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Dimitry Kochenov, *Citizenship*, Cambridge, MA, 2019, 321 pages – review article on the monograph

Abstract

The article reviews the newest monograph of professor D. Kochenov on the critical analysis of the institution of citizenship. The main argument of the book consists in the injustice reinforced globally by the institution of citizenship from the perspective of the rights of an individual. The review refers to the issues discussed in the monograph concerning citizenship as a legal relation between an individual and the state, civil rights and obligations in a critical perspective. The author of the review underlines the significance of critical depiction rarely found in the Polish literature. However, he indicates possible areas for polemics with the reviewed monograph, in particular from the perspective of consular law. Polemic notes do not undermine the significance of this work as an important voice in the analysis of international law from the perspective of the rights of an individual.

Keywords: citizenship, Nottebohm, protection of nationals.

If we were to cast our minds back to the university lecturers devoted to the issue of citizenship, we would remember a specific legal status of this institution, characteristic manner of acquiring it and the classic, historic case of Friedrich Nottebohm. The case deserves, in fact, more attention not only due to the relatively new Polish Act on Citizenship that has been in force for eight years,¹ but from the perspective of political, economic and social changes in the world, which should encourage fresh, more extensive than simply doctrinal, and critical view of legal solutions.

As commonly accepted, citizenship is a legal institution the sense of which consists in the existence of a legal relation between a person and a state expressing a formal connection between this person and a given state, and consequently, generating mutual rights and obligations. Citizenship means a legal relation between an individual (a natural person) and a state (legal connection between an individual and a state), which settles the affiliation (formal connection) of this individual with a specific state and which is related to the existence of a set of mutual rights and obligations of the individual and the state.² However, such a narrow and formal treatment of citizenship does not forejudge this relation, does not allow appraisal, description of the institution of citizenship in the perspective of the principles of equity, justice, also in critical depiction. As rightly noticed by J. Jagielski, citizenship constitutes a non-uniform and multi-dimensional category. It can be considered from many points of view and constitute a subject for consideration for many scientific disciplines, such as: sociology, political sciences, historical sciences and finally, law. Depending on the applied point of view while considering citizenship, understanding of its essence (sense), role and significance, as well as perspectives for the future will be depicted differently.³

The Polish literature presents a logically valid opinion that “the material aspect of citizenship”, that is the set of rights and obligations of the legal relation between an individual and the state, is only the effect of a formal relationship between both entities, which results from the legal order.⁴ In this context, the work of Dimitry Kochenov covers with critical assessment this material aspect settling the whole

1 Act of 2 April 2009 on the Polish citizenship, Dz.U. (Journal of Laws) of 2012, item 161.

2 Jagielski, J., *Obywatelstwo polskie. Komentarz do ustawy*, Warszawa 2016, p. 17.

3 Ibidem, pp. 13-14.

4 “The indicated narrow and formal treatment of citizenship does not detach it completely from the issues of the rights and obligations of the state and its citizen; ‘the material aspect’ of citizenship is even discussed. In fact, this ‘material’ side of citizenship constitutes an effect and not the legal essence of the existence of the legal connection between a natural person and a given state. As a result, the essence of the citizenship as the legal institution should be considered in the context of the legal order of (stipulated by this order) the formal relationship between the individual and the state”, Jagielski, J., op. cit., p. 20.

concept of citizenship, as well as the role of sovereign states dominant in international relations.

Professor Kochenov manages the Department of European Constitutional Law and Citizenship of the University of Groningen,⁵ and a Polish reader may know him from, among others, publications concerning the rule of law in the European Union.⁶ The monograph *Citizenship* constitutes a summary of many years of research conducted by the author in this area. The book is intended to present the topic of citizenship in horizontal terms, by detaching reflections from national legal systems: discussion on the known subject matter, yet, in a completely different light.⁷

The main argument that is brought to the fore from reading almost the entire book is the injustice that the institution of citizenship reinforces in the world: “the story of citizenship is as much a story of flattering the pride of those who are proclaimed to «belong» – a tale of liberation, dignity, and nationhood – as it is one of complacency, hypocrisy, and blunt domination, all dressed up as agency and the pursuit of the common good”.⁸ D. Kochenov elaborates on his thesis in six chapters written in animated, interesting and sometimes even provocative language.

Professor Kochenov starts his analysis of citizenship with questioning its aforementioned legal structure of this institution – a special relation between a citizen and the state. It is an imposed and authoritative relation. In the vast majority it is created without any participation of a human and it has an extremely important impact on his or her life: it can be a ticket to a wealthy life in a welfare state or become a curse that sentences, as in the case of Turkmenistan, to permanent isolation. Perhaps the popularity of citizenship stems from the fact that it is an organising institution which simplifies thinking about complex international matters. The label of citizenship activates stereotypes, sentences and elevates and all of these only on the grounds of an answer given to the customs officer’s question: where are you from? As such, in the author’s opinion, citizenship is a tool cementing global inequalities. It becomes similar to Middle Ages feudal layers, privileges and status limitations from which an individual could not set himself or herself free irrespective of their characteristics. The opportunity to travel freely may serve as an example: for citizens of the USA and the European Union Member States, as well several other wealthy states, border formalities either do not exist or are really non-arduous. For

5 University of Groningen, <https://www.rug.nl/staff/d.kochenov/research> (accessed 14.10.2020).

6 See e.g. Closa, C. and Kochenov, D., (eds.), *Reinforcing rule of law oversight in the European Union*, Cambridge 2016; Jakab, A. and Kochenov, D., *The enforcement of EU law and values. Ensuring Member States’ compliance*, Oxford 2017.

7 Kochenov, D., *Citizenship*, Cambridge, MA 2019, p. XVI.

8 Ibidem, p. XII.

citizens of a vast majority of states they often constitute an unbreakable barrier. The world is not a global village for a vast majority of humanity. Such a presentation of the issue can already be noted in the previously written literature: twenty years ago Bauman divided travellers into tourists and vagabonds.⁹ The question why some are called expats and others – immigrants remains valid. The strength of classification of citizenship remains grossly effective if we acknowledge that only approximately 2 percent of people make an attempt to change citizenship assigned to them at the moment of their birth.

D. Kochenov scrutinizes these two percent of humanity often showing completely different requirements of particular states in terms of naturalisation, gives examples from the history of European states of the 2nd half of the 20th century. Diagrams included on the next pages of this book showing a growing acceptance of states for holding many citizenships¹⁰ and the decreasing trend of the automatic loss of the primary citizenship as a result of the naturalisation process, are extremely interesting.¹¹ While on the subject of the legal character of relations between the state and an individual, the disproportion of this relation is also proven by the possibility of losing citizenship: revocation thereof constitutes, as adopted in the literature, a unilateral act of the state against the individual and this practice used to be still accepted in the 1950s.¹² Admittedly, the Convention on the Reduction of Statelessness of 1961 bans revocation of citizenship, however, this ban is not absolute.¹³ The current issue constitutes the possibility to revoke citizenship due to terrorist activity, e.g. in Great Britain, competence of the Minister of Foreign Affairs (Secretary of State).¹⁴

However, what happens if the previous, lost citizenship overshadows the rights of the individual? Professor Kochenov refers to the case of *Nottebohm* – in his opinion, one of the most wrongly interpreted cases in the history of international law.¹⁵ Did the ICJ rob Friedrich Nottebohm in the light of the law?¹⁶ The author

9 Polish edition: Bauman, Z., *Globalizacja*, Warszawa 2000, p. 92 ff.

10 Kochenov, D., op. cit., p. 87.

11 Ibidem, p. 88.

12 See e.g.: Waligóra, M., *Problematyka obywatelstwa w polskim porządku prawnym*, "Gentes & Nationes. Studia z Zakresu Spraw Międzynarodowych" 2010, No. 2, pp. 165-166. The author refers to, among others, regulations of the Second Polish Republic and the Polish People's Republic allowing revocation of Polish citizenship.

13 Convention on the Reduction of Statelessness, 30 August 1961, United Nations Treaty Series Vol. 989, Article 8.

14 Kochenov, D., op. cit., p. 112.

15 Ibidem, pp. 114-119.

16 Ibidem, p. 119.

criticises not only the conception of the so-called effective citizenship resulting in depriving Nottebohm of benefits directly associated with citizenship, which has already been discussed also in the Polish literature,¹⁷ but the injustice resulting from a certain automaticity of assigning to Germans collective responsibility for activities of the Third Reich even in the event that individual Germans did not support Hitler's policy and as a sign of protest left their homeland¹⁸.

The 3rd chapter of the book is devoted to the rights related to held citizenship. Traditionally, these include the right to settle, protection against deportation, access to the labour market and sometimes other rights, for instance social rights. Oftentimes these rights were not vested in all citizens and depended on the place of residence or other factors.¹⁹ For instance, Kochenov shows how the downfall of the British Empire deprived 200,000 of Indians, subjects of the Queen, of rights. The current trend which has been depicted well in this work is, in fact, the conception of post-national citizenship,²⁰ in which the rights do not depend on citizenship, but are vested in every person under the jurisdiction of the state, on the grounds of the human rights norms. Therefore, one may ask whether a citizen of a failed state benefits from substantially bigger privileges than a stateless person? In such, not that rare, special situations, this differentiation seems to be purely formal and academic, the catalogue of rights remains unspecified and the possibility of its effective use is illusive.

It is a different case with obligations. Was citizenship not invented so that subjects paid taxes and fought for the kingdom in countless wars and conquests of their prince? In the 4th chapter the author presents the overview of civic responsibilities often expressed in a poetic manner in quoted constitutions. In many of them one can find the spirit of totalitarianism, imposed on the human responsibilities towards the homeland which is not, in fact, chosen by anyone. In the context of

¹⁷ See: Sandorski, J., *Opieka dyplomatyczna a międzynarodowa ochrona praw człowieka. Zagadnienia wybrane*, Poznań 2006, p. 118.

¹⁸ See e.g.: *Wypędzenie intelektu*, "Przegląd Polityczny" 2001, No. 50, pp. 87-117. Newer criticism on the Nottebohm case presents the activities of Guatemala as obvious and serious violation of human rights, who might have been one of those who opposed the policy of Nazi Germany: Dolinger, J., *Nottebohm revisited*, in: Casella, P.B. and Silva e, G.d.N. (eds.), *Domensão Internacional Do Direito: Estudos Em Homenagem A G.E. Do Nascimento A E Silva*, No. 141, São Paulo 2000, pp. 142-43.

¹⁹ "In the light of legislations of certain countries we are dealing with citizenship treated from the perspective of holding all political rights and citizenship with a dimension limited from this point of view, with a simultaneous retention of nationality. This phenomenon is reflected in the diverse nomenclature used in legal provisions, as e.g. (respectively) citizenship and nationality, *Bürger-schaft* and *Staatsangehörigkeit*, *citoyenneté* and *nationalité*"; Jagielski, J., op. cit. pp. 21-22.

²⁰ Soysal, Y.N., *Limits of citizenship*, Chicago 1994.

the stenographic record of the Joseph Brodsky's trail one can hum T. Love's song: "Ojczyznę kochać trzeba i szanować, Nie deptać flagi i nie pluć na godło" ("Homeland should be loved and respected, the flag should not be stepped on and the emblem should not be spat on")²¹. Therefore, the concept of citizenship can include the willingness to shape "a good citizen" rooted out of individuality, submerged in state propaganda or history, which is a (controlled?) collective memory. This oppressive dimension of the institution of citizenship was, after all, well-known in the Polish People's Republic, in the militia command: *Citizen!* Fortunately, it is becoming a matter of the past: taxes are paid in the country of residence and not citizenship (the example of the USA is an exception to the rule), the obligation of the defence was taken over by professional armies (also private companies and sometimes hired hands), states are also resigning from the educational function of citizenship and even tolerate far-reaching disloyalty and criticism.

In his deduction, D. Kochenov moves from a dissident to an engaged member of a community: *polis*. The political dimension of citizenship participation is presented in the 5th chapter, where the author gives interesting examples of practices especially targeting minorities and other residents who are or may become citizens, yet, to put it gently, whose political engagement is not promoted, unless it is politically useful e.g. to incite Popper's *tribal spirit* in order to maintain and extend power.²² Mass naturalisations (e.g. in Hungary), referring to diaspora, have the same objective: soliciting new, loyal and grateful voters.

The book ends with a short summary included in the 6th chapter. Kochenov reminds the reader of the previously presented thesis: for the majority of citizens in the world the legal relation connecting them to the state is not a reason for pride, is not a proof of emancipation of a unit or an achievement of the modern law, but a guarantee of injustice. Citizenship is an institution which cements inequalities, simplifications and arbitrary divisions completely independent of human will, personal characteristics or features. The case is different in the event of "super-citizenships": passports of the USA, the European Union Member States and several other, not numerous, wealthy states. Holders thereof luckily born in the jurisdiction of strong, rich and influential states are winners in this lottery.

Fortunately for Polish citizens, our country is included in the premium group providing its citizens with privileges that are unbelievable in certain regions of the world and in our country are treated as something obvious. Probably that is why a Polish reader may not often think critically about the institution of citizenship. The work by D. Kochenov opens our eyes.

21 T. Love, *Wychowanie*, https://bibliotekapiosenki.pl/utwory/Wychowanie_ (accessed 14.10.2020).

22 See: Llosa, M.V., *Zew plemienia*, Kraków 2020, p. 18 ff.

However, it does not mean that this book may be treated as a comprehensive presentation of the issue. The author's intention was to present criticism of a known and often described legal and political institution that is citizenship. Nevertheless, sometimes depiction of the issue from one perspective, albeit announced in the introduction, seems to be devoid of counterbalance. One may have doubts, whether the basic thesis of Professor Kochenov on the incredible injustice of the institution of citizenship from the perspective of a person who was unlucky to be born "under a different sky" does not in essence refer to the whole system of international relations still based on, in fact, states and whether changing this state of affairs is not a certain utopian postulate of rejecting the Westphalian system? One could imagine that every person legally staying in the territory of a given jurisdiction benefits from identical rights and obligations including the right to vote and the right to be elected. Yet again, it boils down to the right to legal stay, the right to enter the territory of the country, which in practice leads to similar dilemmas as in the case of citizenship. The only permanent breaking of the main thesis included in the book on the injustice of the international community would consist in the resignation from the institution of citizenship and simultaneous abolition of borders and allowing each human to fully realise their potential under the latitude under which, paraphrasing the American Declaration of Independence, they will exercise "certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness". Therefore, should we go back to the past?

Sometimes one can also get an impression that examples of practices of states presented in the monograph, although interesting and non-obvious, are taken from different periods, which may give an impression that the institution of citizenship basically stopped in its development. By giving these examples, in several places the author does indicate progress, which took place for instance in the scope of superseding citizenship rights with human rights, however, the contribution of the international law mainly from the 60s and the 90s to the gentle civilizer²³ of the institution of citizenship could have been underlined more.

In this context one should mention the institution of consular protection omitted by the author in the discussed study. Timothy Snyder in his excellent book *The Holocaust as history and warning* indicated that: "Citizenship is the name of a reciprocal relationship between an individual and a sheltering polity. When there was no state, no one was a citizen, and human life could be treated carelessly. (...) For Jews themselves, the existence of a state meant citizenship, even if only in an attenuated and humiliating form. (...) Legal discrimination by antisemitic states did not bring

²³ Paraphrasing the thesis of M. Koskenniemi on international law as a gentle civilizer of nations, see: Koskenniemi, M., *The gentle civilizer of nations*, Cambridge 2001.

an automatic downward spiral toward death, but state destruction did. Once a Jew lost access to a state he or she lost access to the protection of higher authorities and lower bureaucrats.”²⁴ During the Second World War some European Jews were saved because they were covered with consular protection of their own country or were naturalised in an express mode.²⁵ Is there anyone who has not heard about Raoul Wallenberg? Also Polish diplomacy provided such assistance by violating the law e.g. by counterfeiting documents of foreign states or resorting to bribery.²⁶ The history of consular law of the second half of the 20th century and also recent years with probably the most often quoted case of *Avena*²⁷ shows that not only empires strive to protect their citizens, although, obviously the reasons for which they do so may vary. The significance of the protective function of citizenship is, in fact, growing e.g. in the context of consular care provided by the EU Member States on the grounds of the institution of the European Union citizenship.

The above notes do not, however, overshadow the basic, in my opinion, value of this work. It is the phenomenon known in the colloquial language as second-class citizenship. In many places of his monograph D. Kochenov underlines that citizenship is, in essence, a racist and sexist institution. Its practical construction in many countries gives examples of marginalising a group of citizenship out of the political community and also the ethnically understood nation in general. Such an observation has a contemporary value and constitutes a warning for the future in the face of global migrations, resurging nationalism and populism, which settled in the circles of states described as developed. Especially in Poland, the country which is next to Portugal the most ethnically and religiously homogeneous in the EU with authoritarian tendencies established in the newest history, noticeable nationalism, racism (especially antisemitism) and xenophobia observed in the public space. Ironically, the Polish Act of 2 April 2009 on the Polish citizenship is one of the most liberal ones. When will an immigrant – a new citizen become one of us? And does the Polish nation really mean all citizens of the Republic of Poland?

It is worth reading professor Dimitry Kochenov’s book carefully.

24 Snyder, T., *Black earth: the Holocaust as history and warning*, New York 2015, pp. 220-222.

25 A separate matter is the fact that a few years ago people of Jewish descent were in many countries treated as second-class citizens, author’s note.

26 Activities of the so-called Ładoś Group are described in Drywa, D., *Poselstwo RP w Bernie. Przemilczana historia*, Oświęcim 2020.

27 *Avena and Other Mexican Nationals (Mexico v. United States of America)*, I.C.J. Reports 2004; also see: Wedel-Domaradzka, A., *Jednostka a sprawiedliwość międzynarodowa – uwagi na tle “prawa do informacji o pomocy konsularnej” w sprawie Avena i inni obywatele Meksyku*, in: Czubik, P. and Burek, W., (eds.), *Wybrane zagadnienia współczesnego prawa konsularnego*, Kraków 2014, pp. 175-191.

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