was incompatible with some of the principles of the DRMC, including the principle of equality (article 6 DRMC 1789) and the right to respect for private life which, they argued, fell under the “imprescriptible rights of man” listed under article 2 of the DRMC (*cons* 3).²² The Constitutional Council refused to read in nationality as falling under private life (*cons* 16) but agreed that it interfered with the principle of equality. For reasons which I develop later in this chapter, and which matched the rationale of 1996, it did not find that the interference with equality was enough to set aside the legislation. With regards to private life, from a reading of the decision (which is only five pages long), it is not possible to determine why private life was not connected to citizenship. Evidence of the reasons for the decision, in the sense of what legal authority motivated the decision, are sometimes present in the commentaries to the QPC which are also drafted by the Council (Denquin, 2012). In this instance, the commentary reveals that the Council did not wish to enshrine an extensive approach to private life because it considered that nationality does not fall under the “sphere of intimacy” of the individual.²³

In sum, as it appears, the courts’ connections to citizenship rights were minimal in the recent past. Only the Constitutional Council in France was more explicit in determining the content of citizenship, but it accepted that terrorism is a legitimate ground to depart from equal citizenship. However, in more recent case law, the courts of both France and the UK have been more willing to expand on what citizenship encompasses.

²² Article 6 DRMC 1789 states that: “The law is the expression of the general will. [...] It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents.” Article 2 states that: “the aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.” The lawyers also argued that the measure breached the principle of necessity and proportionality of the sentences (article 8 DRMC), the principle of accessibility and intelligibility of the law, and the principle of legal certainty (*cons* 3).

²³ Commentaire, Décision n 2014-439 QPC, 23rd January 2015, *Ahmed S (Déchéance de nationalité)*, Conseil Constitutionnel https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2014439qpc/2014439qpc_ccc.pdf (11/09/2019)

5.4.3 Judicial views in recent deprivation cases: more connection to rights

Since the case of *Pham* in the UK, more connections to rights have been made, but they have all failed and/or not triggered full juridical scrutiny. The primary gateway through which these rights claims came has been via article 8 of the ECHR, as protected by the HRA (right to private and family life). During the passing of the Immigration bill in 2014, which modified the conditions for citizenship deprivation, the government acknowledged that article 8 could be engaged. As it framed it: “this is because nationality is part of a person’s identity and, therefore, potentially their private life. This applies to all deprivation, not just deprivation rendering someone stateless”.²⁴ Despite the connection being made between citizenship and private life (identity), article 8 issues were primarily argued under family life. This is because in at least three cases, including the case of *Pham* when it was remitted to the Court of Appeal, the individuals were outside of the UK when deprived, thereby prevented from operationalising their family connections when they did in fact have some.²⁵ To that extent, it is possible that the lawyers found this limb of article 8 to be a stronger one. But in neither of these cases were the individuals successful, largely because the courts found the case of the Home Secretary to be overriding.

In France, connections with rights have come about in a more thorough way in recent case law. In *Ahmed S*, when the case was referred back to the Conseil d’Etat on merits (*MQ* no 383.664, 11th May 2015), the Conseil accepted that a deprivation order could interfere with the principles of non-discrimination under EU law (articles 20 and 21 of the Charter of Fundamental Rights), but it found that the distinction operated under French law was not a disproportionate infringement of EU rights (at *cons* 7 and 8 of the judgment). The Conseil also made explicit connections to private life under article 8 ECHR in five deprivation cases issued in 2016 (which were adjudicated under one standardised decision on points of law) (*MA* no 394.348, 8th June 2016).²⁶ The cases dealt with five individuals who had been sentenced for participating in an association of individuals with terrorist motives by the Court of Appeal of Paris in 2007 and deprived of their citizenship in 2015. Amongst them, two were born in France and acquired French citizenship by registration, two acquired citizenship by marriage, and one through the naturalisation of his father. All were married and had children in France. The individuals were all in France when deprived of their citizenship. The conclusions of the *rapporteur* in

²⁴ Home Office, “Immigration Bill: European Convention on Human Rights Supplementary Memorandum”, 2014 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276660/Deprivation_ECHR_memo.pdf (27/11/2019)

²⁵ For example, *S1, T1, U1 & V1 v Secretary of State for the Home Department* [2016] EWCA Civ 560; *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064. And, also, before the SIAC: *M2 v Secretary of State for the Home Department* SC/124/2014.

²⁶ I refer to these cases hereafter as “MA”.

these cases are critical because they shed light onto what potentially directed the decision of the court.²⁷ The *rapporteur* asked the Conseil d'Etat to "update" its approach to article 8 ECHR in light of the case law from the European Court of Human Rights (ECtHR). In *Genovese v Malta* (no 53124/09, 11th October 2011) the ECtHR found that, despite the absence of a general right to citizenship under the Convention, article 8 could be engaged because citizenship constitutes an important feature of the "social identity" of individuals which falls under the "private life" of the individual (para 30 of the judgment). The *rapporteur* argued that the Conseil d'Etat should acknowledge the "reality" that "the nationality of an individual is a structuring feature of his/her legal *and* personal identity" (p7 of the conclusions). In line with the *rapporteur*, the Conseil d'Etat found that article 8 was engaged because it interfered with the social identity of the individuals but did not consider the infringement to be disproportionate.

What this shows is that connections to rights were brought out in both contexts, although with more intensity in the case of France. However, despite these different connections and their varying intensities, rights were not upheld in either context. In the next section, I move beyond the review of the structure of rights to the intensity of the scrutiny which the courts operate in these instances as a potential explanation to why citizenship as a right fails to make the critical difference in these instances. I use Chan's (2013) understanding of intensity of review, which entails both the standard of review applied and the minimal or maximal degree of application of the standard in the case.

5.5 Proportionality: the gateway to deprivation cases?

In the case of *Rottmann* (Case C-135/08, 2nd March 2010, *Janko Rottmann v Freistaat Bayern*), which I mentioned in chapter 2, the Court of Justice of the EU pointed out critical factors which national courts should take into consideration when assessing the legality of state action in deprivation cases (in this instance, a case of deprivation on grounds of fraud). According to the court, citizenship of the EU is the most "fundamental" status of the individual and, despite nationality being a core prerogative of member states, the relevant authorities must have "due regard" to the status of European citizenship when determining matters of nationality (para 39 and 45). For the national courts, this means ensuring that the decision observes the principle of proportionality in light of the relevant facts of the case (para 55). The doctrine of proportionality can take different forms but at its core helps to establish whether a limitation or a restriction on a right is justifiable. It is a method of judicial reasoning which considers issues of appropriateness or suitability (of the measure), in pursuit of a legitimate objective, less intrusive means to pursue that aim, and strikes a balance between these different

²⁷ Conclusions of the *rapporteur public*, on case no 394348, *Conseil d'Etat*, of 8th June 2016

interests (in terms of benefits and advantages) (Sauter, 2013: 448). Or, at least, these are the steps which are normally prescribed at the European level and especially in the ECtHR, but there can have variations in domestic approaches (Rivers, 2006). It has been described as fostering a “culture of justification” because it allows individuals, through judicial channels, to require justifications from the state about particular conduct, justification which must meet a certain degree of reasoning (Cohen-Eliya and Porat, 2011; Ferreres Comella, 2018). In *Rottmann* the CJEU said that proportionality should be considered in light of both European law principles, as well as “where appropriate” domestic law (para 55). In the eyes of the courts, this means having due regard to the importance of the status of the citizen of the EU and, in examining whether the decision is necessary, looking at the consequences of the decision on the right to private and family life of the individual, the kind of offence committed by the person (whether it is a grave one or not) and whether the individual holds another citizenship (para 56). Some of these factors, and, especially, the call for proportionality analysis in citizenship deprivation cases, have been echoed by recent case law in France and the UK, but the implementation of the standard is not a consistent one.

5.5.1 Proportionality in France and the UK

Proportionality in the UK applies to the protection of Convention rights under the HRA, but it has also a distinct common law grounding when rights are at stake (see *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26). Previously, when state action was engaging rights, the judges would examine whether a decision was unreasonable using a standard set out in the *Wednesbury* case (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223), or irrational when the objectives of the measure were clearly not suitable to the means adopted. Craig frames reasonableness as a ground “concerned with review of the weight and balance accorded by the primary decision maker to factors that have been or can be deemed relevant in pursuit of a prima facie allowable purpose” (Craig, 2013: 132). In other words, reasonableness focuses on the decision-maker’s attitude when making a decision, and this attitude must be manifest. But since, under judicial review proceedings and, in the context of appeals before the SIAC, the judges are not concerned with the correctness of the decision (*ie* merits review), historically the judges have granted broad deference to the decision-maker under this ground (Jowell, 2018: 5). Proportionality, then, with its emphasis on justification for state action and fair balance, arguably creates the conditions for a more intensive scrutiny from the judges. From the case law, Chan (2013: 7) finds that the UK approach to proportionality includes: whether the measure pursues an important aim; whether the measure is rationally connected to that aim; and whether the measure is no more than necessary to achieve that aim (fair balance), which can also entail whether the benefits of the measure are overall worth the

costs. However, despite proportionality being recognised in matters involving rights, this does not mean that the courts would apply it consistently. Chan (2013: 9–10) finds that in practice the UK courts have often implemented minimal or light-touch proportionality through, for example, the skipping of stages in the analysis,²⁸ or the merging of proportionality into a “reasonableness” or “fair balance” review, or limiting the intervention of the court to cases of “manifest” disproportionality”.

In France, proportionality also has a distinct domestic grounding: in 1917, the French Conseil d’Etat argued that restrictions to civil liberties in the name of “public order” (*l’ordre public*) were not unconditional (*Baldy* no 59855, 10th August 1917). Rather, the *Commissaire* of the government²⁹ said, in his conclusions to the case, that “liberty is the rule and police restrictions the exception”. In the case of *Benjamin* (May 1933), the Conseil d’Etat applied the *Baldy* principle and quashed the decision of a mayor to forbid a public conference which had the potential to cause public order issues because lesser intrusive means to the freedom of association of the individual were available to the mayor. But, as the then vice president of the Conseil d’Etat indicated, it is more recently, under the influence of European law, that a full proportionality review was introduced to the jurisprudence of the Conseil d’Etat: the court now implements a “triple proportionality check”: of suitability, necessity and proportionality in a narrow sense.³⁰ This approach to proportionality in a narrow sense (*ie* of the balancing exercise)³¹ is minimal as compared with European standards: it does not weight the costs and benefits, and most of the time it does not consider lesser intrusive means (Fromont, 1995). It lies somewhere in between what could be considered as the French example of “reasonableness”, the scrutiny of the “manifest error of appreciation” and the European standard of proportionality, which the French courts understand as being modulated according to the specific context. In the words of the then president of the Conseil d’Etat: “proportionality should not lead to a substitution of the views of the judges to that of the representatives of the people”.³² To that extent, he identifies three “precautions”: that the scrutiny should be stable and coherent to be predictable; that there should be explicit and rigorous reasoning; and that it should *really* entail a balancing of all the interests at stake and not the “systematic predominance of fundamental rights over the general interests”.³³ Cahn

²⁸ Rivers (2006) makes a similar claim and writes that the UK courts tend to confuse the “lesser intrusive measures” and “fair balance” requirement under proportionality *stricto sensu*.

²⁹ Former equivalent of the *rapporteur*.

³⁰ “le principe de proportionnalité, protecteur des libertés” : JM Sauvé (then) vice president of the Conseil d’Etat, 2017

<https://www.conseil-etat.fr/actualites/discours-et-interventions/le-principe-de-proportionnalite-protecteur-des-libertes> (29/11/2019).

³¹ In France it is commonly referred to as “*contrôle plein*” or “*contrôle entier*”.

³² *Op cit* 30.

³³ *Ibid*.

(2016: 13) notes that the scrutiny implemented during the state of emergency, for example, was of variable intensity or nuanced: initially deferential towards the state it later became more restrictive.

Before the Constitutional Council, the stakes of the intensity of judicial scrutiny are different because the Council scrutinises parliamentary behaviour. What the council looks at is whether the legislation is suitable for the pursuit of the legitimate aims identified (thereby scrutinising whether those aims are legitimate) and that these are not manifestly disproportionate to the rights protected in the Constitution (Fromont, 1995; Goessel le Bihan, 2007). The kind of test implemented, the “manifest disproportion”, echoes the “reasonableness” under UK judicial review: it is a light-touch one because “the council has always hesitated to go down this road in order to avoid dwelling upon a ‘proportionality review’ [understanding cost and benefit or proportionality *stricto sensu*] which would put itself in the shoes of the legislator”.³⁴ The only thing the Council checks is that the distinction is not the product of a “manifestly striking error of appreciation from the legislator”, *ie* that the legislator was not being unreasonable in striking the balance.

However, the intensity of the review can vary depending on the principle interfered with. This suggests that there is a hierarchy of rights and that the Council has the primary role of determining what this hierarchy is. Rousseau makes the point that constitutional interpretation involves a court engaged in a balance of power with other institutions of a different nature which taken together define “a system for articulating competing norms”(Rousseau, 2007: 39; Rousseau, 1992). If it is a norm which the Council thinks of as superior, the kind of review exercised is a “full” one: there is no reference to the “striking disproportion” and the limitation of Parliament must be justified by a norm of competing value (the doctrine identifies here instances of individual liberties and/or liberty of communication) (Goessel le Bihan, 2007). However, the Council has nuanced this approach when faced with national security legislation: although such legislation most of the time interferes with “individual liberties”, the scrutiny exercised by the Council is one of “manifest disproportion”(Roudier, 2012). With these contextual cues in mind, proportionality has been recognised as an adequate form of scrutiny in deprivation cases.

5.5.2 Recognition of proportionality in deprivation cases

In *Pham*, the Supreme Court concluded that the deprivation of a person’s citizenship was of such gravity that the common law would require a degree of intensity of review which satisfies that of proportionality under European legislation. As Lord Mance put it:

³⁴ *Op cit* 20, document from the Constitutional Council on the principle of equality, p5.

“... removal of British citizenship ... is, on any view, a radical step, ... a correspondingly strict standard of judicial review must apply to any exercise of the power contained in section 40(2) and the tool of proportionality is one which would, in my view ... Be both available and valuable for the purposes of such review” (para 98).

For Lord Sumption, what review is about is a “sliding scale, in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference” (para 106). And, in the case of deprivation of citizenship, he finds that both citizenship of an individual and the security of the UK were at the “weightiest end[s]” (para 108) of the scale. Lord Sumption gave indications as to what the lower courts should take into account, namely, “the fact that the home secretary is the statutory decision-maker, and to the executive’s special institutional competence in the area of national security”, but in a way which would not evade a proportionality test (para 108).

In France, too, proportionality was recently advocated and subsequently endorsed by the Conseil d’Etat. It is, in fact, the *rapporteur* who argued for the implementation of this standard. According to him, the intensity of the scrutiny exercised until then was “excessively restrictive” in light of the impact of the measure on the individual, as well as inconsistent (p4 of the conclusions). He also found that the practice of the Conseil d’Etat during the state of emergency “moved away” from the idea that the more “exceptional” the power the more deference to the executive. As he frames it:

“the vigour of the implementation of the prerogative of the state should always find a counterbalancing, not a supplementary adjuvant in the scrutiny of the judge, who can still implement a proportionality check and take into account the margin of appreciation of the administration” (p6).

What this shows is that the *rapporteur* seems to call upon the Conseil d’Etat to exercise deference, if it so wishes, at a later stage in the scrutiny, when balancing the interests at stake *stricto sensu*. The Conseil d’Etat followed the conclusions of the *rapporteur* in the cases of *MA* and increased its scrutiny of the powers. In both France and the UK, there seems to be a connection between the recent practices of the state and escalation of executive power and the increase in the intensity of the scrutiny of the courts, which could tell us something about the courts’ understanding of their own power and position within the state. The *Pham* case was issued post-immigration amendment (2014) at a time where the state drastically increased its recourse to the power, while the French case came after the first years of the state of emergency. There thus appears to be a different, more intense, standard of scrutiny of executive action, but the data is not sufficient to establish this connection.

Despite recognising proportionality as the correct standard of review, in both France and the UK it has been applied with a minimal, light-touch approach.

5.6 Proportionality in practice: deference and restraint

In his work, Rivers (2006) examines varying intensities of proportionality review which the judges seem to apply in the UK, but his analyses appear to be also relevant to other contexts. What he refers to is the extent to which deference and restraint permeate the case law, and with what intensity. As he notes, excessive (or maximal) restraint pervades when the courts feel precluded from questioning the view of the decision taken about what is necessary to achieve the public interest, whereas a moderate degree of restraint would include some degree of evaluation of the costs and advantages of the measure. A minimum degree of restraint, according to Rivers, would entail a certain degree of convincing the court that the decision is the best way of optimising the rights and interests at stake. By contrast, Rivers measures different degrees of deference according to the confidence which is being placed upon the competence of the decision-maker. He suggests that this would be evidenced through, for example, requirements of the disclosure of the full facts of the case. According to him, the adequate degree of deference or restraint should be guided by the seriousness of the limitation of rights in the specific case (Rivers, 2006) – a point which was echoed by Lord Sumption in *Pham*. Drawing on River's analyses of varying intensities of deference and restraint, in this section I look at how the courts have engaged with proportionality in practice. I examine the scrutiny of the Constitutional Council separately.

5.6.1 Private and family life

As I previously indicated, article 8 issues recently came before the UK courts and the Conseil d'Etat. The case of *S1, T1, U1 and V1 v Secretary of State for the Home Department* [2016] EWCA Civ 560 before the England and Wales Court of Appeal deals with four members of the same family who were deprived of their citizenship in 2011 for allegations of active participation in a terrorist organisation (Lashkar-e-Tayibba). All four individuals were dual nationality holders and had moved to Pakistan in 2009. In this case, the article 8 issue arose in connection with one of claimant S1's wife and son who were both British citizens. Both moved to Pakistan with the family in 2008. Although the rights issue came in late in this case, the Court of Appeal accepted the need to look at it in light of *Pham* because of the importance of the standard of review set in this case. According to the court, "there would be an air of unreality in considering these appeals without applying the principles set out in *Pham*" (para 5 of the judgment). S1 argued that the deprivation order precluded him from returning to the UK and disproportionately infringed on his right to family life. However, according to the Court of Appeal, the

SIAC was right to argue that his article 8 claim should fail because of the risk he posed to the security of the UK. According to the judge, this finding should apply irrespective of whether the claimant was actually separated from his family or not. As the judge framed it:

“There can be little doubt, in my view, that if Mrs S and A [the claimant’s wife and son] had remained in, or returned to, the United Kingdom article 8 would not have provided a basis for contending that S1 should be admitted in the face of a finding that his presence here constituted a danger to national security” (para 108).

The Court of Appeal also agreed with the SIAC’s refusal to consider the possibility to put the individuals under less restrictive measures, such as terrorism prevention and investigation measures (TPIMs), since the underlying premise of the deprivation was that the presence of the appellant in the UK constituted a threat to the country. It also noted that it would be costly to put the individual under TPIMs and would direct funds away from other activities; in other words that it would be a “second best” (para 44 of the judgment). It referred to this issue as a consideration of proportionality in a “wider context” and concluded that it was an “unrealistic submission” (paras 44–45). The case reveals that the court was both deferential and restrained: it refused to engage with what it seemed to consider as policy arguments (*eg* the placing of the individual under TPIMs) and, in a similar way to what has been evidenced by Chan (2013), merged the different steps of proportionality.

In the French cases, as noted, article 8 issues under family life were rejected by the Conseil d’Etat. According to the *rapporteur*, the consequences of a deprivation order on the stay of the individual are “uncertain” (p11), *ie* that it is not clear whether they will be deported or not. However, in at least one instance post 9/11, the French government sought to deport the individual to his second country of nationality, Algeria, after issuing a deprivation order. In this case, the ECHR cancelled the deportation order because of the potential risk of an infringement of his article 3 right (the prevention against torture, which is absolute) if he was deported to Algeria (ECHR, no 1957/08, 3rd of March 2010, *Daoudi v France*). In his conclusions, the *rapporteur* referred to *Daoudi* and warned the Conseil d’Etat against the potential future behaviour of the administration. He recalled that it is crucial for the administration to respect the jurisprudence of the ECtHR when deporting individuals and, especially, to pay due regard to their right to a remedy and to the *effective* character of that remedy (p11). He also praised the Conseil d’Etat for standing “firm” against the administration in these instances, irrespective of the “criticisms which may ensue” (p11), from the state or the public. In other words: the *rapporteur* asked the Conseil d’Etat to defer to the executive in this instance, but to be stricter in its scrutiny when it is ascertained that individuals were going to be deported. With regards to the other limb of article 8, *ie* citizenship as a constitutive element of the identity of the individual, the Conseil d’Etat argued that

such infringement was not disproportionate in light of the “gravity of the action committed” (*cons* 15).³⁵ Besides security protection, the conclusions from the *rapporteur* on this specific issue are revelatory of another set of arguments which played a role here, namely, the fact that the individuals had separate allegiances. Allegiance was also argued against *Pham* when the case was remitted to the Court of Appeal, which makes it relevant here. In both contexts, the connection of citizenship to allegiance played to the disadvantage of the claimants.

5.6.2 Allegiance

The *rapporteur* in the *MA* case noted that the infringement to “citizenship as identity” was a strong ground for at least three individuals out of the five in this case. These three individuals did not acquire citizenship through marriage and two of them were born in France of foreign parents. However, the *rapporteur* contended that their actions clearly indicated that the development of their personal identity was not built around allegiance to France and its values and should not be upheld.

“[Despite MM, TG and C having stronger claims to infringement of their personal identity] it is worth noting that the actions for which they were sentenced reveal [different] allegiances as well as the little role that their allegiance to France and its values played in the development of their personal identity” (p11).

The *rapporteur* referred to the commentary of the Constitutional Council in the 2014 QPC which traced the origin of deprivation as grounded in the idea that the sovereign state must be able to defend itself against the wrongful action of the foreigners it has accepted into its own “allegiance”.³⁶ He drew from this the principle that “in removing the nationality it had granted, the French state excludes from the national community those whom it had symbolically welcomed” (p5). Allegiance is thus, allegedly, supposed to mirror the procedure of naturalisation, whereby applicants must “prove” their assimilation to France, and, to that extent, this is thus only relevant as a legal argument so long as it applies to naturalised citizens. Already here it is possible to note discrepancies in this analysis, in that for individuals who had acquired citizenship through registration, which is the case for at least two of the claimants, there is no condition of assimilation or good conduct. The only condition is one of residence. Indeed, this links back to the developments outlined in chapter 4, that the requirements of integration for individuals who naturalise pass on to their descendants. It also potentially illustrates

³⁵ The claimants in *MA* have since petitioned before the ECHR (no 522273/16, *Ghoumid v France*), on the grounds that citizenship deprivation is a disproportionate infringement of their article 8 right of citizenship as identity, that deprivation interferes with the principle of *non bis in idem* (ie of not being sentenced twice for the same facts) because it would be a “sentence in disguise”. The judgment is still pending.

³⁶ *Op cit* 23, commentary from the Constitutional Council on the decision of *Ahmed S*, p1.

the narrative of national citizenship developed in chapter 3: that, through integration, citizens must have an undivided allegiance – they must relegate their “particularities” or identities to the private sphere.

The Conseil d’Etat followed the conclusions from the *rapporteur* and found that, despite article 8 being engaged, there was no disproportionate infringement of the rights of the individuals in light of the gravity of their past actions (MA no 394.348, 8th June 2016, Conseil d’Etat, *cons* 15). The Conseil d’Etat also accepted the argument that citizenship deprivation was an administrative sanction which was grounded in the purported breach of allegiance of the claimant which, therefore, did not lead to a breach of the principle of *non bis in idem* (of not being sentenced twice for the same facts) as the actions of the individuals had already triggered a criminal sentencing (MA no 394.348, 8th June 2016, *Conseil d’Etat, cons* 10).³⁷

In the UK, too, issues of allegiance filtered through. The stakes in *Pham* (*Pham v Secretary of State for the Home Department* [2018] EWCA Civ 206, para 49) before the Court of Appeal differed from those before the Supreme Court: the individual had since been sentenced in the United States to 40 years’ imprisonment for a terrorist offence and is now serving that term in a high-security prison there. *Pham* was thus no longer a current threat to the security of the UK. However, the government argued that *Pham* should be deprived of his citizenship on the basis that he had repudiated his obligation of loyalty. The Court of Appeal accepted the argument and found that, despite citizenship being an “important and weighty right”, nationality is a “right which carries obligations: it derives from feudal law where the obligation of the liege was to protect, and the obligation of the subject was to be faithful” (para 49). In this case, *Pham*’s criminal conduct was interpreted as a breach of his obligations as a citizen (para 51) which justified the state’s will to seek to “be relieved of any further obligation to protect the appellant” (para 51). This deference to the executive is triggered because under UK law issues of loyalty are treated by a separate set of rules: the criminal offence of treason. Disloyalty and disaffection to the Crown did exist as a standard to deprive in the UK, but the standard was removed in 2002 (chapter 2).

The French and the UK cases evidence the extent to which the political context of deprivation permeates judicial reasoning. Issues of national security protection and purported failed allegiance constituted the core of the cases against the individuals. In these instances, despite implementing proportionality as a standard of review, the courts restricted the intensity of their scrutiny. Deference

³⁷ The claimants had argued that because they had already been sentenced criminally, they should not be deprived of their citizenships. Here, the *rapporteur* contended that the nature of the administrative sanction was different, which the breach of purported allegiance made relevant (*Conclusions of the rapporteur public*, on case no 394.348, p10).

and restraint are visible in both contexts, although they appear stronger in the UK. But, despite the French courts being more proactive than those of the UK, citizenship rights did not make a critical difference. In reality, the behaviour of the Conseil d'Etat goes no further here than establishing an institutional claim *vis-à-vis* the executive at times of heightened national security threat, one which is not related to the specific circumstances of the case. But the connection between citizenship and identity remains important for the future of deprivation because it arguably opens new doors for challenge and requires a more intensive factual review of the case. Before the Constitutional Council, the QPC challenge of 2014 relied on a purported breach of equality: the claimant, Ahmed S, had argued that the legislation, by differentiating between different kinds of citizens, violated the principle of equality. Here too, the claim of unconstitutionality was unsuccessful.

5.6.3 Equality

In the QPC, the lawyers argued different grounds, but here I focus on the issue of equal citizenship. The government argued that the measure was necessary in light of its national security objective and proportionate. As previously noted, equality is a cornerstone of French citizenship, but both the principle and the intensity of the scrutiny have been “eased”. For example, an institutional note drafted by the Council reveals that, in matters where differences in treatment are not prohibited or required, as in the present, the Council will stick to the “manifestly disproportionate” type of scrutiny (page 3).³⁸ In its decision in 1996, the Council applied the “eased” version of the principle of equality: it said that citizens, irrespective of their mode of entry into citizenship, are formally equal before the law, but it accepted that the fight against terrorism is a relevant justification to depart from the formal equality of citizens if it is for a short period of time. However, as noted, the time-limits during which naturalised citizens could be deprived of their citizenship was extended to 15 years in 2006. In 2014, the Council reproduced the same rationale in the QPC and directly used its previous jurisprudence. Denquin writes that this “rhetoric of self-reference” is an example of judicial restraint because the Council purports to establish the continuity of its own jurisprudence and its limited discretionary power (Denquin, 2012: 8). However, this restraint was limited as the Council said, *obiter* (*ie* not in the *ratio*, the legally binding element of the decision), that any further extension to the law to extend the time-limit during which a public authority is entitled to subject individual citizens to different legal regimes would be incompatible with the principle of equality and the Constitution (*cons* 15).

The issue here is that no explanation was provided for the inclusion of this interpolated clause. The limited and syllogistic form of the decision make it difficult to “guess” what the Council intended. The commentaries to the decision of the Council, which are also written by the Council, did not mention

³⁸ *Op.cit* 20, document from the Constitutional Council on the principle of equality.

it. As Denquin notes, the absence of reasons in the commentaries is not surprising because the commentaries do not include an examination of the different views and debates within a case: they are a defence of the solution reached, a “monologue” rather than “dialogue” of the different views presented (Denquin, 2012: 4). Drawing on these features, of secret, unanimous, syllogistic decisions, Baranger (2012) refers to the Council’s approach as being “hyper formalist”. He suggests that this “hyper formal” way of reasoning is there to foster the alleged rational character of adjudication and to preclude the claims that the Council is doing politics by other means.

Commenting on the case at the time, the doctrine argued that the *obiter* judgement operated as a warning addressed to both the government and parliamentarians: that any further extension of the measure would fail to meet the threshold of constitutionality (Chassang, 2015; Roblot-Troizier, 2015; Spinosi, 2015; Pauvert, 2015). However, *obiter dicta* are non-binding and it is unclear as to what would amount to a disproportionate extension of the measure (*ie* in terms of time length). As it stands, it seems that the Council purported to freeze the existing situation and send “the ball back” to Parliament for any future extension. The QPC thus makes clear that the members of the Council are wary of their own legitimacy, and therefore attempting to avoid being exposed to criticism, for example, for usurping the power of amendment of the Constitution, or straying into the realm of politics beyond their legal expertise.

5.7 Institutional deference, restraint, and issues for rights

What the cases on citizenship deprivation illustrate is that the practice of the courts in scrutinising state action varies: despite acknowledging that deprivation powers engage rights, the courts have struggled to interfere with the state action in both contexts. In these cases, the courts have accepted that the measure constitutes a proportionate mode of action from the executive, acknowledging both claims of national security protection and of failed allegiance from the citizens.

However, these “judicial acceptations” have come in with varying degrees of intensity. In the case of the UK, Klug writes that the HRA marked the chance for lawyers to “inject arguments into cases which were not possible before and which now have at least 1% chance of success” (2001: 2), namely, rights issues. However, despite this right framework being available, connections of citizenship with rights have not fully permeated in deprivation cases. Rather, the courts have proved restrained and deferential to the executive, and more so than their French counterparts. Whether the difference in the degrees of deference between the UK and the French courts links to a stronger approach to citizenship as a principle is difficult to establish. In the UK, the connection to citizenship and identity

was made by the executive when presenting the modification to the bill in 2014 but did not feature in the legal arguments of the lawyers before the courts, arguably, for lack of precedent. If the connection between citizenship and identity was made in French courtrooms, it seems to have resulted primarily from issues of reception of the case law from the ECtHR. This could then say something about the collaborative work of foreign jurisprudence and the French domestic courts in the protection of rights but speaks less of the specificity of citizenship in the French context.

Perhaps it is the broader constitutional structures of the judicial system which provide a more convincing explanation for why the French courts were less deferential. Arguably, the HRA itself creates the conditions for judicial deference: both the courts and Parliament were given powers to determine the scope of rights. In the French context, it is possible that rights are perceived as legal objects which are protected by the Constitution and perceived as being primarily a judicial matter. The Constitutional Council, as noted, enjoys important legitimacy as a “protector” of rights. But, in any event, despite different structures of judicial scrutiny, different degrees of deference and restraint, the courts did not uphold citizenship rights in either context. Rather, in both instances, claims of security and allegiance overrode issues of rights.

In 2016, in seeking to explain the then judicial silence on the meanings of citizenship in deprivation cases in the UK, Prabhat wrote that:

“... a third possibility for judicial silence on the meaning of citizenship is that national security concerns simply suspend ordinary rights in a manner that reinforces old colonial and World War era ideas of loyalty and protection. This third possibility indicates a regression to times when rights did not matter and citizenship was merely a nascent idea much over-shadowed by subjecthood” (Prabhat, 2016a: 18).

The judgments from both jurisdictions seem to convert this possibility into an explanation and a justification for government behaviour. Despite the individuals’ actions being clearly reprehensible ones, there is little to be gained in reviving issues of allegiance as legal standards.

Restraint and deference are also problematic from the perspective of a “culture” of justification and accountability because they impede collaboration between the different organs of the state in a way which could improve the protection of rights. In the context of the UK, a potential explanation behind the different degree of scrutiny might be that the legislation itself is too broad and gives too much power to the executive. Phillipson, for example, writes that, rather than focusing on judicial failure in protecting rights in national security cases, it is important to acknowledge that maybe the court failed because “Parliament had deliberately legislated to make it very hard for them to succeed.” (Phillipson,

2014: 273). In chapter 6, I turn to the question of why it seems that the UK Parliament made it easier for the state to deprive than in France. In other words, I look at an alternative hypothesis which could explain the difference in behaviour between France and the UK: if it is not about different conceptions of citizenship (chapter 3 and 4) or different judicial behaviour (chapter 5), perhaps it is linked to differences in the procedures leading up to it, namely, the parliamentary processes.

5.8 Conclusion

In this chapter, I have asked three questions: how do the courts grapple with the rights challenges which deprivation powers create? Could the difference in the states' behaviour be explained by better procedures and judicial protection in the case of France? If not, what does that tell us about citizenship and national security more broadly? I have examined judicial scrutiny of executive action in the context of citizenship deprivation and found that, despite different structures of judicial scrutiny, in that the French system is more protective to rights issues, there is little difference in the outcome of the cases. In both contexts, issues of security protection and allegiance override the protection of citizenship rights and leave citizenship less secure. I have found, however, that there were different degrees of deference and restraint in both contexts, with the French courts proving more active in seeking to limit state action. Perhaps it is that the courts in the UK have been more limited in what they can do before a piece of legislation which gives extensive powers to the executive. In the next chapter, I turn to an alternative hypothesis to potentially explain why the overhaul of citizenship rights is more prevalent in the UK than in France. I examine the constitutional structures of the state and their degree of rigidity or flexibility to account for what seems to preclude overarching changes.

Chapter 6: Cancellation of citizenship and constitutional structures

“... We have no written constitution. We have no constitutional court that would be able to rule upon the matter. Therefore, the safeguards have got to be parliamentary safeguards. Judicial review could not review the compatibility of the Bill with the convention because, if the Government are right, the convention might just as well be written in water—it has no application. That makes me consider it absolutely vital that Parliament properly considers the Bill before this can go on to the statute book, in order to make sure that it is satisfied of the constitutionality of the Bill and its compatibility with human rights” (Lord Lester of Hearne Hill, HL deb 7th April 2014: c1181–1182).

“... the Constitution is not a carry-all text in which we put the feelings of the government of the day ... it is a text which we should touch with precaution because it rules over our legislative system. Only the enunciation of fundamental liberties and the functioning of our public institutions can compose it” (Noel Mamère JO, AN, 5th February 2015, 1013).

6.1 Introduction

In the previous chapters, I demonstrated that in both France and the UK there have been shortcomings in terms of the states’ commitments made to citizenship. These disruptions to citizenship status took place at different times in the two countries. Previously, I also examined the judicial scrutiny of citizenship deprivation in both countries and found that, despite France offering better structures of rights protection, claims of national security protection override the defence of citizenship rights in both countries. As conceptions of citizenship were not sufficient for explaining differences in state behaviour (chapters 3 and 4), in this chapter, I turn to another hypothesis. The parliamentary debates on the overhaul of citizenship rights in France in 2010–11 and 2015–16 indicate that there are other factors which are structural and seem to prevent changes in France. Hence, I now focus on the constitutional structures of the states, their degree of rigidity, underlying principles and practices as a potential explanation for why the overhaul of citizenship rights is more prevalent in practice in the UK than in France. From this I draw insights about the protection of citizenship rights in the context of an adverse rights environment in the face of claims of national security protection and suspicions of a lack of allegiance against minority citizens. I argue that, in the context of retrieving rights, rigid constitutional structures, which set the conditions for impeding change, offer better safeguards to the protection of existing citizenship rights. Before laying out some of the theoretical underpinnings

behind the constitutional structures of the state and locating France and the UK within these debates, I first set out details of how this alternate hypothesis emerged from the data. I then proceed to explain how the constitutional structures of the states and their different degree of rigidity seem to make the critical difference in the specific context of the proposed legislative changes of 2014 in the UK and 2015–16 in France and what that reveals about citizenship rights.

6.2 Why look at the constitutional structures of the states?

In the previous chapters, I have engaged with several hypotheses which could explain why the exercise of deprivation powers is more prevalent in the context of the UK than in France, despite claims that the powers are likely to be scarcely used.¹ I have asked if it is because citizenship as a principle and a claim to equal rights is valued more in France and/or if it is because the French judges are more proactive in protecting it. I have found that, taken separately, none of these hypotheses make the critical difference. The French value of citizenship and equality does come up as a principle at different stages in the political debates, but chapters 3 and 4 demonstrate that it has often been breached. The same holds true for judicial activism: while there are differences in the intensity of the scrutiny of the judges and in the structures of judicial scrutiny (with more protection being afforded in France), the outcome of the cases of deprivation is a similar one in both countries (chapter 5).

Another important feature which recurs in the data hints at the more abstract elements which constitute nation states, namely, their constitutional structures. Comparative constitutional scholars seem to agree that the constitutional structures of the state are what establish and frame the relationship between the different organs of the state, as well as with the people over whom these institutions exercise power (Ginsburg and Dixon, 2011; Tushnet, 2018). These structures contain a narrative about the nation's values and identities (Jacobsohn, 2012). Constitutional structures thus seem to have two functions: to ensure the good operation of the state and limit its excesses and goals; and to thrive towards the common good and/or to protect rights. The contribution of this broad field of the literature has been to show that constitutional designs are important political matters which can have political and legal effects on the state's practices (Hirschl, 2014). The assessment of such features for cancellation of citizenship is therefore an important task.

In this chapter, I ask if the constitutional structures of the states, read in conjunction with previously identified factors of state behaviour (citizenship as a principle and judicial protection), can explain why the extensive practice of citizenship deprivation is far more prevalent in the UK than in France, despite

¹ Theresa May (HC Deb 30th January 2014: c 1043): "The power being put into the bill will apply in only a very limited number of circumstances."

France seeking to emulate similar effects? From this analysis, I elaborate on what it tells us about the protection of citizenship rights more broadly. This chapter contributes to broader debates on the constitutional structures of states and the protection of rights for individuals. I first present an example of why the constitutional structures of the state seem to matter for deprivation of citizenship, before discussing the core features of these debates and locating France and the UK within them. I then move on to assess their role in the specific context of 2014 in the UK and 2015–16 in France.

6.2.1 The 2010–11 debate on polygamy and deprivation of citizenship

The 2010–11 French debate on the extension of citizenship deprivation is a good entry point to a discussion of the constitutional structures of the state. During this debate, the government had to modify its initial proposal, the extension of deprivation to cover instances of polygamy, because of a purported clash with the set of rules and principles of the Constitution. The polemic started from a civil investigation against a shopkeeper from Nantes who was alleged to be guilty of benefit fraud.² According to the prosecution, the individual, who had different female companions, was wrongly receiving benefits through them. This random case happened at a time of political discourse around French national identity and shared values. For Brice Hortefeux, then Home Secretary, it was necessary to modify the law to account for this *de facto* polygamy – since the individual was not married to any of the women.³ A few months later, for reasons unrelated to this case, Nicolas Sarkozy, then President, spoke about depriving of their citizenship those who were of “foreign origin” and committed crimes or misdemeanours against “public officials”(chapter 4).⁴ Hortefeux suggested lowering the standard of deprivation to cover instances of polygamy.⁵ However, the proposal was not enshrined in the bill which was laid down before the National Assembly. Eric Besson, speaking for the government, explained that to include polygamy for deprivation purposes would risk being found unconstitutional, in light of the jurisprudence of the Constitutional Council: “on this question, contrary to what has been stated, Brice Hortefeux and I agreed after comparing our legal analyses: when

² « Nantes secoué par l’affaire Liès Hebbadj », *Libération*, 2010

https://www.liberation.fr/societe/2010/05/03/nantes-secoue-par-l-affaire-lies-hebbadj_623912 (18/10/2019).

³ « Hortefeux vise l’interdiction de la ‘polygamie de fait’ », *Le Monde*, 2010

https://www.lemonde.fr/societe/article/2010/06/09/brice-hortefeux-veut-interdire-la-polygamie-de-fait_1370400_3224.html (09/10/2019)

⁴ Nicolas Sarkozy, « Le discours de Grenoble du 30 Juillet 2010 », *Le Figaro*, 2014

<http://www.lefigaro.fr/politique/le-scan/2014/03/27/25001-20140327ARTFIG00084-le-discours-de-grenoble-de-nicolas-sarkozy.php> (06/03/2019).

⁵ « Polygamie, déchéance de nationalité : de strictes conditions légales », *L’OBS*, 2010

<https://www.nouvelobs.com/societe/20100425.OBS2984/polygamie-decheance-de-nationalite-de-strictes-conditions-legales.html> (27/09/2019).

looking at the current jurisprudence from the Constitutional Council, it is not feasible to pronounce citizenship deprivation for cases of polygamy” (Eric Besson, JO, AN, 28th September 2010, 6356).

At the time, the relevant jurisprudence of the Council was the decision of 1996 which said that deprivation infringed equal citizenship, and for this reason, could be reserved only for the gravest crimes (chapter 5). The non-introduction of polygamy in the bill was thus the product of the government’s interpretations of the Council’s decision and weighting of the purported unconstitutional features of the proposal. But this did not settle the question for all parliamentarians. Discussions on the compatibility of the government’s bill with the Constitution also emerged during the debate. In the National Assembly, Sandrine Mazetier said she was determined to show “throughout the examination of this text ... all its un-constitutional features and the retreat of the *Etat de droit* which it evidences” (JO, AN, 28th September 2010, 6305). Other deputies and senators contended that the measure was contrary to the constitutional principle of equal citizenship (article 1 of the Constitution). Since 1974, deputies and senators have been able to ask the Constitutional Council for an *ex ante* interpretation of the compatibility of a bill with the Constitution. No *ex ante* scrutiny was actioned in 2010, despite the criticisms. Nonetheless, conditions were not secured for the passing of the bill which was dropped after refusal by the Senate (chapter 4).

The developments of 2010–11 are important because they demonstrate that the constitutional structures of the French state matter for the conduct of politics. There is a sense that the government of the day cannot do whatever it wishes and that the behaviour of the different organs of the state, in this case, of the executive and Parliament, operates within a certain matrix or language, namely the text of the Constitution. In chapter 4, I framed the debates of 2010–11 as an example of the politics of belonging which these states implement – politics which are about inclusion and exclusion beyond citizenship as a legal status. These politics are, allegedly, there to strengthen a sense of shared belonging by excluding those who are perceived as threatening the community in some ways (Yuval-Davis, 2006). The debates of 2010–11 evidence that there are competing views about what the narrative of the nation’s values and identities actually is. As it appears, the open-textured principles of the Constitution can sustain competing views which can work against a uniform narrative of who belongs and what is required to belong. One battle in Parliament seems to have been to develop an interpretation of the Constitution which would be the most convincing to other parliamentarians, and to the Constitutional Council if the matter is referred to it. The Constitution, and the framework it institutes, thus becomes a crucial political tool to support or criticise a measure. In other words: parliamentarians take into account the constitutional structures of the state and the jurisprudence of the Council when taking a decision, and these constitutional structures can help to renegotiate the content of the political debates.

6.3 Rigid or flexible constitutional structures?

Essentially, then, constitutional structures affect the ability of the state to exercise fundamental powers within a set of pre-established commitments. Constitutional theorists tend to agree that these structures must be stable to ensure the good working of politics (Holmes, 1995: 23; Tushnet, 2018). One of the primary gateways through which the literature analyses these structures is through their purported degree of rigidity, namely the extent to which they allow for change. Arguably, rigid constitutional structures create the conditions for slowing down the processes of change, whereas flexible structures are more likely to respond to contingent politics. In previous chapters, I have expounded how claims of national security protection can lead to overreaching state action. Scholars have evidenced patterns which suggest that there is a redistribution of powers towards the executive, with deference from both Parliament and the courts (Scheppelle, 2006; Neal, 2012a; Cahn, 2016). This does not mean that constitutionality is neglected (because the law can create the conditions for the suspension of the ordinary playing-out of politics (Scheppelle, 2004; 2006)), only that national security challenges the stability of the constitutional arrangements of the state. Given that citizenship deprivation is driven by security concerns, this frame of analysis, of rigid or flexible constitutional structures, is important because it can explain barriers to overreaching executive action and/or responsiveness to the specific context of the day.

The question thus becomes: what are the indicators of rigid or flexible constitutional structures? From the literature (Dixon, 2011; Oliver and Fusaro, 2011), it appears that the most important factors for assessing rigidity or flexibility are: the existence or absence of formal processes of amendment (when there is a specific procedure to amend the Constitution); the existence of specific body(ies) granted with powers of interpretation of the constitutional text and/or with the powers to quash ordinary legislation if it is found to contradict the Constitution; and, more broadly, political practices or conventions. In what follows, I present how these different parameters have been examined to evaluate rigidity and/or flexibility, in the sense of how they can favour or impede change, and what are their potential political implications. The debates about their political implications can clarify the choices made by France and the UK and the extent to which these choices matter in the practices of citizenship deprivation. I look at amendment and interpretation separately and integrate “practice” within each discussion as, arguably, it spans both categories. From these analytical insights, I contend that a rigid constitutional structure would have mechanisms of amendment which differ from those set out for ordinary legislation (for example, in the form of supra-majorities), and that the interplay between ordinary legislation and the Constitution would be overseen by specific organ(s) with powers to override. By contrast, a flexible constitutional structure would allow for constitutional change

through ordinary politics and would not entail a specific body with powers to interpret and/or override. These two examples, however, are extreme ones in a fictitious scale of rigidity. Even when some of these parameters are lacking, a Constitution can still be considered rigid. “Practice” will thus be relevant here to soften or strengthen the edges of rigidity/flexibility.

6.3.1 Amendment and pre-commitment

With regards to amendment, Lorenz (2005) reviews different methods which have been expounded by political scientists to measure constitutional rigidity. She describes how academics have examined the size of the majority required, the number of bodies and institutions involved, the procedure directing the relationship between these different bodies, and the requirement of popular participation through referendum or election (Lorenz, 2005). The more body(ies) involved or the stricter the procedures, the more the constitutional structures of the state are likely to be rigid because they are difficult to amend. In other words, they make it more difficult to change the “rules of the game”, the constitutional frameworks of the states, for political actors. Scholars have also looked at the number of times the Constitution has been amended as an account of rigidity/flexibility. These accounts are helpful to refine the terms of the analysis by integrating state practice. For example, Ginsburg and Melton (2015) look at the extent to which there is what they frame as an “amendment culture” in the country. They define “amendment culture” as the “set of shared attitudes about the desirability of amendment” and measure it through the rate at which a country’s previous Constitution was amended (Ginsburg and Melton, 2015: 699). Their work complexifies explanations of resistance to constitutional amendment in some settings but not in others under identical institutional arrangements. It is also valuable because it sheds light onto potential resistances to change in non-entrenched constitutional settings. By “non-entrenched” I mean settings where there is no specific rule to amend the Constitution. In such settings, such as in the UK, the constitution can be modified by ordinary legislative processes. What Ginsburg and Melton seek to demonstrate is that amendment rules only tell one side of the story of constitutional change. Even in non-entrenched frameworks, the existence of long-enshrined practices or traditions can equally result in long and difficult processes of change.⁶

The political implications of having entrenched constitutional commitments through specific rules of amendment are important. Entrenchment implies a sense of hierarchy in the sense that there are some things which are constitutional that are perceived as being more important than everyday politics and thus deserve some degree of protection. To put it differently, the state pre-commits to a

⁶ Tomkins makes a similar point when referring to the specific context of the UK (Tomkins, 2003: 15).

certain behaviour through the Constitution and, by entrenching it, purports to make it more difficult for it to dishonour these pre-commitments. In practice, as noted, specific amending rules or their absence thereof does not necessarily secure difficulty or ease in implementing change. But, for the present, what matters is that there is significant disagreement between scholars about the extent to which the constitutional structures of the state should be shielded from ordinary politics through specific rules of amendment. Elster (2003; 2000), for example, favours entrenchment because, according to him, entrenched pre-commitments can help to mitigate the uncertainties of the future. Elster defines pre-commitment as an observable action taken at a certain time which purports to ensure that some options will not be available in the future, or would be available at an extra cost, or through considerable delays. He uses the famous image of Ulysses, who asked others to bind him to the mast of his ship to avoid his changing wants and desires, to illustrate his point that there is imperfect rationality which lays the foundations for some form of pre-commitment (Elster, 2000; 2003). Applied to constitutions and states, his work demonstrates that, by associating certain commitments with complex processes of amendment, states can mitigate and potentially overcome the inconsistencies of changing preferences, for example, by letting time pass for passions to cool down. Holmes (1995) adds to this image the fact that too flexible amendment procedures can foreclose what the Constitution purports to establish: a set of stabilising constraints. He also notes that entrenching important features of political life can benefit future generations because it gives them tools against their ruling majorities (Holmes, 1988). Taken together, what both Holmes and Elster suggest is that entrenchment can create the conditions to hold the state to account in a way that will not suffer from the specific circumstances of the day. But this, in turn, raises the question of what should be entrenched and through which kind of amendment procedure. For example, Luis Marti (2014) complexifies the issue of amendment procedures by demonstrating that purported rigid procedures do not necessarily operate as counter-majoritarian checks on the government, in the sense that they do not necessarily make it more difficult to enact change. As he notes, procedures of amendment which require elections and/or referendums can confirm popular support for the majority opinion rather than impede change (Luis Marti, 2014: 554). In addition, as Oliver and Fusaro show, it is not necessarily the case that rigid structures of amendment would protect minorities, for it depends on the content of what the structures seek to protect (Oliver and Fusaro, 2011: 425). Flexible mechanisms of amendment or non-entrenched constitutional settings can thus appear as critical tools to correct the imperfections or mistakes of the past and/or to “update” the content of the Constitution for the current population, a point which Holmes (1988: 240) also acknowledges. For some, such as Griffith (1979) or Waldron (1999), the idea of having a set of rules separate from everyday politics is problematic because it tends to artificially depoliticise issues. Griffith and Waldron contend that rights

and other forms of pre-commitment are political matters on which people not unreasonably can disagree. Waldron (1999: 102) frames this issue as the “circumstances of politics”. According to him, “constitutional” commitments, just like any other issues, should be settled through mechanisms of simple majority because they do not privilege any of the views which are in dispute and they are respectful of disagreement within a democracy (Waldron, 1999: 108–114). Crucially, for both Waldron and Griffith, what is problematic is that to enforce (or seek to enforce) pre-commitment against the state requires interpreters, often the judges, which grants them broad power. From these analytical insights, rigid constitutional structures run the risk of preserving elite interests.

6.3.2 Interpretation and the judges

Both Waldron and Griffith contend that pre-commitment tends to have the effect of putting political issues outside of the reach of the usual political channels. In essence, they talk about the fact that to exclude some issues from everyday politics can shield minority interests and prejudices in the constitutional structures of the state *and* that these issues can be reproduced by constitutional interpreters which places them out of the reach of the “people”. This is because it is difficult, if not impossible, for the electorate to remove, contest, or hold accountable the members of the judiciary or other specific organ granted the powers to interpret the Constitution. Griffith, for example, writes that entrenched principles: “merely pass political decisions out of the hands of politicians and into the hands of judges or other persons” (Griffith, 1979: 16). The argument is important because it warns against a simple dichotomy between law and politics and sheds light on the role of the judges – or other relevant organ(s) – in creating or impeding change through interpretation and/or through the exercise of powers of override. Alec Stone Sweet (2007), for example, demonstrates that, when the French Constitutional Council quashes a statute, it constitutes or provokes change. This is because, as he shows, the state will have to address the finding of unconstitutionality, either through the making of a new law or through a “corrective” revision of the Constitution (Stone Sweet, 2007). In the French example set out above, there was also a clear sense that the existence of the mechanisms of constitutional review, with powers of override, enabled what Tushnet (1999) frames as a legislative “anticipatory obedience” to the Constitution. In his analyses of the power dynamics between the United States Supreme Court and Congress, Tushnet demonstrates that the possibility of constitutional scrutiny is a critical tool of “political bargaining” which, in turn, can explain subsequent successful outcomes in the courts (Tushnet, 1999: 120). In essence, his work accounts for the fact that the existence of processes of constitutional review (not just their exercise) can create incentives for parliamentarians or the executive to self-limit their powers and avoid the political costs of a finding of unconstitutionality and/or of a contrary interpretation. In 2010–11, there seemed to be a clear pattern

of “legislative anticipatory obedience” and auto-limitation from the government which precluded change. This also suggests that constitutional interpretation is a collaborative process between the different state organs in which the judiciary can have a predominant role but does not necessarily have the “last word” on the interpretation.⁷ There are other systems, such as those which Tushnet (2003) or Gardbaum (2013) identified as enforcing “weak” forms of constitutionalism, or a “Commonwealth model of constitutionalism”, where the collaborative process of interpretation is more clearly exposed. In these systems, which operate under the principle of parliamentary sovereignty, the judges’ interpretative role does not include powers of override. The judges can issue “declarations” that a measure is incompatible with a fundamental statute but cannot quash ordinary legislation: it is left for Parliament to decide to answer or to ignore it (Carolan, 2013). Taken together, what the discussions on interpretation seem to indicate is that the existence of mechanisms of constitutional review with powers of override and/or important powers of interpretation or declaration can enforce some degree of rigidity. Arguably, it would be more difficult for the state to act unilaterally if several “views” about the constitutionality of a state action were circulating: indeed, the very existence of these varied interpretations could potentially act as a brake on the process of change. Drawing from these analytical insights, in the next section I look for elements of rigidity and/or flexibility in the constitutional arrangements of the UK and France.

6.4 The UK “semi-rigid” constitutional arrangements

The UK, as is well known, has no codified constitution. Most of the UK constitution, in the sense of what determines the relationships of power between the different organs of the state and with the people, however, exists in written form (*eg* statutes) but not in a single authoritative document with higher legal force over ordinary legislation. The rest is determined by practices, such as the common law, constitutional conventions or royal prerogatives. The directing principle of the UK constitution, parliamentary sovereignty, as framed by Dicey (1915), or, more recently, expounded in the writings of Goldsworthy (2010), can explain the predominance of everyday politics over “constitutional” politics. According to the doctrine of parliamentary sovereignty, the power of Parliament is unlimited, in the sense that there is nothing that cannot be changed through ordinary legislation. As Dicey writes, Parliament is the body with the “right to make or unmake any law whatever” (1915: 20) and the body whose will is “ultimately obeyed by the citizens of the state” (1915: 101). Therefore, according to Dicey “no person or body is recognized by the law of England as having the right to override or set aside the legislation of Parliament” (1915: 20). To that extent, since parliamentary sovereignty still constitutes

⁷ De Londras (2017) gives an important account of this collaborative process in the context of the Irish Constitution.

the primary constitutional principle of the UK constitution, the constitution is non-entrenched and appears as flexible.

This does not mean that the UK does not abide by some forms of commitment, such as those set out by the rule of law, only that these are sensitive to everyday politics. The rule of law has different meanings (Craig, 1997) but, at its core, suggests legal certainty, equal subjection to the laws and access to justice as fundamental principles of the UK constitutional arrangements. It operates as a check on the exercise of state power which can, in practice, entail minimal and maximal scrutiny on executive action (Jowell and O'Conneide, 2019). Constitutional conventions also form a set of non-entrenched commitments which regulate state action. In the *Law of the Constitution*, Dicey writes that, although theoretically unconstrained, Parliament is politically subjected to the sovereignty of the people by convention (Allison, 2013). According to Dicey, constitutional conventions have as their “ultimate object” to “give effect to the will of that power which in modern England is the true political sovereign of the state – the majority of the electors”(Allison, 2013: 353–354). A full analysis of the UK constitutional conventions would require several in-depth works of its own, but what is important for the present is that they complicate an understanding of the constitution in terms of rigidity or flexibility. Constitutional conventions, in the same way as constitutional statutes, are subject to parliamentary sovereignty, which means that they could be modified by ordinary statute. However, as Tomkins (2003: 13) indicates, despite being non-enforceable by the courts, their “long history of unbroken observance” can make them, at least in principle, rigid constraints on state action.

Drawing on these accounts, Griffith (1979: 19) describes the constitution of the UK as “political” but does not fully define what this means. Gee and Webber (2010: 279) clearly explicate the gist of Griffith’s account of the UK political constitution, the fact that it is not a “framework of fundamental laws, but [a] contingent response of the circumstances of politics that is itself the subject of political debate, as well as liable to the possibility of change, even radical change, through the ordinary, day-to day political process”. In other words, what Griffith suggests is that the UK constitution is marked by disagreement and conflict, over rights and other issues, and that such conflict and disagreement should be addressed through political means. In Griffith’s view, political constraints on state action operate positively: they work to hold the executive to account, to show discontent through elections, and preclude a transfer of power to the judiciary.⁸ There are several ways in which this approach – of the UK constitution being non-entrenched and state action regulated by political means – has recently been challenged.

⁸ A contemporary defence of the UK constitution, or political constitutions in general, can be found in the work of Tomkins (2005) or Bellamy (2009).

Blick (2017), for example, discusses the principle of non-entrenchment in the UK and reviews such statutes, or parts of the statutes, which set out special procedures for the taking of decisions.⁹ These procedures, by making it more difficult for Parliament to take decisions on certain matters, suggest some level of entrenchment. But perhaps the most important setbacks to non-entrenchment come from the courts. Ahmed and Perry (2014; 2017) demonstrate that the courts have “quasi-entrenched” some constitutional statutes. Drawing on recent case law, they note that courts have said that they would prefer to make it harder to amend or repeal certain constitutional statutes and have asked for express statements from Parliament¹⁰ (Ahmed and Perry, 2014; 2017). However, it is still unclear what counts as a “constitutional” Act of Parliament. In *Thoburn v Sunderland City Council* [2002] EWHC Admin 195, the court found that “a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights” (para 62). Feldman (2013) writes that this broad definition does not necessarily imply that all provisions of a particular statute may be of constitutional significance, or that ordinary statutes may contain one or more provisions that are judged constitutional.

The courts have also developed more extreme proposals in which they have suggested that they could refuse to recognise as law any attempt by Parliament to abrogate fundamental principles, such as that of judicial review, although *obiter*.¹¹ Aside from issues of non-entrenchment, there was also a sense that the Labour Party’s constitutional reform programme of the 1990s and the introduction of legislation such as the Human Rights Act (HRA) 1998, modified the political nature of the constitution, in the sense of narrowing the sphere of decision-making to the benefit of the judiciary (Bevir, 2008). But these did not alter the fundamental political features of the UK constitution (Masterman, 2009). Masterman demonstrates that their supposedly real impact is that they have reinvigorated political accountability alongside a limited protection of human rights in the constitution. He takes a closer look at the HRA to suggest that Parliament, at least in the text of that statute, still has the last word on rights issues (Masterman, 2009: 479). As noted in chapter 5, there is a general view that the section 4 declaration of incompatibility “sent the ball back” to Parliament to potentially address the incompatibility with rights through a “fast-track” remedial procedure (s10 of the Act) or decide to ignore it (Davis and De Londras, 2014; Davis, 2014). This is despite the fact that a convention is

⁹ Amongst other examples, he refers to s11 of the Scotland Act 2016 and s9 of the Wales Act 2017 which require that certain electoral legislation must be subject to approval by two-thirds of the Scottish Parliament and the National Assembly for Wales (Blick, 2018: 16).

¹⁰ See for example: Lord Hope in *BH and Another v the Lord Advocate and Another* [2012] UKSC 24, para 30

¹¹ *Jackson and Others v Her Majesty’s Attorney General* [2005] UKHL 56.

More recently: *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22

arguably emerging which indicates that Parliament should answer such a declaration in the spirit of what the judges have said (Blick, 2017: 18).¹² Bellamy writes that there is a risk that legal advisors to the relevant committees in Parliament, or to the government, and other Members of Parliament would tend to “second guess” what the courts would do, in the face of risks of a section 4 declaration of incompatibility (Bellamy, 2011: 100). This practice would constitute a form of “legislative anticipatory obedience” as has been formulated by Tushnet in the context of the United States’ rigid form of constitutional review. But, although the HRA renegotiated the contours of the political debates by ensuring that rights issues would come in (section 19), compatibility with rights (or absence thereof) does not have any legal consequence in the Act. Under section 19, the relevant minister can still choose to proceed, despite alleged violation of Convention rights, and leave it to parliamentarians to make up their minds about it. So far, the research which has looked at the extent to which the HRA has modified the behaviour of political actors in Parliament has led to more nuanced conclusions. Nicol (2004), for example, looks at whether a “culture of compliance” exists in the UK, *ie* whether there is a similar anticipatory obedience to the courts’ findings and interpretations of rights. He compares this purported “culture of compliance” with what he frames as a “culture of controversy”, a form of “rights dialogue in which the legislature, rather than the judiciary, has the whip-hand” which “emphasises that the identity and content of rights are not self-evident” (Nicol, 2004: 454). The bills he scrutinised were contentious ones, some of which raised serious rights issues. His analysis included the bill of the HRA, the Terrorism Bill 1999–2000, the Anti-Terrorism Crime and Security Bill 2001, which introduced indefinite detention for foreigners, and the Nationality, Immigration and Asylum Bill 2002, which lowered the standard for citizenship deprivation. In the four bills he examined, Nicol concludes that this culture of compliance has, in the main, so far proved elusive (Nicol, 2004: 459).

By the markers set out above, of amendment, interpretation and “practice”, the UK constitution can be framed as “semi”-rigid. Parliament remains the leading legal and political force which, at least in theory, cannot bind itself for the future. But practice and more recent legislation seem to have introduced some degree of rigidity. The HRA, for example, brought some degree of formal constraints on state action by ensuring that issues of rights would come into parliamentary discussions, alongside a mechanism of judicial oversight. It enforced a collaborative process of decision-making which can, at least in theory, preclude unilateral action and/or ensure that there is some justification for state action. But, since these judicial inputs have not permeated cases of citizenship deprivation (chapter 5), the implications for cancellation of citizenship are likely to be significant, given that cancellation is

¹² So far, only one s4 declaration has not been followed by Parliament.

driven by national security needs which often spark broad consensus within society and limit political constraints on government action.

6.5 The French rigid constitutional arrangements

The French Constitution is codified in a single document which can only be amended according to a specific procedure and has superior legal force over ordinary legislation. The fundamental and superior status of the Constitution was advocated early by revolutionary statesman such as Joseph Emmanuelle Sieyes. In his writings, Sieyes (2002) contends that the real holder of political and legal sovereignty in France is the “nation”. He talks about the nation as something which “exists before everything and is the origin of everything” (2002: 53). He differentiates this unconstrained sovereign, which he frames as the “constituent power”, from the “constituted power”, the ordinary body of politics which executes the will of the majority. According to Sieyes, the constituted power “exercises real power so long as it is constitutional; it is legal only so long as it is faithful to the laws imposed on it” (2002: 53–54). Sieyes conceives of the Constitution as a “politico-legal” document which protects the sovereignty of the nation against its government.¹³ But in the aftermath of the Revolution, although they did not criticise the idea of limits to their exercise of powers, the revolutionary statesmen feared the potential of an unconstrained constituent power with supremacy over ordinary politics. The idea of a “sovereign people” was perceived as the source of what could undermine the principle of democratic representation (Jaume, 2008: 68). In fact, until the 5th Republic, the successive Constitutions had no superior legal status over everyday politics and were extremely difficult to amend. France was a “constitutional laboratory” (Boyron, 2011; 2013). As Boyron notes, the failures of a constitutional regime were often explained by the inadequacy of the constitutional instrument, which led drafters to experiment constantly in search of the perfect Constitution (Boyron, 2011; 2013). Baranger (2011) adds to this account a more symbolic representation. According to him, behind the succession of the French Constitutions also lies the belief in the “quasi-religious” communion of the amendment procedure with the founding moment of each political regime – where each new authority expresses future political behaviour in the Constitution and enjoys the outmost legitimacy (Baranger, 2011).

¹³See also: « Préliminaire de la Constitution française – reconnaissance et exposition raisonnée des Droits de l’Homme et du Citoyen » by M l’Abbé Sieyes, 1789

<https://gallica.bnf.fr/ark:/12148/bpt6k41690g/f3.image.texteImage> (02/12/2019).

Alongside the framing of powers, the Constitution establishes the “political precautions which it is wise to undertake, so that the exercise of political powers would always be beneficial but not dangerous”.

The current Constitution of the 5th Republic purported to remedy the inconsistencies of the past by easing the procedure for amendment and reinforcing the powers of constitutional oversight. Article 89 regulates the procedure of constitutional amendment and confers upon the President the power to initiate a procedure. As with any bill proposed by the government, it is referred to the Conseil d'Etat for a non-binding opinion.¹⁴ What this means is that, before the bill is presented to the houses of Parliament, two views – from the government and the Conseil d'Etat – have already evaluated the significance or relevance of the powers. In constitutional amendments, the power of the Commissions is diminished. Under ordinary procedures, a bill would first go to one of the Commissions of the Senate or the National Assembly. The Commissions have the power to amend the bill, which will then be discussed – in its potential amended form – before the whole of the relevant house. Under the procedure of constitutional amendment, the text which is being discussed before the relevant house is the initial proposal. The Commissions can propose amendments, but these will be debated before the relevant houses, just like any other amendment from MPs or senators. Crucially, article 89 does not give the last word to the National Assembly if the houses are not able to agree on a similar text, which means that both houses have an equal role to play. What these procedural hurdles focus on is to get as many views as possible to assess the extent of the power and build consensus between the different institutions. The equal sharing of powers between the President, the government and each of the houses purports to enforce a strict separation of powers, allegedly to preclude unilateral action from one institution. The bill can take effect after approval by referendum, or by both houses of Parliament convened in Congress. In Congress, the bill is accepted only if it gathers a 3:5 majority of the votes. Article 89 also includes formal and substantive limits to the process of amendment. Under article 89(4), it is not possible to initiate a constitutional revision at times when the “integrity” of the territory is under threat. Under article 89(5), the republican form of the government cannot be changed. The extent to which this last limit includes a form of “supra-constitutionality” or represents the identity of the French Constitution is debated.¹⁵ But, for the present, these limits reveal the rigid character of the constitutional amendment procedure. In practice, the text has been amended relatively frequently. Guillaume (2018) reviews 24 successful constitutional amendments since 1958. A document from the Senate from 2006 lists 14 unsuccessful amendments,¹⁶ to which it is possible to add (at least) the failed attempt of 2015. Within the 24 successful revisions, one has been conducted through a different article of the Constitution: article 11. Article 11 authorises the President to submit

¹⁴ Since the constitutional reform of 2008 both projects of laws (*ie* bills initiated by the government) and propositions of laws (*ie* bills initiated by Parliament) can be referred to the Conseil d'Etat for advice – although its opinion is non-binding. Prior to 2008, this feature was reserved to the bills from the government.

¹⁵ See, for example, Dubout (2010).

¹⁶ Sénat, « Les révisions de la Constitution du 4 octobre 1958 », 2019 (but it is not, to my knowledge, up to date) https://www.senat.fr/evenement/revision/revision_inaboutie.html (25/10/2019).

a government bill which deals with the organisation of the public authorities, or with reforms relating to the economic or social policy of the nation, to referendum. In 1962, De Gaulle, then president, used article 11 to put to referendum the direct election of the President by the electorate. Baranger (2011) shows that the practice was unanimously criticised by the doctrine and the matter deferred to the Constitutional Council for review. The Constitutional Council ruled that it had no jurisdiction to determine whether the bill violated the Constitution or not (no 62-20 DC, 6th November 1962). This decision is one of the three where the Council stated its refusal to review constitutional amendments¹⁷ because, it argued, that to do otherwise would grant it constituent powers. From these accounts, then, the procedure of constitutional amendment is rigid: the procedure is strict and, although there is no review by the Constitutional Council of the legality of the text or the procedure, at least one out of two revisions has failed in the past.

For Louis Favoreu, it is the powers of constitutional review under the 5th Republic which allowed the Constitution to “adapt”, under the interpretation of the Constitutional Council, to the circumstances and practices of the day without calling for a full redraft (Favoreu, 1994). As noted in chapter 5, the mechanisms of referral to the Council for review are both *ex ante* (*ie* during the discussion of a bill) and, since 2008, *ex post* (during any legal proceeding) (articles 61 and 61-1 of the Constitution). The powers of the Constitutional Council are important because a finding of “unconstitutionality” buries the bill or the law (article 62 of the Constitution). According to Favoreu, the introduction of a strong form of constitutional review does not mean that the Constitutional Council is engaged in policy-making. Rather, he contends that the Council is a “switchman”. This is because he argues that the Constitutional Council does not have the “last word” on what is legal or legitimate, but directs the state towards the “right” procedure before disagreement about what is legal or legitimate: a constitutional amendment (Favoreu, 1994).¹⁸ More recent accounts, however, would not deny the political role of the Council in provoking law-making and/or in interpreting the Constitution (Stone Sweet, 2007: 72; Denquin, 2012). Taken together, the constitutional framework of the French republic establishes rigid constraints on the exercise of state powers. As Favoreu (1988) writes, the 5th Republic constituted the moment where the law “grabbed” politics because it instituted the primacy of the Constitution and the principle that all state action must be channelled through law. The implications for cancellation of citizenship are likely to be significant, given that any extension of the powers must comply with the set of principles of the Constitution, under the scrutiny of the Constitutional Council, or risk modifying the Constitution directly, under much stricter procedures. For reasons which I set out in the next section, this is the path which the then French President chose to

¹⁷ DC no 92-312, 2nd September 1992, rec 76, and DC no 2003-469, 26th March 2003, rec 293.

¹⁸ For a criticism see, Rousseau (2007), Stone Sweet (2007).

undertake in 2015–16: before uncertainties on the “constitutionality” of his proposed extension of deprivation of citizenship, he sought to modify the Constitution directly.

6.6 Different interpretations of the legality of citizenship deprivation in France

Stone Sweet refers to constitutional revisions in the French context as “corrective”: modifications which occur *after* a finding of unconstitutionality from the Constitutional Council (Stone Sweet, 2000: 83). And he makes a relevant claim: most constitutional revisions, when they are not about the modernising of institutions, generally follow findings contrary to the provisions of the Constitution. But constitutions and constitutional practices evolve and involve different actors, other than the judges. In 2015, in the direct aftermath of the terrorist attacks in November 2015 in Paris, the then French President innovated. Hollande proposed to modify the Constitution *prior to* a contrary finding from the Constitutional Council and to introduce the exceptional procedure of the state of emergency:¹⁹

“... we need to go beyond the emergency. I have deeply thought about it. I feel, in conscience, that we need to modify our constitution to allow the public powers to act in compatibility with our *Etat de droit* against the terrorism of war”.²⁰

He also referred to “other measures” to fight against terrorism, including the extension of deprivation to all citizens, birthright and naturalised alike:

“We must be able to strip the nationality of an individual who has been condemned for acts contrary to the fundamental interests of the Nation or acts of terrorism, even if the individual was born French, and I mean it ‘even if the individual was born French’ so long as that person has another nationality”.²¹

The proposal was thus clear: it should be possible to deprive all citizens *provided that* it does not lead up to *de jure* statelessness. What was less clear though was where the measure should be enshrined: in the Constitution or in ordinary legislation. Finchelstein writes that this ambiguity was potentially deliberate (2017), arguably, to leave time for the government to poll opinion (public and institutional) on the subject. Legally, introducing the measure by way of the Constitution would shield the

¹⁹ At the time, Hollande had already declared the state of emergency and the procedure has been subsequently endorsed by both houses through ordinary legislation.

²⁰ Service de Presse de la Présidence de la République, « Discours du Président de la République devant le Parlement réuni en Congrès », 2015, 10pp.
<http://www.ariège.gouv.fr/content/download/9989/68738/file/16112015%20CONGRES%20VERSAILLES%20AT%20TENTATS%20DE%20PARIS%20DISCOURS%20DE%20FRANCOIS%20HOLLANDE.pdf> (26/11/2016)

²¹ *Ibid.*

procedure from claims of future illegality. An introduction in ordinary legislation would risk a finding of incompatibility with the Constitution, or, at least, trigger challenges, because the question of the legality of the deprivation of citizenship of birthright citizens had not been settled by the Constitutional Council, which had only adjudicated on the question of deprivation for naturalised citizens (chapter 5). The government therefore approached the Conseil d'Etat for a non-binding opinion on the conformity of the proposed measures with the Constitution.

6.6.1 The interpretation of the Conseil d'Etat on the constitutionality of deprivation

In its advisory opinion, the Conseil d'Etat found that the extension of cancellation of citizenship to birthright dual nationality holders pursued a valid objective: to ensure the security of the citizens and the protection of the nation. But, according to the Conseil d'Etat, there were important grey areas regarding the constitutionality of the measure. For this reason, it argued that citizenship deprivation for birthright citizens should be introduced directly into the Constitution.²² The Conseil d'Etat found that this risk of unconstitutionality was not linked to a breach of equality between single and dual-nationality holders. This is because, according to the Conseil d'Etat, multiple and single nationality holders are in different situations: only single nationality holders risk statelessness (point 5 of the opinion). Rather, the Conseil d'Etat contended that incompatibility with the Constitution could result from a potential incompatibility with a “Fundamental Principle acknowledged in the laws of the Republic” (referred to as “PFRLR” in French) and/or from a violation of article 16 of the Declaration of the Rights of Man and of the Citizen (DRMC), which protects situations “legally acquired” (article 16: “a society in which the guarantee of rights is not ensured, nor the separation of powers enshrines, has no constitution”). The PFRLR are principles which are referred to in the preamble of the Constitution of the 4th Republic (1946).²³ What these principles entail is vague and not defined or illustrated by the preamble. PFRLR are in fact a jurisprudential creation: they are delineated by the Constitutional Council or the Conseil d'Etat. In two decisions in 1988 (no 88-244 DC *cons* 12)²⁴ and 1989 (n 89-256 DC *cons* 23) the Constitutional Council laid out the conditions for the “acknowledgment” of a PFRLR:

²² Conseil d'Etat, « Loi constitutionnelle de protection de la Nation », Assemblée générale, Section de l'Intérieur, Décembre 2015

<https://www.conseil-etat.fr/ressources/avis-aux-pouvoirs-publics/derniers-avis-publies/loi-constitutionnelle-de-protection-de-la-nation> (29/09/2019). Point 5 of the advisory opinion.

²³ “They [the people of France] solemnly reaffirm the rights and freedoms of man and the citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles acknowledged in the laws of the Republic” Constitutional Council, “Preamble to the Constitution of 27th October 1946”, 2002 https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst3.pdf (25/10/2019).

²⁴ *Cons*” (in French: “*considérant*”) refers to the different paragraphs of the decision from the Constitutional Council or the Conseil d'Etat. I thus use it in lieu of “para” for the French cases.

it needs to be derived from a “Republican law” before the 4th Republic (*ie* an important law voted between the 1st and the 3rd Republics), and the legislation must not have been contradicted by any subsequent statute. In other words, there needs to be a continuity in the legislation which, according to the Constitutional Council, accounts for its importance in the French political and legal culture.²⁵ This flexible category allows for an extension of the protection offered by the Constitution. Could citizenship acquired from birth be recognised as a PFRLR? The Conseil d’Etat argued that, since there was no legislative history which deprived French-born citizens of their nationality, and since the laws on deprivation were enacted before the 4th Republic, in theory the conditions for the “acknowledgment” of the principle are met. But the Conseil d’Etat recognised that, even if the conditions were met, this would not necessarily suffice to enshrine it (*ie* to give it constitutional validity). The Conseil d’Etat thus turned to another feature which could account for the incompatibility of the measure: the fact that citizenship is a “constitutive element” of the person. According to the Conseil d’Etat, since citizenship grants fundamental rights to the individual from birth, its privation could be found excessive and disproportionate. It would shatter the principle of article 16 which says that societies must guarantee rights or be considered constitution-less. The Conseil d’Etat thus concluded that citizenship acquired from birth constitutes such a “legally acquired” situation (point 5 of the opinion).

Taken together, the Conseil d’Etat did not consider that the potential infringements on the rights of the individuals, and their limited pragmatic effect, were enough to give a negative opinion on the measure. It preferred to limit the reach of the powers to the most serious crimes and said that if the government wished to proceed it would have to amend the Constitution (point 8 of the opinion). This opinion is important for several reasons. It differs from the kind of juridical scrutiny evidenced in chapter 5 since the Conseil d’Etat was acting as an advisor to the government. When operating in this capacity, the Conseil d’Etat is not subjected to the submissions of the parties and to issues of formalism. The non-binding character of the opinion also has the potential to limit instances of deference and restraint. For example, here, despite eventually finding in favour of the government, the advisory opinion includes several limits and a thorough inquiry into some of the substantive issues which deprivation raises. These, in turn, can become important resources in the political debate. It also vouches for a constitutional amendment, which answers much stricter procedures than ordinary

²⁵At present, PFRLR include such principles as freedom of association, the independence of university academics, the rights of the defence, etc.

Conseil Constitutionnel, « Le Conseil Constitutionnel et la protection des droits fondamentaux », Présentation faite lors du vingtième anniversaire de la révision constitutionnelle de 1974, 1994, 9pp

https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/pdf/Conseil/droitfon.pdf

(25/10/2019).

legislative modifications. In light of what it had promised, and before the uncertainty around the constitutionality of the proposed measure, the government decided to follow the advisory opinion of the Conseil d'Etat.

6.6.2 The interpretation of the Commission of the Laws of the Senate

Before turning to the conditions of this constitutional revision, it is important to note that the interpretation from the Conseil d'Etat on the constitutionality of the measure was not shared by all institutional powers. In scrutinising the jurisprudence of the Council, the rapporteur for the Commission of the Laws of the Senate argued that the interpretation of the Conseil d'Etat was highly “questionable” and that there should be no constitutional amendment.²⁶ According to the rapporteur, the decisions of the Constitutional Council from 1996 and 2014, which interpreted positively the constitutionality of cancellation of citizenship (chapter 5), offer three insights: first, the fact that a difference in treatment between birthright and naturalised citizens cannot exceed 15 years; second, that citizenship deprivation amounts to a punitive sanction but is not disproportionate; and, third, that citizenship deprivation does not interfere with other constitutional principles such as article 16 DRMC or private life.²⁷ In considering these decisions, the rapporteur argues that nothing indicates that the extension of deprivation to birthright citizens would be unconstitutional. Rather he contends that it would remove the inequality between naturalised and birthright citizens. His last criticisms were directed at the Conseil d'Etat's interpretation of article 16 of the DRMC and the fact that citizenship *could* be a constitutive element of the person. Here, the rapporteur found that nothing in the jurisprudence of the Constitutional Council seems to acknowledge this and that, crucially, it would go against the Council's principle that “French born citizens and naturalised citizens are in an equal situation before the law.” In other words: according to the rapporteur, if citizenship, when acquired by birth, was to be acknowledged as a constitutive feature of the individual, birthright citizens would enjoy a superior constitutional protection than naturalised citizens. In any event, he found that it would have been *better* or at least preferable to wait for a decision from the Constitutional Council on the constitutionality of the proposed extension before revising the Constitution (p11 in the report). This *preventive* constitutional revision by anticipation of a potential future finding of unconstitutionality was unheard of and, he argued, inadequate. Later, he said that this approach was

²⁶Sénat, Rapport n°447, Commission des lois constitutionnelles, de législation, du suffrage universel, du règlement et de l'administration général sur le projet de loi constitutionnelle, adopté par l'Assemblée Nationale, de protection de la Nation, session ordinaire de 2015–2016, Philippe Bas (rapporteur), 268pp, at p11, and pp56–64

<http://www.senat.fr/rap/l15-447/l15-4471.pdf> (04/12/2019)

²⁷ *Ibid* p57.

“much preferable to that chosen by the President because it leads the constituent power [the power in charge of revising the Constitution] to act by being fully aware of the purported unconstitutionality it is supposed to overcome and not to anticipate a virtual and hypothetical one” (p60 in the report). Here too, the interpretation from the rapporteur on the constitutionality of deprivation powers, endorsed by the Commission of the Law of the Senate, is analytically detailed and thorough. First, it seems to indicate that citizenship as a fundamental principle cannot operate without equal citizenship: if citizenship were to be a constitutive feature of the individual, this should apply to all, irrespective of their mode of entry into citizenship. Second, it points to the decisive role of the Constitutional Council in initiating a discussion on constitutionality. The rapporteur advocates for “corrective” modifications of the Constitution, *ie* constitutional revisions following on from an interpretation by the Council. He also appears to reproduce the portrayal of the Council as a “switchman”, as an entity which does not legislate but “orientates” potential reform towards the most adequate forum in a contentious area where people and institutions disagree: a constitutional revision.

Taken together, these different opinions on the constitutionality of cancellation of citizenship, from the Conseil d’Etat, the Commission and the government, are important because they added views to the debate on the scope and worth of the powers. They also orientated the debate towards getting broad consensus through a constitutional amendment. By contrast, the developments described in chapter 5 demonstrated that the UK, prior to the proposed amendment of 2014, lacked a substantive judicial analysis of the legality of the powers. The Supreme Court decision in the case of *Al Jedda (Al Jedda v Secretary of State for the Home Department [2013] UKSC 62)* was argued on narrow procedural grounds: the fact that the individual was alleged to be left stateless. In this case, the UK Supreme Court found in favour of Al Jedda and quashed the order. A direct consequence of the case was the legislative overhaul of 2014. Before the House of Commons, Theresa May, then Home Secretary, said that she was disappointed at the Supreme Court’s decision and asked her legal advisers to address the key points in the judgment to reverse it (HC deb 28th January 2014: c1041). What this means is that there was no UK equivalent to the views expressed by the Constitutional Council, which, as seen, formed an important part of the pre-amendment debates. In addition, the constitutional structures of the states directed France and the UK towards different procedures of change: a constitutional amendment in France, an ordinary parliamentary revision in the UK. In the next sections, I investigate whether these differences of procedures (of constitutional amendment against ordinary legislation) and difference in the number of “views” which came into the debate mattered for the outcomes of 2014 in the UK and 2015–16 in France.

6.7 Amendment in an adverse rights environment

A critical feature of both proposed changes is that they were taken in the context of deep scepticism about rights protection for alleged terrorist offenders. In her work, De Londras (2011: 10) demonstrates how, in the direct aftermath of a terrorist attack, there are significant pressures to expand security powers. She shows that these pressures to protect are both “top-down”, *ie* manufactured by the state, and “bottom-up”, *ie* they come from the people themselves. Taken together, her work accounts for the fact that such top-down and bottom-up panics create a political space which can facilitate consensus, beyond political affiliations, and result in the taking of drastic measures (De Londras, 2011). This feature, she argues (in a different work), can be heightened when the individuals who are exposed to the new counter-terrorism powers have already been made foreign, when they have been “othered” (Davis and De Londras, 2010: 38). Within that frame, as she explains, political support from MPs for the “other”, the purported terrorist who acted against the community as a whole, is unlikely to attract political gain from parliamentarians and policy-makers (Davis and De Londras, 2010). Drawing from her insights on what factors seem to filter through state behaviour in counter-terrorism cases, I examine the extent to which the constitutional arrangements of the state played a role in ensuring political checks on the state. The terminology of “adverse rights environment” is here to account for both the context of heightened national security concerns and the playing-out of the political paradigm of the “politics of belonging” to seek support against the “other”.

6.7.1 The 2014 Immigration Bill

In the UK context, the effect of the 2014 amendment was to reintroduce a distinction between citizens according to their mode of entry into citizenship and to allow for statelessness in limited circumstances. The passing of the bill faced severe criticisms in both houses of Parliament. In the Commons, some MPs contended that the amendment conferred extensive powers to the government, effectively “a blank cheque to remove people’s rights to have rights” (Sarah Teather (Liberal Democrat), HC deb 14th January 2014: c1040). Others tackled the government on the measure’s limited pragmatic gains for the protection of the state. Frank Dobson (Labour), for example, said he “[had] never heard anyone give a single example of Britain’s having benefited from some individual’s loss of British citizenship” (c1094). Pete Wishart (Scottish National Party) asked the government what the state purported to do about individuals who had been deprived of their citizenship: “are we going to launch them [the deprived] into orbit and leave them circling round the Earth as stateless people without any sort of citizenship?” (c1082) On more principled grounds, some MPs criticised the creation of statelessness and the reinstatement of different kinds of citizens. Julian Huppert (Liberal Democrat), a member of the then majority, said he would not support the clause

because he did not “like the idea of creating two-tier citizenship” (c1100). There were also considerable concerns about parliamentary processes being skipped and/or seriously impeded by claims of national security protection. David Hanson (Labour) repeatedly asked the Home Secretary to explain why the new clause was tabled so late in the process (at report stage) and without the consultation of outside bodies (c1040).²⁸ The official response from the government, linked to the *Al Jedda* judgment, was that “given the importance of the subject matter, we wanted the time to ensure that we got it right” (Theresa May: c1042). But, as the Joint Committee on Human Rights (JCHR) later indicated,²⁹ the Home Secretary had made comments in the media before the introduction of the bill. The JCHR concluded that time and opportunities for a public consultation were open to the Home Secretary, who had failed to implement them, thereby seriously undermining Parliament’s ability to scrutinise the powers under review. Crucially, in addition to the rushed proceedings, what seemed to undermine the parliamentary process was the non-disclosure of critical information from the government because of the risk it allegedly posed to the security of the state.³⁰ Despite these criticisms, in this relatively short debate (40 minutes) the House endorsed the bill: 297 yes and 34 noes, including from some members of the Liberal Democrat Coalition government, with the majority of the Labour opposition abstaining.³¹

The Lords introduced a critical amendment which proposed to establish a Joint Committee of both Houses to consider all aspects of the bill and to report back (amendment 56). The government’s response was that this would create “unnecessary delay” and undermine the efficiency of executive action which, as alleged, the urgency of the national security required (Lord Holbeach, HL deb 7th April 2014: c1171). In responding to the claim made by the executive, Lord Lester of Hearne Hill made a critical statement about the balance of powers within the UK constitution and how claims of national security protection tend to undermine it:

“We have no constitutional guarantees other than what is in the Human Rights Act and the Government are saying that the Human Rights Act has no application ... let us assume that the

²⁸ Bodies such as the Immigration Law Practitioners Association briefed during the night and the opposition tabled manuscript amendments.

²⁹ Human rights Joint Committee, Twelfth Report. Legislative Scrutiny: Immigration Bill (Second Report), 2014 <https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/142/14205.htm> (28/06/2019).

³⁰ The JCHR asked the government why it refused to inform Parliament on the number of cases in which the power to deprive had been exercised; and on the number of cases in which the decision was taken wholly or partly in reliance on information which the Secretary of State’s view should not be made public, but did not receive an adequate answer: *ibid* 18–25.

³¹ Hansard UK Parliament, “Immigration Bill”, Division 198, 30th January 2014 <https://hansard.parliament.uk/Commons/2014-01-30/division/14013062001907/ImmigrationBill?outputType=Party> (25/10/2019).

Government are right We have no written constitution. We have no constitutional court that would be able to rule upon the matter. Therefore, the safeguards have got to be parliamentary safeguards. Judicial review could not review the compatibility of the Bill with the convention because, if the Government are right, the convention might just as well be written in water—it has no application. That makes me consider it absolutely vital that Parliament properly considers the Bill before this can go on to the statute book, in order to make sure that it is satisfied of the constitutionality of the Bill and its compatibility with human rights” (c1181–1182).

In this quote, Lord Lester sets out all the important reasons for why there should be parliamentary scrutiny under the constitutional arrangements of the UK. The “political” character of the UK constitution means that effective checks on government action require thorough political scrutiny by parliamentarians. In security bills, as the data shows, this tends to be neglected before claims of “efficiency” and “urgency”. However, the arguments of efficiency and urgency did not carry the day in this specific case. Harvey (2014) hypothesises that one reason behind the level of opposition is that the government overplayed its reliance on the security argument by refusing to offer critical information about the number of people deprived. This view is well captured in the words of Baroness O’Loan: “The Government say that they are ‘unable’ to put the numbers into the public domain, for reasons of national security and operational effectiveness ... However, I do not believe that the release of this number, or of many other numbers, will in any way impact on national security” (HL deb 7th April 2014: c1177). The Lord’s amendment was endorsed by 242 contents against 180 non-contents. There was important abstention from the Liberal Democrats and some dissent from other members of the Coalition government.³² Issues of statelessness, arbitrariness, and the rule of law, along with different treatment for different citizens, also crystallised the core of the arguments against the state action. For Lord Pannick, the measure “is so fundamentally flawed, so in breach of international law and so damaging in its practical consequences for the security of this country that it should be removed from the Bill” (HL deb 17th March 2014: c48). Before the bill was referred back to the Commons, the government decided to “compromise” and introduced a clause which sought to secure both a form of *post* legislative scrutiny, a sunset clause,³³ and a statement from future Home

³²Hansard UK Parliament, “Immigration Bill”, Division 2, 7th April 2014

<https://hansard.parliament.uk/Lords/2014-04-07/division/HOLDT20140407DIV2/ImmigrationBill?outputType=Party> (25/10/2019).

³³ The obligation to report is towards the independent reviewer on terrorism and circumscribed to a report on the provision on statelessness rather than deprivation more broadly. The current legislation writes that the powers must be conducted at the end of the first year where the powers have been enforced and, later, after a three-year interval (s40(4B)).

Secretaries that they would only deprive naturalised citizens who were single nationality holders on the reasonable belief that these persons would acquire another nationality. The bill was eventually fully endorsed by the House of Commons (305 ayes, 239 noes on 7th May 2014).³⁴

6.7.1.1 Party-system and the politics of belonging

Neal (2012b; 2012a) contends that counter-terrorism law-making in the UK, especially at times of heightened emergency crisis, is marked by speed, poor legislative scrutiny and broad consensus. The data suggests that these “ingredients” were present in 2014: there was political expediency, poor regard to parliamentary procedures, and a lack of transparency from the executive which, at least for a time, precluded a full parliamentary scrutiny of the issue. These features, however, do not explain why counter-terrorism measures are almost systematically endorsed by the houses of Parliament. In their respective analyses of counter-terrorism law-making, De Londras (2010; 2011) and Neal (2012a; 2012b) point out the importance of the structural features of the parliamentary processes as potential explanations for parliamentary behaviour. These include rigid voting patterns within the party-political system (the “whip” system)³⁵ and the fact that career advancement can depend on alliances with older members (the “patronage”). Taken together, they find that, if there is some form of parliamentary dissent, the noise which dissenters can make only helps to secure minimal forms of controls on the government, such as sunset clauses. The 2014 amendment seems to back their claims. Alongside evidence that the whip had been strongly enforced,³⁶ the rigidity of the party structure is perhaps best encapsulated by the speech of the Conservative MP Jacob Rees-Mogg. In his speech, Rees-Mogg expounds at great length why he objects to the measure and gives several principled arguments to criticise it but did not vote against the bill. According to him, one issue deals with the creation of

³⁴ Hansard UK Parliament, “Immigration Bill”, Division 268, 7th May 2014

<https://hansard.parliament.uk/Commons/2014-05-07/division/14050791003107/ImmigrationBill?outputType=Party> (25/10/2019).

³⁵ The whip system operates by issuing directions to vote. It is what organises the parties’ contributions to Parliament, through ensuring that a maximum number of MPs will vote and do so in the way their party requires. In very contentious matters, such as national security, the whip can be very extensive. This is what is referred to as the “three-line whip”: defying a three-line whip can lead to the exclusion of the MP or the Lord from the party.

³⁶ The Public Whip, “Immigration bill- new clauses 12 and 18 – Fees – Power to deprive naturalised citizen of citizenship even if that would leave them stateless – 30th January 2014 at 16:00”, 2014

<https://www.publicwhip.org.uk/division.php?date=2014-01-30&house=commons&number=198> (25/10/2019);

The Public Whip, “Immigration bill – report (3rd day) – 7th April 2014 at 18:53”, 2014

<https://www.publicwhip.org.uk/division.php?date=2014-04-07&house=lords&number=2> (25/10/2019);

The Public Whip, “Immigration Bill – clause 60 – power to deprive naturalised citizens even if that would leave them stateless – 7th May 2014 at 16:23”, 2014

<https://www.publicwhip.org.uk/division.php?date=2014-05-07&house=commons&number=266>(25/10/2019).

different kinds of citizens (“Once any one of us has a passport that says we are British, we are as British as anybody else, whether they were born here or got their passport five minutes ago”(HC deb 30th January 2014: c1086). Another issue deals with the broad powers it confers on the executive (“I am always nervous about giving the Executive relatively arbitrary powers, because they are the ones that can be most misused”) (c1086). He also argued that the criminal process offered a better way of dealing with those who would be deprived than did citizenship deprivation:

“If people have committed an offence so serious, important and threatening to the life of the nation that their passport should be confiscated, surely they have committed some other crime for which they could be charged, dragged through the courts, perhaps found guilty by a jury and then sentenced accordingly, with the penalty handed down in the right and proper way and their rights and liberties as subjects being maintained” (c1086).

But, despite these criticisms, Rees-Mogg said he would not object to the measure: “I will not oppose the new clause, but I wished to raise those concerns” (c1086). This example from the data seems to support the fact that principled arguments do not always suffice to defeat the measures, for MPs can be compelled by other inducements such as strict party rules.

Beyond structural rules of party politics, perhaps it is, as Neal (2012b: 365) contends, that parliamentarians have internalised the “rules of the games” when faced with counter-terrorism bills. Neal draws on Bourdieu’s (1977) notion of “habitus”, of deeply embedded social practices, to demonstrate that if the nature and/or content of the threat appear new, the behaviour of Parliament and the executive is a relatively similar one. As he argues, the behaviour of parliamentarians seems to indicate that they have accepted the unequal power relation with the executive in such contexts and act accordingly (Neal, 2012a; 2012b). Another potential explanation behind the lack of full enforcement of political checks for security matters might link to the people who are the targets of the measure. In the debate, there is evidence that the political paradigm of the politics of belonging, which distinguishes between “us” and “them”, framed some of the political discourses. As Simon Kirby (Conservative) put it, “is this not just about getting rid of very bad people and preventing them from coming back to our country? Is that not the nub of what we are discussing?” (HC deb 30th January 2014: c1049). To which Theresa May answered:

“I am grateful to my hon Friend for putting the matter so succinctly and sensibly” and, later, that “[he] raises the important issue of people who may have trained and fought in Syria potentially coming back here radicalized and with the desire to do us harm. I am sure this is a matter of concern throughout the House” (my emphasis) (HC deb 30th January 2014: c1049).

As De Londras (2010) shows, the framework of the politics of belonging can have some importance in terms of voting patterns since there can be little political gain for MPs to protect those who have already been excluded from the political community. What the data seems to indicate, then, is that, in the specific context of 2014, the value of the UK political checks on the government is being undermined by claims of security protection which entail expediency and poor respect for parliamentary procedures. It is also possible that, in such matters as security, strict party rules and the political paradigm of the politics of belonging decrease the value of political dissent and democratic dialogue in a way which can favour the taking of extremely harsh measures. Parliamentarians can discuss their concerns, but they still need to vote according to party lines. In the next section, I look at how the process of change operated in France and whether the same issues arose.

6.7.2 The French constitutional amendment

In 2015, following on from the interpretation of the Conseil d'Etat, the government decided to modify the Constitution. Time and again during the debates the government justified the measure, and the constitutional amendment, as something which would symbolise the unity of the French people against terrorism. In the initial text of the bill, the government wrote that, despite citizenship being a "constitutive" element of the person, "it is for the national community to be able to decide to sanction those who, through their behaviour, seek to destroy the social link".³⁷ Before the Commission of the Laws of the National Assembly, Manuel Valls argued that unity means a collective responsibility of parliamentarians acting as constituent powers to endorse the proposed amendment. According to the then Prime Minister, this amendment was requested by the French people themselves: "the French expect from us to meet, collectively, irrespective of our political affiliations, the challenges and their exigencies. An ethic of shared responsibility imposes itself".³⁸ And he was, at least for a time, in the right: a poll conducted by *OpinionWay* for the newspaper *Le Figaro* concluded that 85% of the French people questioned between 28th–29th December 2015, a few days after the opinion from the Conseil d'Etat and the decision of the government, were in favour of the extension of the measure to French-born citizens who were multiple nationality holders. Amongst them, 62% were "totally in favour" of the measure.³⁹ The expansion of the state's power, in this particular case, thus matched the desire of

³⁷ Assemblée Nationale, « Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », étude d'impact, Juillet 2014, 72pp

<http://www.assemblee-nationale.fr/14/pdf/projets/pl2110-ei.pdf> (06/11/2019).

³⁸ Assemblée Nationale, rapport no 3451, « Au nom de la Commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur le projet de loi constitutionnelle no 3381 de protection de la Nation », Dominique Raimbourg, 28 Janvier 2015, 191pp, at p24

<http://www.assemblee-nationale.fr/14/pdf/rapports/r3451.pdf> (06/11/2019).

³⁹ "85% des Français seraient favorables à la déchéance de nationalité », *Le Monde*, 2015

the public for tougher measures and illustrates the “top-down” and “bottom-up” approach to law-making to which De Londras (2011) refers. An interesting feature is that the government did not seek to modify the Constitution through referendum, which, as noted, can be sought through article 89 and would have involved the “people” directly in the debate. Nor did it purport to recourse to article 11 of the Constitution. A constitutional amendment through article 11 frees the state from most of the procedural hurdles enshrined in article 89 (*ie* acceptance of a similar text and no last word to the national assembly). Admittedly, the likelihood of any future revision through article 11 is unlikely as these have been widely criticised by the doctrine because they do not constitute the orthodox gateway for amending the text. But there is past constitutional practice which could establish it. Rather, the similar text which was to be agreed on by both the National Assembly and the Senate was to be referred to the Congress for a vote. From the context set out above, of terrorist attacks against the state and fear among the “people”, it could have been predicted that the proposal would not get turned down. It was turned down, however. I suggest that there are different potential explanations for why the proposal did not go through, some linked to the constitutional form of the amendment, others to the specific political context of the time.

6.7.2.1 Strict procedures: the equal role of the houses in constitutional revisions

At the time the bill was referred to the Commission of the Laws of the National Assembly, there was heightened criticism from the majority in the government and other important public figures that the bill undermined the constitutional principle of equality (Finchelstein, 2017). In light of this, the government compromised. The core of the change for the government was to take out any reference to origin and/or multiple nationality, to remove anything which would interfere with formal equality in the text of the Constitution. The Prime Minister also declared that France would ratify the UN Convention on the Reduction of Statelessness of 1961 and emulate the wordings of its declaration at article 8.3 (chapter 2). The amendments were endorsed by the Commission of the Laws of the National Assembly and, later, by the National Assembly through a tight majority, by 162 votes for and 148 against with 22 abstentions.

The text was then presented to the Commission in charge of reviewing the laws of the Senate and modified, against the advice of the government. According to the *rapporteur* of the Commission, the current proposal gave too much powers to the ordinary legislator to lay down the contours of cancellation of citizenship. The *rapporteur* refused the conferral of such wide powers to the

https://www.lemonde.fr/police-justice/article/2015/12/30/selon-un-sondage-85-des-francais-sont-favorables-a-la-decheance-de-nationalite_4839945_1653578.html (28/09/2019).

representatives of the state, as “no one knows what the legislator of tomorrow will be”.⁴⁰ This approach is a good example of the portrayal of the Constitution as a legal document which protects the “people” from their governing majorities, in a way which Holmes (1995) envisaged. It suggests a suspicion towards the “ordinary” legislature and its potential responsiveness to the specific context of the day. Crucially, the new formula allowed for statelessness, which the Commission of the Senate refused to endorse. A cross-reading of the arguments in the National Assembly and before the Commission of the Senate hint at a principled “battle” between equality and statelessness. For example, the rapporteur says that:

“Unless we give up the measure of citizenship deprivation, it is not possible to conciliate the exigence of the prevention of statelessness with the wish to formally put all French citizens as equal under the law, whether they enjoy one or multiple nationality. The national representatives are before a choice which they cannot skirt with symbolic phrases ... The Commission decided in favour of the prevention of statelessness”.⁴¹

The Commission subsequently endorsed a series of amendments: statelessness would be prevented, there would be a limit to the exercise of the measure against the most important crimes, and the measure would be decided by the administration rather than a judge.

An important feature which comes out of the data is the Senate’s statement of its constitutional power and refusal to bow before the pressures of the government and the National Assembly. Before the Senate, and in light of the amendment of the Commission, Manuel Valls asked the senators if they “really” wanted to challenge the consensus which had been reached in the National Assembly (JO, Sénat, 17th March 2015, 4179) and, later, noted that “once again” the Senate did not purport to build a consensus (,4180). In the same way that the UK government potentially overplayed the national security card in the debates of 2014, these repeated accusations appeared to rebound upon the government. Since both houses have an equal role to play in constitutional amendments, the Senate did not seem to be willing to hold back on its positions. For Phillipe Bas, the *rapporteur* of the Commission: “The senate will take a decision according to its own conviction, just like the National Assembly. This is the condition for a balanced and respectful dialogue between both of our houses” (,4183). Similar points were made by other senators which stresses the clear institutional line taken by the Senate. For Michel Mercier, in the “institutional context [of constitutional amendment], the Senate must take its responsibilities as constituent power” and, further, that “we expect, Mr Prime Pinister, that you build the consensus [between both houses]. You cannot tell us: the National

⁴⁰ *Op cit* 26, Commission of the Laws of the Senate, p123.

⁴¹ *Ibid*, p100.

Assembly has made its decision, get in line” (,4189). Jacques Mezard, now a member of the Constitutional Council, was even more explicit when he warned the Prime Minister not to get into a form of “*Senate bashing*” (in English in the original text) and that to make the Senate the scapegoat for the failure of the project was not a way to bring the French people together (,4279). Eventually, the article, as amended, was adopted by the majority in the Senate (187 votes against, 149 in favour, with 8 abstentions). The constitutional revision as a whole was also endorsed by the House but, here too, on tight majorities (176 in favour, 161 against, 11 abstaining) and without consistent group-voting patterns. Under the procedural conditions of article 89, the article thus modified was to go back to the National Assembly. Contrary to ordinary legislative procedure, however, no last word is given to the National Assembly in instances where no agreement is found. On 11th February 2016, the President announced that he did not wish for an endless back and forth between the two houses of Parliament.⁴² This eventually led to the dropping of the measure.

6.7.2.2 More flexible party rules in constitutional amendments?

Beyond these procedural features, what potentially explains the dropping of the revision links to different factors. One potential set of factors are that constitutional amendments require more flexible party rules. The developments described in the previous section highlighted the potency of the party structures in the UK, the systems of the whip and of patronage, as well as the pressures from the electorate and the accountability of parliamentarians to that same electorate. The progress of the French constitutional amendment reveals important dissent from parliamentarians and an absence of clear party voting patterns. In fact, none of the parties, across the houses, voted in a similar way. This is clearly evidenced in the following exchange between members of the Socialist Party in the National Assembly.

According to Patrick Menucci, at the time speaking for the Socialist Party, “any individual who excludes him/herself from the national community, who commits a crime against the life of the nation, must be excluded from it ... This is why the socialist group [within the assembly] will vote for this reform of the Constitution” (JO, AN, 5th February 2015, 1034). To whom Pascal Cherki (member of the Socialist Party at the time) replied: “There is no common group position on the subject!”, and to whom Bruno le Roux, another member, answered: “Yes, there is a group position! One needs to get informed – or

⁴²« François Hollande renonce à la déchéance de nationalité et au Congrès », *Le Monde*, 2016 https://www.lemonde.fr/attaques-a-paris/article/2016/03/30/francois-hollande-renonce-a-la-decheance-de-nationalite-et-au-congres_4892426_4809495.html (28/10/2019).

to change group” (,1035), under the amused looks of the opposition: “Oh, oh ... there is division in the air!” (Alain Chrétien, 1035).

In the National Assembly, 165 of the MPs from the socialist group voted in favour of the measure, 83 against, with two abstaining. Of the Republicans, 111 voted in favour, 74 against, with eight abstaining.⁴³ It is difficult to read these figures from a UK perspective, for the party-political system in France does not (always) produce voting patterns which are institutionalised in the form of whips. Maybe it is that in these instances, constitutional revisions, parliamentarians acting as the constituent power are less inclined to give way to ordinary politics and to represent a certain political colour. In the National Assembly and the Senate one of the strongest and repeated lines of criticism was directed towards the opportunity presented by the constitutional amendment. According to the Prime Minister, this amendment was necessary because of the “shock” which France had undergone and the “change of epoch” since the terrorist attacks.⁴⁴ The bill was a “symbolic weapon” in the fight against terrorism, as Valls frames it: “I believe in the concrete strength of symbols, enshrined in a Constitution”.⁴⁵ For most MPs and senators, the Constitution was no place for such symbols taken at a time of national emergency. For example, Cécile Dufflot, a former member of the government, contended that, on top of being useless, the amendment was dangerous because “it puts our Constitution, our shared ground, under the realm of contingency” (JO, AN, 5th February 2015, 1006). Noel Mamère referred to the Constitution as a “paper cloth” which can be dictated to by circumstances and emotion (,1013) and, later, that the Constitution:

“... is not a carry-all text in which we put the feelings of the government of the day ... it is a text which we should touch with precaution because it rules over our legislative system. Only the enunciation of fundamental liberties and the functioning of our public institutions can compose it” (,1013).

What they seemed to express is the idea that the Constitution is above political party politics and the day-to-day life of the state. For Danielle Auroi, the constitutional amendment, put forward under a realm of emotions, should be taken back, now that “we came back to reason” (1012). Danielle Auroi’s

⁴³ The split is less clear cut for smaller parties: for the Union of Democrats and Independents (centre right) 25 were in favour, 4 against; the Green Party 4 in favour, 13 against, one abstaining; the Radical Republican (centre right), 10 in favour, 5 against, 3 abstaining; the Radical Left: 12 against, 1 in favour, 3 abstaining; and the non-group affiliated, 1 in favour, 8 against, 1 abstaining
[http://www2.assemblee-nationale.fr/scrutins/detail/%28legislature%29/14/%28num%29/1237#G0\(02/12/2019\).](http://www2.assemblee-nationale.fr/scrutins/detail/%28legislature%29/14/%28num%29/1237#G0(02/12/2019).)

⁴⁴ *Op cit* 26, hearing before the Commission of the Laws of the Senate, p46.

⁴⁵ *Ibid* p48.

opinion also points to the role of the Constitution as a buffer against heated passions, in a way which Elster (2000) envisioned.

Another important feature which can help interpret the situation is the surrounding political context: the coming to end of the presidential mandate of President Hollande, preparations for regional elections and the election of the future leader of the Conservative Party who would run for the presidency. In this context, MPs in the National Assembly had, arguably, nothing to lose by seeking to distinguish themselves from the then majority and prepare the grounds for the upcoming elections. What the French failed attempt to revise the Constitution reveals is that rigid constitutional structures can operate as a brake upon the expansion of state power on national security grounds.

6.8 Rigid constitutions: a safeguard against hard cases?

The previous sections demonstrate that a potential reason behind the lack of prevalence of citizenship deprivation in France is linked to the rigid structures of the French constitutional state. What the rigid structures of the state allowed for was many voices to be heard so that a decision could be reached on whether or not to extend the powers for cancellation of citizenship. This manifested itself in different ways. In 2010–11, it was illustrated through a kind of “legislative anticipatory obedience” of parliamentarians to the interpretation of the Constitutional Council. In 2015–16, the advisory opinion from the Conseil d’Etat, which operated in a non-legal capacity, added important elements to the (already existing) interpretations from the Constitutional Council. The Commission of the Laws of the Senate disagreed with the Conseil d’Etat and offered another perspective on the legality of the powers. These disagreements about the constitutional interpretation of the powers created voices in the debates and, arguably, directed state action towards a constitutional amendment, which must answer much stricter procedures. Colm O’Cinneide argues that political controls on the exercise of emergency powers can prove effective when they play out against a constitutional culture where, as he notes, the potential for abuse is recognised and excessive violations of rights rub up against the normative values of the system (O’Cinneide, 2008: 291). Such culture (also) appeared to be present in the French case, in that there were important challenges from MPs and senators who viewed the powers as problematic, from a present and historical viewpoint and, in any event, as powers which had no place in the constitutional norm.

This is perhaps best encapsulated by the contention from the Conservative MP Nathalie Kosciusko-Morizet who criticised the proposed amendment and extension of cancellation powers as nothing but other than a “political move”:

“This revision is useless and dangerous ... The fight against terrorism, the protection of our security will not get anything from it ... there is no need to modify the Constitution to implement these measures. ... Eventually this is political ability, and only political ability ... which pushed you to propose this constitutional amendment and to look for baroque alliances to make up a majority ... We will take away from these debates that political ability does not always win” (JO, AN 5th February 2016, 1037).

This purported culture, in addition to a rigid constitutional framework, offered a better protection of rights in this case. The example of cancellation of citizenship and of the inter-institutional connection in the French context thus constitutes a good example for Young’s (2017) claim that a “dialogue” between different institutions can best protect rights. Dialogue is a normative claim under constitutional theory that assumes that interactions between institutions are better able to protect human rights and provide a better control over the executive’s aims. Criticisms of dialogue rightly point out that institutions within a state rarely “talk” to each other but, rather, express “views” in their own institutional capacity (Carolan, 2016; Kavanagh, 2016). These views can “collaborate” in practice to offer a better system of rights protection. To rephrase it, then, the French model is a good example of a collaboration between the different organs of the state which enhanced the protection of existing rights.

In the context of the UK’s expansion of deprivation powers, the criticism of dialogue theories has important credentials. The mechanisms of the HRA, and especially of section 4 declarations of incompatibility, have been described as enhancing a dialogue between the different institutions of the state (Klug, 2001; Young, 2008). In chapter 5, I demonstrated that the courts have been unwilling and, to a certain extent, prevented from fully engaging with the rights implications of deprivation powers prior to the overhaul of 2014. This, potentially, gave broader scope for action of the executive in Parliament. Arguing against this view, Bellamy (2009: 10) writes that competition between political parties in elections and Parliament offers a balance of powers that renders government attentive and answerable to the electorate and citizens, in a will to reciprocate and collaborate. He further contends that the hearing of many voices in Parliament has the result of producing a dialogue and involves the mutual modification of many individual positions. In this chapter, I have shown that the views which Bellamy advocates for did not necessarily come through in the face of claims of political expediency, and, those which did operated under strict party structures. Bellamy recognises that there are instances, which he frames as “hard cases”, where his argument might fail to operate (Bellamy, 2009). The context of citizenship deprivation in 2014 seems to provide such a “hard case”. In such context, the kind of “competing views” which Bellamy refers to are, to say the least, minimal. There do not seem to be equal safeguards against populist arguments couched under the politics of belonging.

These findings do not seek to undermine the idea that rigid constitutional structures can trigger, for example, processes of reproduction of elite interests or precluding change against minority rights.⁴⁶ But perhaps these criticisms can be best appreciated in the context of adding new rights, whereby the institutions of the state can preclude a transfer of their powers to the greater number. This chapter has demonstrated, however, that in an adverse rights environment, the rigid constitutional structures of the state can be perceived as safeguards for the protection of existing rights.

6.9 Conclusion

In this chapter, I examined an alternate hypothesis to explain the prevalence of the powers of citizenship deprivation in the UK. I looked at the constitutional structures of the state and their degree of flexibility as a potential explanation of the French struggles to enforce change in a similar context. I found that the rigid constitutional structures of France played a critical role in impeding overreaching powers to deprive individuals of their citizenship. By forcing the expression of many views, the rigid constitutional structures of France, in this particular context of an adverse rights environment, provided greater safeguards to existing rights. On balance, although social and political factors are always multi-causal and complex, this analysis provides the best fit in terms of addressing the research questions.

⁴⁶ For example, Hirsch (2007) draws on a comparative approach to evidence that the transfer of power to the judges is part of a broader process whereby political and economic elites aim to insulate policy-making from democratic politics. Tushnet (1999) presents extreme examples of conservative interpretations from the Supreme Court of the United States which foreclosed the development of progressive rights issues and worked against minorities.

Chapter 7: Conclusion

7.1 Introduction

The thesis laid out so far has covered wide ground but has done so through focused questions examined via a specific methodology (chapter 1). The ideas underpinning the research have already been presented in chapters 2 and 3, and the research questions were addressed in chapters 4, 5 and 6. In this concluding chapter, I summarise my findings, reflect on the implications of this study, and consider potential areas for future research.

7.2 Addressing the research questions

As described at the outset, this thesis is about cancellation of citizenship in the context of national security. It has looked at the increase in the practice as a critical tool of the French and UK counter-terrorism frameworks – two countries that profess to hold liberal constitutional values. However, citizenship deprivation has weakened citizenship both as a legal status and as a claim to equal rights in both states. The rigidity of the constitutional structures of the nation states appears to be the clearest barrier to the erosion of existing citizenship rights, although other factors matter too, such as long-enshrined commitments to equal citizenship and judicial activism in upholding it.

A few months after the beginning of the PhD research, in November 2015, France faced terrorist attacks which propelled citizenship deprivation to the forefront of the public debates. The government proposed expanding the reach of deprivation powers to birthright citizens, even if this would leave individuals at risk of statelessness. But cancellation was already in the news because of the UK context. A year before the French attacks, in 2014, the UK introduced a critical amendment to citizenship deprivation which now allows the state to create statelessness, if the individuals are naturalised citizens. However, birthright citizens are not immune to cancellation, simply better safeguarded from statelessness. Since 2002 (under the Nationality, Immigration and Asylum Act 2002), deprivation powers are also applicable to birthright citizens who hold a second nationality in the UK. More recent state practice, from 2019, evidences an extensive interpretation of the legislation to cover UK-born citizens of a different minority ethnicity. The case of Shamima Begum, a UK-born citizen of Bangladeshi background who was deprived of her citizenship in 2019 on account of her participation in Jihad in Syria, suggests that minority citizens are at greater risk of being left *de facto* stateless on account of their foreign heritage.

Despite these converging practices, there remain critical differences between the French and UK legal frameworks and practices. In 2017, the UK government issued 104 cancellation orders, whereas there have been, to date, only 14 reported cases in France since 2001.¹ In 2016, the French government failed to carry out the changes required to deprive birthright citizens and cannot denaturalise any of its citizens at risk of statelessness. There are also important procedural differences in the implementation and exercise of the powers. These facts invited a number of questions, of which I chose three which were most pertinent to understanding the differences in trajectory in cancellation in similar national security contexts. The questions determined the theoretical and methodological orientations of the thesis. The first research question I addressed was:

- Why did both countries increase their recourse to cancellation of citizenship for naturalised or multi-nationality holders in the context of a heightened national security threat?

Second, given that there are differences in the states' practices:

- Why is the practice more prevalent in the context of the UK than in France? And, linked to this question, why did the French extension to cancellation of citizenship not take place in 2015–16?

Third, and finally, in light of the current overreaching state actions and the legal frameworks of the France and the UK which treat different kinds of citizens differently for the purposes of deprivation, I asked a conceptually linked question:

- Can we learn anything about the content of citizenship and belonging in both countries?

I now summarise the answers to these questions generated by my research and the implications of these answers.

7.2.1 The overhaul of the citizenship rights of minority citizens

As a starting point, the states' turning to their own minority citizens for purposes of national security protection appears to be indicative of two concurring phenomena: the normalisation of exceptional powers and the public portrayal of some individuals' conduct as "foreign" and a threat. By normalisation, the long-enshrined state practices of counter-terrorism and their past implementation of what Scheppele (2004) analysed as "emergency legal frameworks" are relevant. These have ratcheted down the protection of basic freedoms and rights and limited the space for contestation to

¹ « Cinq questions sur la déchéance de nationalité », *Le Parisien*, 2019
<http://www.leparisien.fr/faits-divers/cinq-questions-sur-la-decheance-de-nationalite-25-10-2019-8180274.php> (05/12/2019).

overreaching state action by Parliaments and the courts. For example, the states have increasingly used administrative measures pertaining to the field of immigration law to preclude entry and/or preclude the travels of their own nationals. In chapter 2, I examined the counter-terrorism measures of passport withdrawal, passport refusal, temporary exclusion orders and/or temporary prohibition of travel which, when applied to the citizens of the states, have drastic effects on their rights. These normalised state practices which leave citizenship less secure have been facilitated by the transformation of the conduct of some citizens into a security issue. The literature which demonstrates that citizenship has been “securitised” in the political context post 9/11 – in the sense that some citizens’ conduct has been identified in political discourses as so threatening that it needs to be addressed through security means – is a robust one. This literature was critical for understanding what is now considered to be a threat; namely, that threats were increasingly perceived to be inherent in the conduct of those individuals who were alleged to share similar characteristics with terrorist offenders (Macklin, 2007; 2014). One of the critical downsides of this association, as laid out by the literature, was that the citizenship of some individuals – who are alleged to share similar characteristics – was contested, and individuals were put under heightened demands to conform to what the majority in the state dictates. Given this context, I first had to enquire whether there were other areas, apart from security protection and past practices, which required an intensified heightened duty to conform for some individual citizens and challenged their membership of the state. Here, I drew on Yuval-Davis’s (2006) analytical framework of the “politics of belonging”, particular political projects which draft requisites for belonging to the state and exclude those who are not seen to meet these requirements, to demonstrate that, historically, entitlements and belonging did not necessarily constitute automatic features of formal citizenship (chapter 3).

In light of these analytical frameworks and historical comparisons, in chapter 4, I contended that there were different critical factors which appeared to drive the current overreaching state actions towards naturalised citizens and multiple nationality holders. These critical factors were: the international framework of statelessness protection; heightened duties to conform for people who naturalise; and doubts about the political belonging and allegiances of citizens of a different ethnic heritage (such as ancestry from some other country). The last two critical factors, in essence, predicted who would be considered as foreign by the state and whether this determined how state power should be exercised: through deprivation.

With regard to statelessness, in light of the UN Convention of 1961, states primarily directed their cancellation of citizenship policies at multiple nationality holders. It appears that France and the UK have derogated from the full protection of the UN Convention and are not precluded, legally, from making single nationality holders stateless on national security grounds. However, the international

framework against statelessness, and the association of statelessness with the illiberal practices of the Second World War, have created important political incentives for the states to comply and played a critical role in the states' distinctions between single and multiple nationality holders.

The prohibition against statelessness does not, however, explain why the states treat naturalised citizens differently from birthright citizens. Drawing on Sayad's (1994; 1999b; 1999a) sociology of immigration and concept of "social hypercorrection", it is possible to infer that migrants are exposed to a heightened duty to conform as the actions they perform in the receiving state are "multiplied" because of their presence in the territory. I suggest, as does Sayad (1993), that these perceptions might continue despite naturalisation. In other words, individuals who naturalise are under an ongoing duty to conform to the requirements of naturalisation in the eyes of the states. This duty to conform and the portrayal of citizenship as a privilege for naturalised citizens have become deeply entangled with national security protection. In the debates, and their surrounding contexts, there were important elements which did not link to national security in the justifications advanced by the states. Deprivation of citizenship evidences that the heightened duty to conform for naturalised citizens, to demonstrate loyalty to the state and to have citizenship reframed as a "privilege", has been normalised in the context of security protection. I do not suggest that this process goes unchallenged. Indeed, there are important criticisms to the creation of different duties or expectations for different of citizens which are often not heeded.

Second-generation immigrants are also perceived, in the eyes of the states, as being subject to this heightened expectation to conform and show loyalty to the state. The discourses on integration which have increasingly been directed at birthright citizens support this view, although the third critical factor behind state practice, namely doubts of the political belonging of second-generation citizens, had the least explanatory power. Taken together, my answers to this first research question are modest: I do not suggest that these critical factors, taken separately, have full explanatory powers, but I do submit that, taken together, they provide a complex picture of what seems to drive the states' actions in this context of counter-terrorism.

7.2.2 The difference in the states' practices

From the literature on comparative methodology and the literature which engaged with citizenship in France and the UK more specifically, I developed several hypotheses to explain the difference in the states' behaviours which were then refined in light of the data. These alternate hypotheses were:

- that there is fundamentally a stronger conception of citizenship and/or equal citizenship in France (chapters 3 and 4);

- and/or that in France and the UK there may be different commitments to international statelessness obligations (chapter 2 and 4);
- and/or that the constitutional structures of both countries and scrutiny of state power contributes to understanding what propelled and enabled the British cancellation agenda and held back the French one (chapters 5 and 6).

With regard to the first hypothesis, a strong approach to citizenship views it as a core element of the individual persona. In this context, citizenship's connection to rights, which are equally distributed, is there to facilitate the individual's life in society. A complex picture emerged from my analysis. In light of the methodological commitments adopted, different "images" of citizenship in both countries were distilled from socio-historical debates and historical practices. The purpose was to demystify predominant views from the literature. The first was the portrayal of French and UK citizenship models as opposites; the second was linked to the states' supposed long-enshrined histories of equal citizenship. The analysis revealed important similarities in the states' practices – for example, similar historical exclusions on grounds of wealth, gender and race and an increased focus on integration, which can be more or less inclusive of the differences of individuals – and this finding minimised the explanatory power of the first hypothesis. In chapters 4 and 5, the representation of French and UK citizenships as opposite models was challenged by showing that the content of citizenship rights and the frameworks of equality protection were broadly similar. Despite these similarities, the French value of citizenship and equality did emerge as a relevant principle at different stages in the political debates, but it did not seem to make a critical difference in practice. Crucially, there seemed to be an acknowledgment that the context of security protection allowed for derogations or nuances to the principles of citizenship in France. As for obligations against statelessness, the states were situated similarly with regards to the international framework of statelessness protection (chapters 2 and 4).

Therefore, since the content of substantive citizenship appeared to be relatively similar and did not seem to make the critical difference, it could be that French judges were more effective at protecting these existing frameworks before national security claims. Here too, a nuanced picture could be discerned. There were better procedures of rights protection in France because the courts have more scope to scrutinise rights issues and because these procedures are more easily available to the claimant (the QPC, *question prioritaire de constitutionnalité*, for example, is a "fast-track" procedure) with more significant consequences (the quashing down of the executive action or the legislation). However, despite these superior procedures, there were few connections to citizenship as rights in both countries, although they were more prevalent in the case of France. And, crucially, despite these different connections and their varying intensities, rights were not upheld in either context. Therefore, what the judicial approaches to deprivation powers in France and the UK evidenced is that the political

context of deprivation has permeated judicial reasoning with far-reaching consequences for the rights of individuals and, to that extent, cannot fully explain the difference in the state's practices.

As a third alternate hypothesis, the more abstract elements which constitute nation states – namely, their constitutional structures and, crucially, their degree of rigidity – needed to be examined. Rigid constitutional structures can create the conditions for slowing down the processes of change, whereas flexible structures are more likely to respond to contingent politics. In other words, the differences between rigid or flexible structures can explain barriers to overreaching executive action and/or responsiveness to the specific context of the day. The French constitutional structures were more rigid than those of the UK and played a critical role in impeding overreaching powers to deprive individuals of their citizenship. By forcing the expression of many different views in the public arena, the rigid constitutional structures of France, in this particular context of an adverse rights environment, provided greater safeguards to existing rights. On balance, although social and political factors are always multi-causal and complex, this analysis provided the best fit in terms of addressing the research question.

7.2.3 Citizenship, equal citizenship and rights

The interplay between citizenship deprivation and national security has weakened citizenship both as a statement of rights and as a statement of equal relationship with the state. In 2015, in an interview with journalists prior to the attacks of 13th November, François Hollande was referring to citizenship deprivation as one of “these right-wing measures which are symbolic ones and do not bring anything to the fight against terrorism”.² A few months later, he proposed increasing the reach of deprivation powers to birthright citizens, initially provided that they had a second nationality. The implications of citizenship deprivation on equal citizenship are many. The powers, by only applying to citizens with a different ethnic background, create an effect of foreignness for ethnic minorities which undermines equal citizenship. They also assume that there are some citizens within the citizenry whom it is legitimate to suspect. There is a danger that the powers of citizenship deprivation run the risk of normalising racial inequalities already present in French and UK societies because they fail to treat terrorist suspects differently other than on the basis of their mode of entry, other nationality, or ethnic heritage that they may share with non-suspects (or a combination of these factors) *and* because they are built on previous discourses on integration which consider that some citizens are under heightened duties to conform. In 2016, in a speech delivered after the terrorist attacks in Brussels, the

² « Déchéance de nationalité : quand François Hollande dézinguait cette ‘chose de droite’ » *LCI*, 2016 <https://www.lci.fr/politique/decheance-de-nationalite-quand-francois-hollande-dezinguait-cette-chose-de-droite-1506366.html> (09/05/2019).

then Prime Minister David Cameron referred to the UK as a Christian country whose values must be defended against terrorism.³ In 2010, Nicolas Sarkozy, in the speech in which he proposed to extend citizenship deprivation to crimes against the state for individuals of “foreign origin”, after the killing of a policeman by minors, said that:

“Finally, we need to acknowledge it, I must say it, we are undergoing the consequence of 50 years of insufficiently regulated immigration which led to a failure of integration. We are so proud of our system of integration ... It worked. It doesn't work anymore ... It is incredible that youngsters from the second, if not third, generation, feel less French than their parents or grandparents ... Why do we not say it? Are we scared? For me, it is not to acknowledge it which scares me, it is the reality”.⁴

In essence, as I have demonstrated throughout this thesis, the recent overhaul of deprivation powers and the normalisation of the discourses attached to it, which has tightened citizenship around a discourse of national values, have left equal citizenship less secure. This has resulted in a diminution of the citizenship of some ethnic minority individuals to a privilege and made it conditional on further demonstrations of loyalty. Hollande's comment,⁵ made after his presidency came to an end, that citizenship deprivation, rather than “uniting” people, as he had intended, had instead “divided” French society, is powerful.

Beyond equal citizenship, citizenship as a statement of rights and a factor that can facilitate life in society was also left less secure. This was first evidenced through the states' acceptance that rightlessness is a legitimate consequence of purported involvement in terrorism activities. As seen in chapter 4, the states have been willing to initiate the most minimal compliance with international law and actionize their derogations to the 1961 Statelessness Convention. In chapter 5, the national security context was also shown to weaken citizenship because lawyers and judges tended to limit the reach of their arguments to arguments of form. The courts, in both contexts, have proved restrained and deferential to the executive, despite rights frameworks being available. As I demonstrated in chapter 6, restraint and deference are also problematic from the perspective of a “culture” of

³ “Britain must defend its Christian values against terrorism, David Cameron says”, *The Independent*, 2016 <https://www.independent.co.uk/news/uk/politics/david-cameron-easter-message-2016-christian-values-christian-country-a6954996.html> (26/06/2019).

⁴ Nicolas Sarkozy, « Le discours de Grenoble du 30 Juillet 2010 », *Le Figaro*, 2014, <http://www.lefigaro.fr/politique/le-scan/2014/03/27/25001-20140327ARTFIG00084-le-discours-de-grenoble-de-nicolas-sarkozy.php> (06/03/2019).

⁵ “I thought it [cancellation of citizenship] could unite us but it is what divided us.” « Le ‘seul regret’ de Hollande, ‘avoir proposé la déchéance de nationalité’ », *Le Parisien*, 2019 <http://www.leparisien.fr/elections/presidentielle/le-seul-regret-de-hollande-avoir-propose-la-decheance-de-nationalite-01-12-2016-6401871.php> (28/04/2019).

justification and accountability because they impede collaboration between the different organs of the state in a way which could better the protection of rights.

Taken together, I found that the data furthered Prabhat's (2016a) claim in 2016 that national security suspends ordinary rights in a manner that reinforces old colonial and World War era ideas of loyalty and protection which seriously undermine citizenship both as a statement of equality and as a legal status. However, within this bleak picture, there is still some hope for the protection of existing citizenship rights and equality when these are supported by rigid constitutional structures. I found that rigid constitutional structures thus far seem to provide the best safeguard against overreaching state action and the most effective protection for minority rights in the context of national security protection.

7.3 Reflections on the study and avenues for future research

My first reflection links to the choice of my methodology, a contextual and comparative approach to citizenship deprivation. The comparison has been critical for shedding light upon the significance of the constitutional structures of the states to explain differences and, in this case, limit overreaching state action in the context of national security. The analysis revealed that the rigid constitutional structures of the French state, when supported by a constitutional culture (*ie* of long-enshrined history and practice) protected existing rights more effectively. It also showed that the rigid structures of the state can potentially further improve collaboration between different organs of the state which, as noted in this thesis, offers a better system of rights protection. To add a third-country case into the analysis of practices of deprivation – despite adding to the “messiness” of the comparative endeavour with its constant requirement to delve further and deeper into the case studies to change and/or nuance the terms of the comparison – could further this finding or potentially challenge it. Canada is a good example of such a comparator, having increased its recourse to deprivation powers and modified its legislation in 2014 only to revisit the legislation in 2017. Belgium is another example, as it too increased its recourse to deprivation, in the aftermath of Charlie Hebdo, and has similar laws to France, but has since made little use of the powers. The analyses of this thesis also brought nuances to the view that Parliaments and the courts, when faced with national security claims, are acting as “rubber stamps” to executive action. Despite the courts and Parliaments in most of the cases giving way to the executive, there were important challenges and resistance from state actors. The data suggests that the courts and Parliaments are increasingly willing to engage with state power. For example, in chapter 6, there was a sense that the executives in both France and the UK had overplayed their reliance on expedient security arguments and that parliamentarians were not willing to easily give way. In chapter 5, the courts also appeared to be willing to heighten their scrutiny of the states’

actions through proportionality analysis, although this did not appear to make the critical difference in the cases examined. Here, a further avenue for research could be to deepen these themes through a different set of data, such as, for example, elite interviews with parliamentarians and/or members of the judiciary.

Crucially, the powers of citizenship deprivation and their supporting discourses reveal that there is a deep insecurity in western, liberal states as to how citizenship is understood with respect to migrants who may become or have become citizens. Throughout this research, citizenship has emerged as a contentious and complex issue, one whose political nature and association with the nation state means that it is often brought to the fore in public debates and in search of a definition. It has been portrayed, on the one hand, as a positive force, encouraging further participation in the state and enhancing good race relations and social justice; and, on the other, as a negative force of closure, differentiating along ethnic lines between those who belong and those who do not. Citizenship as a contentious object can also become overheated at times of national security threats, although this is not always the case.⁶ National security constitutes only one of the “threats” which have triggered obsessions with the meanings of citizenship – current debates on immigration and circumstances in the era of empires evidenced other such contexts.

Indeed, there were important resonances between discourses on citizenship deprivation analysed in this thesis and those on the framing of citizenship in the context of the empires. In 1961, in the debates leading up to the 1962 Immigration Act in the UK which restricted access to the country to colonial subjects, MP Harold Gurden said: “We hear all sorts of stories about how, in the coloured countries, the white man is told to go home, but we here are not allowed to tell the black man to go home.” (HC deb 16th November 1961: c736). Fifty years later, in 2011, the then UK Prime Minister David Cameron made the point that “when a white person holds objectionable views, racist views for instance we rightly condemn them. But when equally unacceptable views or practices come from someone who isn’t white, we’ve been too cautious frankly – frankly, even fearful – to stand up to them”(cited in (Klug, 2011: 18)). These selected quotes belong to different and specific historical contexts, and there is little to gain by overemphasising their reach, but it is still worth highlighting the extent to which these discourses refer to individuals who, although formal members of the state, are not seen to fully belong, in this case to be fully British, because of their different ethnicity. In other words, a current thread linking these different time periods is the continuing requirement to identify and affiliate with particular values – if not assimilate them – in a way which is exclusionary of those who do not or cannot comply with this expectation.

⁶ For a recent analysis in the context of the UK see (Prabhat, 2019)

In essence, this type of ethnically loaded language of empire and sameness questions the extent to which minority citizens are ever considered as equal to other kinds of citizens in the eyes of the state. The UK immigration policy of “hostile environment”, which from 2014 to 2018 aimed to make life in the UK more difficult for irregular migrants — and indeed for those wrongly perceived to be irregular migrants — is one example of the effect of these discourses. Bertram (2019: 107–108), in his criticism of the of “hostile environment” policy, demonstrates the symbolic power of this state-led exclusionary project. According to Bertram, such policies reduced the status of those who fall outside of the “ethnic core” of the “people” whilst simultaneously legitimising the racialised outlook of some members of society. He argues that the effect of the policy goes further in that it creates “a gamut of effective statuses and a spectrum of increasing precarity and insecurity” for people in the UK, from full-citizens (those who are seen as possessing the ethnic core and enjoy effective rights), to semi-citizens (who suffer under precarious rights) and denizens (who are refused an exercise of their rights). The French woman who had her citizenship annulled at her citizenship ceremony in 2018 because she refused to shake the hand of a male representative is just one example of these different degrees or claims of membership.

Formal equality – for those citizens who are already legal members – has so far protected against the most extreme seepages of rights in France (in a legal sense), such as those advocated in 2011. But the fragility in public representation of this equal citizenship is critical. Marine Le Pen, who finished second in the presidential elections of 2017, recently proposed emulating the Danish model of citizenship deprivation and depriving through administrative decrees French citizens who are Jihadis and held in camps in Syria. According to her, the measure should be applicable to dual nationality holders without the need for criminal sentencing and should even be extended to their children.⁷ Thus framed, the measure would be quite similar to the current situation of the UK. Today, the rigid structures of the French Constitution and its content provide a means to limit state power, but, as the examples from 2015 have demonstrated, these safeguards can be exposed to change, especially in troubled times. What this demonstrates is that the fate of citizenship, as well as citizenship deprivation, is still unsettled. That remains the final word that can be said about citizenship from this extensive examination of citizenship cancellation.

⁷« Marine Le Pen redemande de ‘déchoir de leur nationalité’ les jihadistes français », *L’Obs*, 2019 <https://www.nouvelobs.com/politique/20191017.AFP6811/marine-le-pen-redemande-de-dechoir-de-leur-nationalite-les-jihadistes-francais.html> (08/11/2019).

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