

(Re-)gaining Citizenship via Constitutional Law, European Human Rights and Transitional Justice: The Federal Constitutional Court on Article 116 (2) BL

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From a formalistic perspective, nationality is nothing more than the attribution of a person to a State. Citizenship, on the other hand, is what that attribution means within the domestic sphere. To whom it can be attributed, and to whom it belongs, is all too often a matter of (re-)configuring the polity that makes up a State. It is a political tool used by populists and nationalists in search of a made-up homogeneity.¹ As such, it was also employed by the German State under National Socialism as a tool to create a ‘community of people’ (*Volksgemeinschaft*) by persecuting persons cast as social outsiders.²

But this macro perspective is mirrored in the lives of the individuals concerned. Hannah Arendt has famously shown how the formal attribution, or rather, non-attribution of a person to a State effects their access to subjective rights and the protection thereof – that is, how it affects their right to have rights.³ Arendt’s perspective – which drew in part from her personal experiences of what nationality and citizenship mean in exile and emigration – is one that she did not only share with international law scholars such as F.A. Mann,⁴ but one that has also marked the post-1945 international legal system through the ever-increasing role of the individual.⁵ In

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¹ Étienne Balibar, *La Proposition de l'Égaliberté* (2010), at 302–305; specifically regarding National Socialism see, Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (1992), at 165–168.

² Robert Gellately and Nathan Stoltzfus, ‘Social Outsiders and the Construction of the Community of the People’, in Robert Gellately and Nathan Stoltzfus (eds.), *Social Outsiders in Nazi Germany* (2001) 3, at 4–5.

³ Hannah Arendt, ‘We Refugees’, in Marc Robinson (ed.), *Altogether Elsewhere: Writers on Exile* (1994) 110, at 118–119; Hannah Arendt, *The Origins of Totalitarianism* (3rd ed., 1979), at 297–302; see also, Christian Volk, ‘The Decline of Order: Hannah Arendt and the Paradoxes of the Nation-State’, in Seyla Benhabib (ed.), *Politics in Dark Times: Encounters with Hannah Arendt* (2010) 172, at 182–186.

⁴ Geoffrey Lewis, *F. A. Mann: a Memoir* (2013), at 47, 125–127, and 137–138.

⁵ Anne Peters, *Beyond Human Rights* (2016), at 31–34.