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Unequal citizenship and subjecthood: a rose by any other name …?

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Abstract

British Citizenship is facing significant contemporary challenges in terms of failure to include ethnic minority citizens in an equal manner within the legal rights and protection of citizenship. Some examples of such failure are the hostile environment laws which have resulted in discrimination and deportation of citizens, new hurdles in becoming a citizen, and cancellation laws for conduct which have affected citizens with migrant connections more than those born British and holding only British nationality. This paper investigates why such legal inequalities persist by tracing modern-day manifestations to the progress of law in this area from the days of subjecthood and empire. It finds that, despite changes in the nature of state and governance since days of empire, contemporary British citizenship has inbuilt legal inequalities which persist from the time of subjecthood. Present inequalities are not just remnants of empire; they are constructed on the legal archaeology of empire.

Keywords: subjecthood; citizenship; empire; immigration; nationality.

Introduction

> Hitherto, we have not had any law discriminating against any British subject. I hope we never shall, but I do not know. If you are minded to discriminate, you can discriminate, whether you call them 'subjects' or whether you call them 'citizens'.[2] *William Allen Jowitt, 1st Earl Jowitt, The Lord Chancellor, 1948*

Modern British citizenship is a formal, legal relationship.[3] Although the link between rights and citizenship is often considered fundamental, there is very little case law in terms of the content of British citizenship.[4] Statutory laws on citizenship have developed

1 A version of this paper was delivered as the keynote address at a workshop on Subjecthood and Empire at Glasgow University organised by Dr Paul Scott. The discussions at the workshop, and anonymous peer review comments from the journal's peer reviewers, were most helpful for refining the paper.

2 HL Deb 11 May 1948, vol 155, cols 754–99, 3.21pm. §Order of the Day for the Second Reading Read.

3 Rieko Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (Psychology Press 2003).

4 Some cases do offer a few reflections on the content of citizenship, most recently in the Court of Appeal in *Pham* [2018] EWCA Civ 2064, discussed later in this paper. Two decades earlier, in 1998 in the *Al-Fayed* case, Lord Woolf wrote: 'Citizenship was an important status; refusal could have damaging implications, important benefits were not conferred.' See *R (Al-Fayed) v SSHD* [1998] 1 WLR 763, 773E.

in close conjunction with legislation on immigration control. In its turn, the present-day framework of immigration control in the UK developed largely as a response to decolonisation and the breakup of the British Empire in the twentieth century. This chapter traces the present-day challenges to equal citizenship faced by ethnic minority citizens in the UK and links these to past developments in subjecthood and decolonisation. It argues that even within the formal, legal framework there are inbuilt inequalities which have rendered citizenship rights illusory for many citizens who have minority ethnicity and who are racialised through their migrant origins or connections. These legal inequalities are rooted in the legal contours of the concept of subjecthood in Britain and in the British Empire. Some contemporary examples which are manifestations of these deep-seated legal inequalities are hostile environment policies, new stringent requirements for acquisition of citizenship, and the effect of cancellation of citizenship on ethnic minority citizens. The paper demonstrates that the racialised effects are not just remnants of empire but legal constructions built on the legal archaeology of empire. Understanding the legal links explains why some inequalities are durable and persist over time irrespective of changes in political forms of governance.

1 Challenges of modern British citizenship

1.1. Hostile environment policies

The 'hostile environment' is a shorthand reference to the anti-immigration policies and sentiments of the government from the 2010s. Used as a political buzzword in an interview with *The Telegraph* in May 2012 by Theresa May, the hostile environment has come to encompass a series of legislative and policy measures to make lives of irregular immigrants difficult, thereby motivating them to leave the UK.[5] Yet, many British citizens have been adversely affected by the 'hostile environment' policies of the past decade. The hostile environment includes measures to limit access to basic life resources such as work, housing and healthcare. Citizens who have access to the resources become responsible for checking the immigration status of others who seek employment, a place to live or treatment. Primary legislation, the Immigration Acts 2014 and 2016, made it mandatory for employers to check the immigration status of employees, whereas secondary legislation, for example regulations governing National Health Service charges, created barriers to healthcare for migrants. Bureaucratic changes (such as embedding of immigration officials at police stations and in local authorities) and data-sharing agreements between government departments (such as memorandums of understanding between the Home Office and Department of Health) have led to greater numbers of deportations.

Theresa May elaborated in the interview that the objectives of the hostile environment were to discourage people from coming to the UK (so stopping them at source through negative branding), to prevent those who do come from overstaying (by putting the actual barriers in place for them which make them detectable) and to stop irregular migrants from being able to access the essentials for living life (hence the focus on basic resources). Then Immigration Minister Mark Harper introduced the Bill for the Immigration Act 2014 in a similar manner: 'stop migrants using public services to which they are not entitled, reduce the pull factors which encourage people to come to the UK and make it easier to remove people who should not be here'.

5 'Theresa May Interview' *The Telegraph* (London 25 May 2012) <www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html>.

These measures have a spillover effect on all kinds of people, including citizens. The most visible images of the hostile environment have been concerned with the detriment to British Caribbean persons for their inability to prove their British citizenship. Termed the *Windrush* scandal, many people who had lived all their lives in the UK suddenly found themselves homeless, unemployed, without healthcare and even deported as new document-checking rules and practices became prevalent.[6]

The racialised effects of measures, such as making landlords check the immigration status of tenants, have been disproportionately borne by ethnic minority citizens and migrants. The Home Office asked landlords in the West Midlands in 2015 to roll out the scheme of checking documents of prospective tenants. Home Office and Joint Council for the Welfare of Immigrants (JCWI) research indicated that minority ethnicity tenants were more likely to be asked for their immigration papers and that some landlords displayed potentially discriminatory behaviour or attitudes. The JCWI brought a case about the new housing checks in the High Court. It won the case, as the High Court agreed that housing immigration checks cause racial discrimination and declared them unlawful. As a result, the government was forced to halt its plans to roll the new scheme out to Wales, Scotland and Northern Ireland. The government appealed, so in 2020 the case came to the Court of Appeal. The Court of Appeal agreed with the JCWI that the scheme causes racial discrimination but stopped short of declaring the scheme unlawful, instead leaving it to MPs and government to decide whether the racial discrimination is 'greater than envisaged'.[7]

1.2 Restrictions on becoming a citizen

While the contingency on political context of citizenship status has become apparent in the hostile environment policies, the uncertainty in the lives of other long-term residents has also increased as access to citizenship was tightened through the requirement of longer periods of residence.[8] New language and citizenship tests were introduced in 2002 and later toughened to introduce greater difficulty.[9] Another hurdle has been the cost of making an application which has increased sharply from £575 in 2008 to £1330 in 2018.[10] All of these measures have served to create a significant population of settled residents without citizenship who are permanently subject to immigration control.[11] The lack of a declaratory system for settled status for EU nationals in the context of the Brexit legal transition has added to these numbers in limbo, as EU nationals undergo administrative processes to secure their residence rights. Adding to the continued control of migrant entrants and further extending it to those who are citizens is the cancellation of British citizenship for conduct.

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6 Fiona Bawdon, 'Remember when "Windrush" was still just the name of a ship?' in Devyani Prabhat (ed), *Citizenship in Times of Turmoil? Theory, Practice and Policy* (Edward Elgar 2019); Amelia Gentleman, *The Windrush Betrayal: Exposing the Hostile Environment* (Guardian Faber 2019).

7 See JCWI, 'Right to rent' <https://www.jcwi.org.uk/right-to-rent>.

8 Continuous residence of five years has always been required in order to naturalise for those not married to a British citizen, but a shorter three-year route available to those who were married to British citizens was effectively scrapped in 2012.

9 For an informative background note on cancellation powers, see Melanie Gower, *Deprivation of British Citizenship and Withdrawal of Passport Facilities* (House of Commons Library 2015).

10 £1330 is the current naturalisation application fee in 2020.

11 Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (Oxford University Press 2013) 108–109.

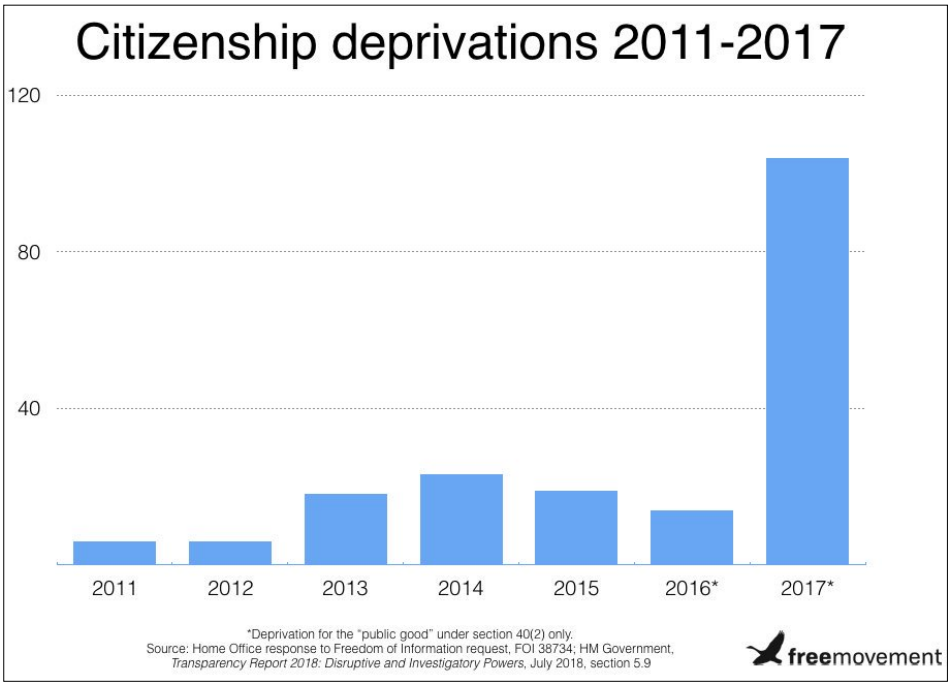

Figure 1

1.3 Cancellation of citizenship

Cancellation of citizenship is justified as a national security measure but has become increasingly popular as a means of determining who is undesirable and has to be kept out of the country. Figure 1 depicts how cancellation powers in the UK are on the rise for conduct reasons.

The British Nationality Act 1981, which sets out who can have their citizenship revoked, is clear that some citizens cannot lose their citizenship: people who are British at birth and do not have any other nationality cannot have their British citizenship cancelled.[12] It permits cancellation as long as a person has a surviving nationality in order to safeguard against statelessness.[13] However, since an amendment in 2014, it is now possible to leave a naturalised, single (only British) nationality holder stateless by

12 The general standard for cancellation is whether it is conducive to the public good. The Immigration Act 2014 defines the standard of conduct for cases in which cancellation can occur. The first is whether it is conducive to the public good to cancel the citizenship. This typically is considered in instances of terrorism and war crimes, which are both deemed as unacceptable behaviour. It is a broad standard for defining what is conducive to the public good and can potentially expand beyond the scope of national security. In s 40(4A) of the British Nationality Act 1981 the Home Secretary can deprive a naturalised person of their British citizenship status on the grounds that they had conducted themselves in a manner 'seriously prejudicial' to the vital interests of the UK.

13 Statelessness is the foremost concern in cancellation of citizenship. Article 15 of the Universal Declaration of Human Rights declares that 'everyone has the right to a nationality'. The 1954 UN Convention on Stateless Persons aims to regulate and improve the legal status of stateless persons: Article 1 defines a stateless person as 'a person who is not considered as a national by any State under the operation of its law'. The Convention on the Reduction of Statelessness aims to avoid incidents of statelessness (ratified with reservation).

depriving them of their British citizenship. This change put into the formal legal framework the lesser tolerance of 'disloyal' behaviour by naturalised citizens. Table 1 illustrates this new scenario and how different people are affected differentially by the new powers:

British citizen born in the UK?	Any other nationality?	Can British nationality be cancelled for conduct?	Can be rendered stateless?
YES	NO	NO	NO
YES	YES	YES	NO RISK OF STATELESSNESS
NO	YES	YES	NO RISK OF STATELESSNESS
NO	NO	NO	YES

Table 1

The international framework on statelessness and the right to nationality, of which the UK is a signatory, declares that governments cannot create statelessness. However, there is a caveat to this; in the interests of national security, naturalised people can be stripped of their citizenship and left stateless. There is very little information about what any person who is deprived and left effectively stateless may expect. The only indication of practice and policy in this area can be found in a letter sent from Lord Taylor of Holbeach, Home Office Minister, who after the Lords Report stage debate on the Immigration Bill in 2014 writes:

> 1. anyone who had been deprived of their British citizenship in such circumstances would be unlikely to satisfy the eligibility criteria for leave to remain under the Immigration Rules for stateless people … 2. But scope to grant people a period of 'restricted leave', which could be subject to conditions such as restrictions on employment and residency.

Hence, it is unclear how far statelessness acts as a safeguard anymore and, also, whether the kind of statelessness created by deprivation is now qualitatively different from the kind which is protected under international law.

Just as the importance of marriage is underlined in divorce proceedings, ironically, it is in the context of citizenship cancellation in the *Pham* case of 2018 that Arden LJ pronounced that: '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.' Yet, many are able to lose this weighty right without even being present in the country and without any criminal charge or judicial determination of the order to deprive them.

A recent controversy in cancellation of citizenship which demonstrates the continued precarity of British citizens of minority ethnicity is that of Shamima Begum. Ms Begum, now 20, was born in the UK to British parents of Bangladeshi origin. At the age of 15 she was recruited online and went to Syria where she married an Islamic State fighter. After some years she wanted to return to the UK, but her British citizenship was cancelled by the government for national security reasons. She was not charged with any offence, but she has been unable to re-enter the UK. While her citizenship was being cancelled, her infant son,

a British citizen at birth, died in Syria.[14] Ms Begum is now in Syria in refugee camps while her family in the UK challenges the cancellation of her citizenship.[15] At the time of writing, Ms Begum has lost her appeal heard by Closed Materials Proceedings in the Special Immigration Appeals Commission (SIAC) which has found that, at the time she was deprived of her British citizenship, Ms Begum was also a Bangladeshi citizen, and so was not left stateless by that deprivation.[16] According to Bangladeshi law, until she is 21 Ms Begum has an automatic claim through her parents to citizenship. This approach has now opened the door for Home Office submissions that it is possible for people to have involuntary and automatic national connections with other countries through ethnicity or parental links which may count as other nationality at time of deprivation.[17]

Intense media interest has followed Ms Begum's situation, but her case is not just a human interest story. It is an example of the use of legal powers in relation to citizenship and potential statelessness and what the implications are for the usage of such powers. Her situation raises pertinent questions about British citizenship and statelessness, especially as these apply to ethnic minority people who are born in the UK and/or who hold British passports. Are all citizens equal or are some more susceptible to having the bonds of citizenship snapped because of their conduct than others? From the Home Office deprivation order, and the subsequent SIAC judgment, it appears people who are migrants who naturalise or who have migrant parents are more vulnerable in cancellation cases, as they are likely to have connections with other countries. In Ms Begum's situation, Bangladesh has already declared her as an alien and said it would prosecute her and execute her under death penalty provisions if she is found guilty of terrorism. Despite acknowledging her inability to effectively conduct her appeal from outside the country, the SIAC has found she has Bangladeshi nationality and is therefore not stateless.[18]

In *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064, Arden LJ said at paragraph 51 of the judgment:

> In the present case, the appellant has over a significant period of time fundamentally and seriously broken the obligations which apply to him as a citizen and put at risk the lives of others whom the Crown is bound to protect. I do not consider that it would be sensibly argued that this is not a situation in

14 See blogpost on the cancellation decision: Devyani Prabhat, 'Shamima Begum: legality of revoking British citizenship of Islamic State teenager hangs on her heritage' (*The Conversation*, 20 February 2019) <https://theconversation.com/shamima-begum-legality-of-revoking-british-citizenship-of-islamic-state-teenager-hangs-on-her-heritage-112163?utm_source=twitter&utm_medium=footertwitterbutton>.

15 The issue of surviving nationality has come up in the past in the *Al Jedda* case [2013] UKSC 62, where the issue was whether Mr Al Jedda had a surviving Iraqi nationality. Mr Al Jedda claimed that he did not have a surviving Iraqi nationality in addition to his British nationality, and the court agreed that indeed Mr Jedda did not have any other existing nationality at the time he lost his British nationality. The UK's statelessness obligations in international law at that time meant Mr Jedda could not be stripped of his British citizenship.

16 Appeal No SC: 163/2019; judgment dated 7 February 2019.

17 The Court of Appeal decided on 16 July 2020 that Shamima Begum should be allowed back so that she can effectively challenge the removal of her British citizenship. See blogpost about the Court of Appeal decision: Devyani Prabhat, 'Shamima Begum: what the legal ruling about her return to the UK actually means' (*The Conversation*, 17 July 2020) <https://theconversation.com/shamima-begum-what-the-legal-ruling-about-her-return-to-the-uk-actually-means-142860?utm_source=twitter&utm_medium=bylinetwitterbutton>.

18 Similar issues have come to the courts in the past: see Devyani Prabhat, *Unleashing the Force of Law: Legal Mobilization, National Security, and Basic Freedoms* (Palgrave Macmillan 2016; and Lucia Zedner, 'Citizenship deprivation, security and human rights' (2016) 18(2) European Journal of Migration and Law 222–242. In the *Pham* case of 2015 the Supreme Court examined the statelessness issue. *Pham (Appellant) v Secretary of State for the Home Department (Respondent)* [2015] UKSC 19 and the *Al Jedda* case (n 15). See, generally, Gower (n 9) for a background note on deprivation powers.

> which the state is justified in seeking to be relieved of any further obligation to protect the appellant.

Irrespective of the assessment of Mr Pham's individual conduct, this judgment illustrates the resurgence of a loyalty and allegiance model in British citizenship as it makes protection conditional on conduct.

The framework of 'exceptionalism' in national security has further eroded citizenship rights and extended state powers of immigration control.[19] It facilitates the shoring-up of the nation-state's borders as jurisdiction is removed from the bodies of former citizens who are effectively expelled from the borders. There are new elements of extraterritoriality in counterterrorism as proposals include setting up war tribunals to try European fighters in Syria (rather than in Western democracies).[20] Apart from keeping people outside the country, cancellation powers make expressive statements about who does not belong. These signal that there are certain – usually non-white – populations who need to be managed outside the borders. Such clear differentiation between citizens, both in law and in practice, resonates with the concept of second-class citizenship.[21] Bosniak writes that racial subordination has distorted formerly egalitarian polities resulting in the creation of 'second-class citizens' who enjoy the status of citizenship but who nevertheless are denied the enjoyment of citizenship rights or 'equal citizenship'.[22] The denial of substantive rights has created lesser forms of citizenship status itself; a conditional citizenship which can be deactivated without much administrative or judicial engagement.[23]

2 Why are legal inequalities inbuilt into British citizenship?

As seen from the three prominent examples above, there are legal inequalities built into every aspect of modern British citizenship law: its acquisition, its holding, and its loss. Such legal inequalities can be traced back to British citizenship's close connections with subjecthood.

2.1 What is subjecthood?

Subjecthood was a relationship of allegiance and protection.[24] There is a critical link between subjecthood and the emergence of the nation-state; allegiance and loyalty was first to king and then, with time, to king and state.[25] Muller writes how it also provided a

19 Devyani Prabhat, 'The blurred lines of British citizenship and immigration control: the ordinary and the exceptional' in Prabhat (ed) (n 6).

20 Rojava Information Centre, *Bringing Isis to Justice towards an International Tribunal in North East Syria* (RIC 2019) <https://rojavainformationcenter.com/storage/2019/07/Bringing-ISIS-to-justice-Rojava-Information-Center-Report-2019-Website.pdf>.

21 Linda Bosniak, 'Constitutional citizenship through the prism of alienage' (2002) 63 Ohio State Law Journal 1304; Linda Bosniak, 'Citizenship denationalized' (2000) 7 Indiana Journal of Global Law Studies 447.

22 Linda Bosniak, 'Citizenship denationalized" (n 21) 465.

23 See also on alien-citizenship: Mae M Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton University Press 2004) and Mae M Ngai, 'Birthright citizenship and the alien citizen' (2007) 75 Fordham Law Review 2521. The alien citizen is an American citizen by birth on American territory but whose citizenship is suspect, if not denied, on account of the racialised identity of immigrant ancestry.

24 A Dummett and A Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Weidenfeld & Nicolson 1990) 142.

25 Benjamin Carvalho, 'The making of the political subject: subjects and territory in the formation of the state' 45(1) Theory and Society 57–88.

common bond between people of distant lands in times of empire.[26] The ruler was distant but was experienced from afar in diverse lands through connections fostered by ceremonies and rituals to celebrate royal life events. Although subjecthood was a different kind of political and legal relationship between the ruler and the ruled it also had dimensions which continued seamlessly into citizenship and immigration legislation.

Subjecthood is often traced genealogically as a pre-cursor to citizenship starting from the *Calvin* case.[27] The *Calvin* case arose out of the succession of James VI of Scotland to the English throne and the unification of the Crowns of Scotland and England. The question was whether Calvin, a Scot, could hold land in England. This was possible if Scots were subjects of England as well as of Scotland, rather than just of Scotland. The legal question thus became about who is an alien and who is a subject.

The court decided that for a person to be a subject he has to be born in the 'King's dominion' and have parents who were 'under the actual obedience of the King'. The case has connected subjecthood to territorial control and allegiance to the ruler. However, another consequence of the case is that protection of rights, such as property rights for Calvin, can be derived from the status of subjecthood.[28] In the context of empire and colonial rule, rights have been attached to subject status as well. Whereas colonial rulers have used subjecthood pragmatically to enforce relationships of allegiance, colonial people have mobilised subjecthood as a category to agitate for rights as well. Both processes could take place simultaneously.[29] People approached courts set up by the British rulers to be declared as 'subjects', so that they could seek the protection of the common law.[30] In India, the Calcutta High Court, for example, has given several decisions on who is a subject.[31] The person bringing the case has wanted to be declared as a subject in order to come within the court's jurisdiction.[32] Given the close proximity of subjecthood with rights (even if inconsistent over time and space), it is not wholly accurate to contrast subjecthood with citizenship on the basis of rights or rightlessness.

3 Dominions and colonies

Subjecthood's complex dimensions arise from its portability across the vast breadth of the British Empire comprising of present-day old and new Commonwealth nations, as

26 Hannah Muller, *Subjects and Sovereign, Bonds of Belonging in the Eighteenth-century British Empire* (Oxford University Press 2017).

27 (1608) 77 ER 377.

28 Keechang Kim, 'Calvin's case (1608) and the law of alien status' (1996) 17(2) Journal of Legal History 155–171, 156.

29 In the context of resistance and the use of legal systems, see Brooke N Newman, 'Contesting "black" liberty and subjecthood in the anglophone Caribbean 1730s–1780s' (2011) 32(2) Slavery and Abolition 169–183 and Sally Engle Merry, 'Law and colonialism' (1991) 25 Law and Society Review 889 who write about resisting using colonial ideology, procedures and systems.

30 Bijita Majumdar, 'Citizen or subject? Blurring boundaries, claiming space: Indians in colonial South Africa' (2013) 26(4) Journal of Historical Sociology 479–502.

31 It may be relevant to note the exceptional position of India within the British Empire, as it was not considered a colony because the East India Company's rule came to an end in 1858, and the British Crown took direct control and appointed a government there. Yet, India was often treated as a dominion, and especially after the First World War Indian representatives at the 1923 Imperial Conference were formally treated as equals of the representatives of the dominions.

32 Several cases exist on jurisdiction and subjecthood. One example is *Killican v Juggernauth Dutt* (1777) 1 Ind D 946 where jurisdiction of the court extended over all born in Calcutta or residing in Calcutta. The court was less likely to extend jurisdiction over people in the areas surrounding Calcutta.

well as other lands not in the present-day Commonwealth.[33] The old Commonwealth (Canada, Australia, New Zealand) were also called 'dominions'. These are white settler colonies where local governance was usually autonomous. Locally elected representative governments were in charge in these places. In colonial territories, there were large non-European populations, and the white residents were a small minority. These colonies became self-governing later than the dominions and became known as the new Commonwealth.

During days of empire there were significant differences in how people perceived the legal status of being a British subject in dominions or colonies and within England.[34] Within Britain, the term British subject stood for Britain's own national identity as well as imperial supremacy. This rang true even at the time of the dissolution of empire. For example, Lord Chancellor Lord Jowitt introduced the British Nationality Bill in the House of Lords on 11 May 1948 with the words:

> … of all the remarkable contributions which our race has made to the art of government, the conception of our Empire and Commonwealth is the greatest … I believe that we have managed to combine a sense of unity and a sense of individual freedom, now the link the bond which binds us together is of course primarily the fact that we are all proud to be subjects of his Majesty the King.[35]

In dominions, which primarily consisted of settler white populations, subjecthood was perceived as a direct relationship with king and country, although this perception changed with time as dominions strove for independence. In the colonies, where white rulers were minorities, being a subject was seen as being subjugated to a foreign power. Colonial subjects were considered social, cultural and political inferiors. For instance, Indian British subjects were mockingly referenced as Gentoos (Hindus) and conquering Moors (Muslims) with Gentoos waiting to be rescued from their subjugated state.[36] Subjecthood encountered different issues in settler societies and in colonies. In settler societies, the presence of indigenous people was a factor that did not exist in colonies. While indigenous people were part of subjecthood, they were often denied citizenship of the emerging nations; a situation rectified only after many struggles for equality. Like an able contortionist, subjecthood could change shape and become both what is desired and what is feared across the Empire.

While subjecthood was carried around the world by British rulers through documents, laws and courts, it was never tested in a uniform or universal manner. Thus, experiences of being a subject varied widely. Hardly any mass travel had taken place for most of human history until the past century, so few British subjects chose to make use of their hypothetical rights by travelling to England. The few who did were at the extremes of social strata: either very poor or very wealthy. Poorer British subjects, such as sailors and servants from India who travelled to England, were usually left impoverished by the India

33 For example, see Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996), which ably demonstrates the complex dimensions of subjecthood in late colonial Africa and the effects of these on contemporary Africa, and Radhika Mongia, *Indian Migration and Empire: A Colonial Genealogy of the Modern State* (Duke University Press 2018), in the context of India and Indian migration throughout the Empire and which demonstrates how subjecthood interacts with migration to build a state.

34 Priyamvada Gopal, *Insurgent Empire: Anticolonial Resistance and British Dissent* (Verso 2019).

35 HL Debs 11 May 1948, vol 155, col 755.

36 Sudipta Sen, 'Imperial subjects on trial: on the legal identity of Britons in late eighteenth-century India' (2006) 45(3) Journal of British Studies 532–555.

Office in England, which was charged with their welfare.[37] Others who were elite travellers from colonies could come and reside peaceably and even qualify from the most elite institutions. For example, alongside many male Indian barristers who studied in the UK, was the first female Indian lawyer Cornelia Sorabji. Sorabji was the first woman to study law at Somerville College, Oxford University. She was also the first woman to practise law in India.[38]

4 Barriers to free movement of subjects

Indeed, migration has stretched the fabric of subjecthood because global movement of people as humans with agency and freewill was not anticipated or planned for in the past. Human beings outside Europe were transported as property rather than as humans. They were traded as slaves or moved as indentured labour to provide for colonial needs.[39] When human beings exercised their freewill to travel they made attempts to use free movement between colonies and dominions using the promise of equality in subjecthood as a basis of free movement. The reality of free movement was quite different from the legal promise. People from colonies (with white minority rulers) who wanted to travel to and/or settle in dominions (with white settler populations) often found that there were racial qualifications added to their entry and settlement criteria.[40] Discrimination was directed towards non-white migrants, both subjects and non-subjects, through various means, from charging additional fees (e.g. for Chinese workers to enter) or fixing number of passengers of one ethnicity as a ratio of total passengers in a ship, through to setting conditions such as not allowing people to land unless they travel directly to the country, which made long-distance journies (such as between India and Canada) impossible.[41] Chesterman writes:

> … a person's status as a British subject in Australia entitled them to very few legal rights. Entitlements that one might see as naturally flowing from British subject status – such as the right to vote and receive social security – did not follow automatically upon a person being recognised as a British subject in Australia.[42]

In order for subjecthood to attach to specific rights, it has had to be mobilised by movements or individuals who tested the limits of its egalitarian scope. Otherwise it meant there were no real gains. Contextually placing subjecthood in the various backdrops, it is possible to see how the promise of rights has been illusory for many people in the colonies. The indeterminacy of its form has led to its widespread use as a pragmatic policy linked to selective categorical operation in demographic control.

37 Raminder K Saini, '"England failed to do her duty towards them": the India Office and pauper Indians in the metropole, 1857–1914' (2018) 46(2) Journal of Imperial and Commonwealth History 226–256.

38 See Open University Research Project, *Making Britain* <www.open.ac.uk/researchprojects/makingbritain/content/cornelia-sorabji>for details on Cornelia Sorabji.

39 Brenna Bhandar, *Colonial Lives of Property* (Duke University Press 2018): Bhandar writes about racial regimes of property ownership that have evolved in settler societies in the context of colonialism.

40 In *Musgrove v Chung Teong Toy* 1891 AC 272, the Privy Council ruled that aliens had no enforceable right to enter the country. Canada enacted an Act in 1909 which stated regulations could prohibit 'immigrants belonging to any race deemed unsuited to the climate or requirements of Canada'.

41 Ann Dummet, 'Nationality and immigration status' in Ann Dummet (ed), *Towards a Just Immigration Policy* (Cobden Trust 1986).

42 John Chesterman, 'Natural-born subjects? Race and British subjecthood in Australia' (2005) 51(1) Australian Journal of Politics and History 30–39, 33.

These disjunctions in understanding subjecthood indicate that it was a relationship that was made-to-measure rather than a one-size-fits-all.[43] It remained indeterminate in character with a wide range of inbuilt discretion regarding its substantive content. It could demand allegiance, become rights-linked or facilitate subjugation of people. Muller writes: 'Subjecthood … was constantly shifting both in response to, and to accommodate, the vagaries of imperial rule.'[44] It did not, however, denote cultural belonging to Britain. In that sense, it is very different from citizenship, where demonstrating cultural knowledge and language skills is part of the naturalisation process even if it reduces actual emotional wellbeing and sense of belonging for modern-day migrant-citizens.[45] Citizenship ceremonies also include an oath of allegiance which is reminiscent of the loyalty aspects of subjecthood.[46]

Continued British involvement in a post-war period in former colonies and dominions, whether through the Commonwealth or special relationships, has kept links alive between the former constituents of the Empire. Whereas divisions of countries into controversial borders have left nationality as a legacy of misery for millions today,[47] as already mentioned, Britain as a policy continued subjecthood via its own nationality legislation. These links between subjecthood and citizenship continue in present times but, arguably, the most important links to subjecthood today are the living progeny of former colonised people who are ethnic minority citizens in the modern UK. For the rest of this paper the focus shifts to how such people come within immigration control. Subjecthood lives on through them while being replaced in terminology by citizenship. This is clear when twentieth-century nationality and immigration laws are examined.

5 Twentieth-century nationality and immigration

Prior to 1948 every British national was treated as a British subject.[48] The loyalty element of subjecthood acted as a rallying call for participation in the two world wars across the Empire. In the dying days of empire, subjecthood was challenged and discarded nationally in the former colonial spaces. The rise of nationalism in the newly born, free countries in decolonising nations created an urge to monitor immigration locally and nationally as an expression of state sovereignty. This led to more barriers being set up against the entry and naturalisation of British subjects. In different countries, racial and ethnic qualifications to citizenship were eventually removed because of national social and political movements to include minority and indigenous persons in the fold of national citizenry. Countries like Australia and Canada perceived this reconfiguration as a

43 See Timothy H Breen, 'Subjecthood and citizenship: the context of James Otis's radical critique of John Locke' (1998) 71(3) New England Quarterly 378–403 for a conceptual analysis of the difference between subjecthood and citizenship; and Robbie Shilliam, 'Civilization and the poetics of slavery' (2012) 108(1) Critical Theory and Historical Sociology 97–116 for a discussion on how subjects can invent their own subjecthood.

44 Muller (n 26) 13.

45 Devyani Prabhat, *Britishness, Belonging and Citizenship: Experiencing Nationality Law* (Policy Press: 2018).

46 Bridget Byrne, *Making Citizens: Public Rituals and Personal Journals to Citizenship* (Palgrave Macmillan 2014).

47 A current example is the controversy about the Indian Citizenship Amendment Act 2019 which offers a fast-track citizenship to people belonging to persecuted minority religious groups in Muslim majority countries neighbouring India but not to any Muslims. This Act has caused concerns about India's secular constitutional structure. Meanwhile, several Muslim lifelong residents in some parts of India have not been included in registers of citizen names, leaving them stateless and vulnerable. These issues can be traced back to the arbitrary religion-linked borders drawn at the time of the partition of India signalling the end of Empire but also the end of a subcontinent-wide country of religious pot-pourri.

48 Sarah Ansari, 'Subjects or citizens? India, Pakistan and the 1948 British Nationality Act' (2013) 41(2) Journal of Imperial and Commonwealth History 285–312.

liberation from British subjecthood. Discretion remained on racial qualifiers for admission, as well as settlement, and rights did not automatically transfigure from legal guarantees.

Arguably, national citizenship in both Australia and Canada is of a thin kind.[49] This could be a reason for the lingering ethnocentrism of subjecthood with its continued structural inequalities. However, even in the USA where American citizenship, born out of American decolonisation and anti-slavery constitutionalism, is of a much thicker kind, durable inequality of the legal structural kind between citizens continued.[50] Equal rights and racial non-discrimination, at least on paper, were achieved only after prolonged civil rights struggles and after social movements agitated for continued justice.

At the point of breakdown of empire, as more and more countries achieved independence, if those countries chose to join the Commonwealth their citizens remained British subjects. The British Nationality Act 1948 changed the focus of having allegiance to the king to, instead, just being a citizen of a country in the Commonwealth.[51] Regarding the 1948 Act, Everson writes[52] 'the natural universalism of subjecthood had been territorially qualified', and the 1948 Act had 'created a new geographical and territorial entity known as the UK and Colonies'. The British colonies would henceforth share a citizenship with the UK to be called citizenship of the UK and colonies. Under the British Nationality Act 1948, the concept of a British subject covered, in addition to citizens of the independent Commonwealth countries, 'Citizens of the United Kingdom and Colonies' (CUKCs) and 'British subjects without citizenship'. 'British subjects without citizenship' were persons who could potentially become citizens of an emerging independent Commonwealth country on the coming into force of that country's citizenship law. If they did not acquire such citizenship, they would, by default, then acquire citizenship of the UK and colonies.[53]

The story of how citizenship came to be defined in the UK was not about the UK's willingness to express a definitive view on the matter. Indeed, British politicians had viewed the dilemma of dominions regulating entry from colonies as follows:

> We quite sympathise with the determination of the white inhabitants of these colonies which are in comparatively close proximity to millions and hundreds of millions of Asiatics that there shall not be an influx of people alien in civilisation, alien in religion, alien in customs, whose influx, moreover, would most seriously interfere with the legitimate rights of the existing labour population. An immigration of that kind must, I quite understand, in the interests of the Colonies, be prevented at all hazards, and we shall not offer any opposition to the proposals intended with that object.[54]

49 David Pearson, 'Theorizing citizenship in British settler societies' (2002) 25(6) Ethnic and Racial Studies 989–1012.

50 Denver Brunsman, 'Subjects vs citizens: impressment and identity in the Anglo-American Atlantic' (2010) 30(4) Journal of the Early Republic 557–586, 559; Andreas Fahrmeir, Citizenship: *The Rise and Fall of a Modern Concept* (Yale University Press 2007); Douglas Bradburn, *The Citizenship Revolution: Politics and the Creation of the American Union, 1774–1804* (University of Virginia Press 2009).

51 Randall Hansen, *Citizenship and Immigration in Post-war Britain* (Oxford University Press 2000).

52 Michelle Everson, '"Subjects", or "citizens of Erewhon"? Law and non-law in the development of a "British citizenship"' (2003) 7(1) Citizenship Studies 57–83, 77.

53 Dummet (n 41) 143.

54 Joseph Chamberlain in a conference in 1896, cited in Robert A Huttenback, 'The British Empire as a "white man's country" – racial attitudes and immigration legislation in the colonies of white settlement' (1973) 13(1) Journal of British Studies 108–137, 117.

Eventually, it was an assertion of national sovereignty of a newly independent dominion which forced the UK legislation to adopt a statutory definition of citizenship. The direct impetus was the Canadian domestic legislation. Canada passed its own citizenship Act in 1946 and issued Canadian passports to include its own French Canadian citizens.[55] Canada's initiative in controlling its own immigration and naturalisation meant that each dominion could now determine criteria for entry and residence of its own and regulate subjects from other parts of the Empire. This challenged the common status of British subjecthood.

Canada termed British subjects as Commonwealth citizens, so the British government introduced its own Bill to include all Commonwealth citizens as British subjects. This was achieved through a legal sleight of hand: a shift in terminology from subject to citizen in the British Nationality Act 1948. To create equal status of subjects, the 1948 Act permitted former subjects of the Commonwealth and colonies to freely enter and settle in the UK. The Act made it possible to naturalise as well as hold plural citizenships elsewhere without any limitation. It also recognised for the first time in statute law that people can become British by incorporation of territory (s 11) without requirements of proving any allegiance as a basis for citizenship. However, having to take an oath of allegiance to the monarch was part of the process of naturalisation (s 10(1)), so some people still had to demonstrate some sort of allegiance akin to subjecthood. Thus, the 1948 Act did not abolish subjecthood and replace it with a uniform set of rights attached to British citizenship. Instead of this, the various former colonies and dominions made different rules applicable for their own national citizenship.

Newly independent countries could opt whether to join or not join the Commonwealth. Burma, for example, chose not to join the Commonwealth, so Burmese nationals did not retain British subjecthood. In contrast, Commonwealth citizens retained a right to enter, live, and work in the UK just as all subjects had done in the past. The driving force behind a continued nationality relationship with people of decolonised nations was the desire of Britain to exert soft power over the former empire nations and to retain a position as 'first amongst equals' in the Commonwealth.

Apart from empire nostalgia, why did the 1948 Act not attempt to control immigration from the Commonwealth? First, there was hardly any mass migration in the early 1940s, so migration had not yet become a major concern. Thus, the Act merely embodied the status quo. The second reason was Britain's partnership with its colonies in the two world wars. In 1914, George V, the King of England, had declared war on Germany on behalf of the whole empire. Every subject was called upon to contribute to war efforts and appeals were made to their sense of allegiance to the Crown.

The First World War proved extremely expensive for Britain, and the Second World War left Britain in enormous debt. Troops from the colonies and dominions fought for Britain, and resources were mobilised from all over the Empire. Given the role of the colonies in the world wars and the continued role of the Commonwealth in 1948, there was a lack of political will for bringing in new checks on immigration from the newly born Commonwealth nations. Ironically, it was the involvement of British colonial subjects in the Second World War that led to increased migration to the UK.

55 Laurie Fransman, *Fransman's British Nationality Law* (Bloomsbury Professional 2011).

6 The change in subject status

People did not just arrive in the UK on their own initiative. British companies actively recruited from the Commonwealth, especially in sectors such as textiles and farm labour where labour was scarce within the UK. Family members of labourers arrived later, closer to the end of 1950s or in the early 1960s, when there were strong indications that immigration policies were likely to tighten to stem further migration.[56] The apprehensions about the closing immigration door were proved right when the Commonwealth Immigrants' Act 1962 ended the right of automatic entry for Commonwealth citizens. They were still 'British subjects' under the British Nationality Act 1948, but that status was detached from any substantive rights. Even if they were ordinarily resident, or had been, they were subject to a new system enabling deportation of those who had committed criminal offences. All of these changes permitted enormous administrative discretion in determining who could enter and who could stay in the UK. Crucially, the 1962 Act removed the right of entry of citizens of the UK and Colonies whose passports had been issued by colonial authorities.

It is clear that, through legal limits placed on the rights of Commonwealth citizens, the UK was withdrawing from the Commonwealth free movement area from 1962 onwards, thereby affecting its citizens who resided outside the UK and whose parentage lay outside the UK. CUKCs formally possessed the same legal status, but few had real residence rights. Citizens who resided in the UK, or whose parentage lay within the UK, did usually have a continued right of residence in the UK; they were mostly white. People who lacked residence rights were disproportionately non-white CUKCs. Just as free movement of subjects during days of Empire was also racially determined by their regions of origin, British citizenship was now of less value to non-white British from overseas. Alongside new legislation, steps were taken to discourage new arrivals, such as through advertising campaigns. Racism and hostility directed towards these newer members of British society became heightened.[57]

It was in this politically charged context that in the 1960s and 1970s a large number of displaced East Asian African British passport holders migrated to the UK. Dictatorial regimes of East Africa, and the rise of African nationalism there, had led to the persecution of minorities such as Asian-origin Ugandans and Kenyans.[58] Of these people, those who were British passport holders migrated to the UK to seek personal safety but found that they could not readily enter and settle in the UK. The British government refused them entry or detained and deported many of them, stating that their passports were not intended to be used as travel documents.

The refusal of entry of several East African Asian British passport holders was challenged in the European Commission of Human Rights. The European Commission found that the UK had participated in the inhumane and degrading treatment of the East African Asians in the form of racism and discrimination.[59] In response, the UK government started a voucher system for each head of household (defined as a male member of household) who wanted to resettle in the country.

56 Joe Turner, 'The family migration visa in the history of marriage restrictions: postcolonial relations and the UK border' (2015) 17 British Journal of Politics and International Relations 623–643.

57 Trevor Phillips et al, *Windrush: The Irresistible Rise of Multi-Racial Britain* (Harper Collins 1998).

58 Randall Hansen, 'The Kenyan Asians, British politics, and the Commonwealth Immigrants Act, 1968' (1999) 42(3) Historical Journal 809–834.

59 *East African Asians v UK* (3 EHRR 76) 15 December 1973.

In 1968, in just three days, the British government passed an immigration Act, the Commonwealth Immigrants' Act 1968, in order to prevent the re-entry of people from countries such as Uganda and Kenya. The 1968 Act further restricted the right of entry of Commonwealth citizens. A citizen could only live and work in the UK if they, or at least one of their parents or grandparents, had been born, adopted, registered or naturalised in the UK. This rule excluded almost all of the East African Asians who were at that time seeking entry to the UK.

7 Patriality and new categories

The zenith of the process of exclusion of Commonwealth citizens was seen in the enactment of the Immigration Act 1971. It ended the preferential system of labour vouchers and student entry for Commonwealth citizens and introduced the concept of 'patriality' and 'right of abode' for CUKCs. The Immigration Act 1971 created two categories: patrials, who have a special connection with the country; and 'non-patrials'. Patriality depended on close connections (for instance, grandparent or parent born in the UK). A 'patrial' was generally (i) a CUKC who held that citizenship through birth, adoption, naturalisation or registration in the UK, or (ii) a CUKC who acquired citizenship outside the UK but who had lived in the UK for a continuous five-year period. These patrials held the right of abode in the UK; non-patrials did not. There was no longer any advantage in immigration law in being a Commonwealth citizen without patriality.

These new categories carried over the dominion-versus-colony divide, as they also gave preference to those who were ethnically similar to the white British population. People from former dominions with their white settler populations were more likely to have parents or grandparents born within the UK because of having ethnic links to the white majority British population. They could readily establish patriality. Naturally, non-patrials resided mainly in the former colonies, which were ethnically different, and so were usually not able to prove such a link. As a result, they were automatically eliminated from future migration.[60]

Under this differential treatment, aggravated racial divisions were created in the UK and culminated in the hostile environment towards migrants and their progeny. Eventually, it led to a renewed emphasis on a loyalty and allegiance model of citizenship for migrants and migrant-citizens which is exemplified in the development of cancellation laws.

8 Hostile environment and proving citizenship

As has been set out above, from 1983 there were no more special connections in law with Commonwealth citizens. They had to naturalise like anyone else. *Jus soli* (birth on territory citizenship), which had not depended on bloodlines, was abolished by the British Nationality Act 1981.[61] The British Nationality Act 1981, which also abolished the status of citizenship of the UK and colonies, and the earlier Immigration Act 1971, together brought preferential Commonwealth migration to a complete halt. The big question at this point was: how would Commonwealth citizens already present in the UK be differentiated from those who would apply to enter in the future?

60 Nadine El-Enany, 'Before Grenfell' in Dan Bulley et al (eds), *After Grenfell* (Pluto Press 2019) 54–55.

61 Karatani (n 3).

The UK government did not engage in any immediate egregious ethnic makeover by removing all rights of all Commonwealth citizen residents and preventing all future entries. It also did not compel any residents to apply for new permits or visas. It simply adopted a declaratory system in legislation which implied that all existing lawful residents could simply continue to exist as lawful residents without taking any additional action. At the time, this step caused minimal disruption, but, because they were not required to take any further steps, many residents did not obtain any proof of their secure legal status. This made it impossible to readily ascertain who had legal residence as a citizen and who was a newer arrival not covered by the law, thereby creating the injustice suffered by the '*Windrush* generation'.

Just as the formal restrictions of citizenship law in the USA in the nineteenth century set the stage for the gendered and racialised *de facto* barriers to full membership in the twentieth century (as Haney-Lopez, Volpp and Aleinikoff have demonstrated),[62] so subjecthood of racialised others has also cast a long shadow over citizenship rights in present-day Britain for racialised others. Although it seems unlikely that the British Nationality Act 1948 played a major role in attracting the *Windrush* generation from the colonies and Commonwealth into the UK as it merely maintained the status quo, the manner in which the status quo shifted over the years meant that the progeny of the *Windrush* entrants were never fully considered as British, despite living their whole lives in the UK.[63] Their plight highlights how the promise of equal citizenship has been as much illusory for Britain's ethnic minority citizens as the hollow promise of equal subjecthood had been earlier for ethnically non-white subjects.

The consequence of the legacy of empire and the mutual, self-resembling faces of subjecthood and citizenship is the undermining of British multiculturalism today. Pearson writes that British multiculturalism is a product of the end of empire and the 'unwelcome arrival of waves of New Commonwealth migrants' which led to a political consensus about the necessity of strict immigration control.[64] Everson[65] situates the tensions of contemporary Britain in three critical factors: 'the non-incorporation of the Briton within the state, the failure to identify a distinct national notion of belonging and the unstable nature of industrial citizenship'. The factors contribute to the flexibility and indeterminacy of citizenship which, while formally equal, remains differentiated in its practice and its impacts in a categorical manner.

The current allegiance approach to citizenship is strikingly similar to subjecthood, which was based on loyalty to the king and state in earlier times. It harks back, through centrality of allegiance tested by national security exceptionalism, to similar promises of subjecthood which were also derived from its variability. Continuing in its current trajectory, citizenship is likely to become a similar legal technique of control over minority/migrant-citizen bodies. As Said wrote: 'Imperialism did not end, did not suddenly become "past", once decolonisation had set in motion the dismantling of the classical empires.'[66]

The promise of automatic rights which a legal guarantee of citizenship seems to propose, and which subjecthood also tended to proffer, was always an illusion.

62 Ian Haney Lopez, *White by Law: The Legal Construction of Race* (Critical America) (NYU Press 2006); Leti Volpp, 'Feminism versus multiculturalism' (2001) 101(5) Columbia Law Review 1181–1218; Alexander T Aleinikoff, 'Citizens, aliens, membership and the constitution' (1990) Constitutional Commentary 1067.

63 Phillips et al (n 57).

64 Pearson (n 49).

65 Everson (n 52) 82.

66 Edward W Said, *Culture and imperialism* (Knopf 1993) 282.

Understanding subjecthood, and its close links with citizenship, reveals citizenship for what it is; a potential relationship of the promise of rights which is contingent on ongoing struggles for rights rather than a taken-for-granted set of rights.

Conclusion

Given the contemporary context of conditional citizenship, and the history of legislative changes to free movement of erstwhile Commonwealth citizens from the 1960s onwards, as well as the juxtaposition of 'hostile environment' legislation with Brexit proposals, a clear picture emerges of what successive nationality and immigration laws have sought to achieve or achieved through their effects. Instead of a clear territorial decolonisation at the end of empire, these laws have created demographic changes within the UK through a process of successive and cumulative exclusion. It is a process which is reminiscent of 'reverse decolonisation' where people who could freely arrive are rendered susceptible to deportation and expulsion. Contextually placing subjecthood and citizenship in various backdrops, it is possible to identify similarities such as the promise of rights, the indeterminacy of form, a pragmatic policy-linked categorical operation, and a strong role in demographic control.

Thinking about citizenship through subjecthood could help one reflect on issues of extra territoriality, and how, and why, the UK chooses to exercise jurisdiction over some populations, but not others. The implications of categorical exclusion go beyond illusory promises and pragmatic politics. If citizenship of a democratic country for its ethnic minority people is mapped so closely to subjecthood of an empire for colonised people, is it even possible for democracy to thrive? Can the centre of an erstwhile empire ever fully adopt multiculturalism in a meaningful manner? These questions are timeless but are also time sensitive, as the effect of Brexit on long-term resident migrants and their citizenship rapidly becomes another chapter of precarious legal situations in British history. To return to the words in the epigraph of this paper of the Lord Chancellor William Allen Jowitt, 1st Earl Jowitt, merely substituting the word citizen for the word subject does not mean that discrimination ends. Discrimination can continue irrespective of terminology and is the thread that ties citizenship to subjecthood. It is the negative version of Shakespeare's words in *Romeo and Juliet*:

> *What's in a name? That which we call a rose*
> *By any other name would smell as sweet.*[67]

67 Act II, scene II of *Romeo and Juliet*.