Conflicting Conceptions of Citizenship

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Donald Galloway
Faculty of Law
University of Victoria

Writing in 1901, the New Zealand legal theorist John Salmond, in the introduction to a two-part article[1] comparing and contrasting the concept of citizenship found in Roman Law with its Common law counterpart, made the following intriguing comments:

> Viewing the matter historically, we may say that citizenship is a legal conception the importance of which is continuously diminishing…. Citizenship and its remaining privileges are the outcome of the primitive conception of the state as a personal and permanent union of determinate individuals for whose exclusive benefit the laws and government of the state exist. Residence, regarded as a title of membership and protection is the product of the more modern conception of the state, as consisting merely of the inhabitants for the time being of a certain territory. The personal idea is gradually giving place to the territorial and the present twofold title of membership is the outcome of a compromise between these two co-existent and competing principles.

One of the most noticeable and striking things about this excerpt is how modern it sounds. The question whether citizenship is in decline is one that is frequently discussed today particularly when reference is being made to the modern phenomenon of individuals holding multiple citizenships. The point is often made that allowing individuals to hold more than one citizenship dilutes the concept by creating multiple loyalties and conflicting commitments. Likewise, as we hear more about the demise of

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the nation state and the rise of supranational and local political institutions (from authors such as Linda Bosniak) we hear more about the demise of (state-based) citizenship. And thirdly, the membership status and entitlements of non-citizens has at last become a mainstream issue, inciting conferences such as this one. These are “turn of the century” debates but in this century not a hundred years ago.

In 1901, when multiple nationality was not a significant phenomenon and national or imperial governments seemed to have a monopolistic grasp on political power, the conception of citizenship seemed to have a secure place in the legal lexicon. How could a leading legal theorist have concluded that it was a moribund concept whose days were numbered?

Salmond traces the roots of the criteria then in place for recognizing and granting citizenship to their feudal sources and identifies that their historical foundation lies in the belief in an irrevocable bond between the individual and the Crown that began at birth or by legal grant. The Crown demanded full allegiance from individuals born within the realm and offered protection and privileges in return. By the beginning of the twentieth century the idea that citizenship involved a personal bond of allegiance to the monarch that was irrevocable, lasting until death, had lost gravitational force. Republican conceptions of the relationship between state and individual had replaced their monarchical predecessors.

Moreover, aliens were coming to enjoy benefits formerly reserved for citizens. In 1870, the Naturalization Act in the UK had introduced significant change by permitting aliens to hold and inherit real property within the country. In the face of such a momentous legal amendment, the remaining benefits that were still reserved for the citizenry at the beginning of the 20th century (Salmond cites the right to vote, the right to sue the Crown and the right to own ships) may have seemed unstable. With these factors in mind, Salmond’s inference that citizenship as a legal concept was in decline and that residence alone was taking its place as a source of membership seems quite reasonable.

However, although there may have been some basis for his inference about citizenship’s decline and obsolescence , it is important to emphasize that Salmond’s

talents as a trendspotter were somewhat lesser than his abilities as a legal theorist. Not only did the traditional criteria for recognizing and granting citizenship not continuously decline during the twentieth century, in many ways the gulf between citizens and aliens and even the gulf between citizens and residents expanded. Even as citizenship became voluntarily (and in some few cases involuntarily) revocable, it did not come to be seen as resting on residence alone. Some other grounds – by and large unarticulated or understood hazily - were assumed to underlie the legal criteria of membership and these, rather than residency, became the plinth on which a variety of jurists and law-makers of various political stripes constructed accounts of the law of citizenship and its privileges . However modern Salmond's ideas may seem today, his announcement of the rise of residency as the ground of membership was, if not wrong, at least egregiously premature.

In the Canadian context, one can easily point to a long list of factors that indicate that the twentieth century trend was in the opposite direction. For example, we see the Canadian government introducing the category of citizen into the Immigration Act of 1910 as a way of asserting its authority over its border. While the same effect could have been achieved by using different language (British subject, and domicile in Canada) the choice of the language emphasized independence from the imperial government of the UK and the federal government's wish to assert sovereign national control over exit, entry and the right to remain. In other words, the concept of citizenship became a strategic tool in the contests between national and imperial government. Residency would not have fulfilled the same goal. The same statute clearly distinguishes those whose residency is a matter of right and therefore stable, from those whose residency is unstable because subject to discretionary revocation.

In addition, the Citizenship Act of 1947 is at the forefront of a series of Acts whose sole purpose seems to have been to create a series of complex and ever changing tests to distinguish insiders (members) from others. These statutes do not specify the benefits and obligations that the status may carry, but confirm that residency alone is not a source of membership. The fact that they were modified constantly is significant. It reveals the absence of an established or stable set of principles that demanded that

membership be allocated according to specific criteria. The absence of an apparent or agreed on governing principle did not seem to stall the creation and implementation of rules. They proliferated despite the absence of "a theory of citizenship". These statutes also continued to enforce the strict requirements found in earlier Naturalization Acts for those wishing to obtain full membership status thereby endorsing the point made by both Hannah Arendt and Aristide Zolberg that "where the possibility of citizenship was extended to nonnationals, it required a profound personal transformation on their part, well expressed by the term 'naturalization'." Being here was not enough.

It is not only anti-imperialists or sovereigntists that extolled the ideal of citizenship. We see civil libertarians in the 1950s rely on the idea of citizenship as the source of freedoms that constrain government powers. It was from the idea of citizenship that jurists such as Ivan Rand elicited such basic rights as freedom of speech and association. The criteria of citizenship themselves were not challenged by these individuals. Their "naturalness" or "neutrality" or uncontentiousness seem to be assumed. The rights and freedoms that were recognized at this time did not of course include freedom of global mobility nor the right to become a citizen. These were well established as unconstrained government powers.

With the rise and expansion of the welfare state, the idea that social benefits belong only to citizens also becomes widespread . And later we see the ideal of equal citizenship being used to support progessive action on behalf of the poor, women and racialized groups. In many accounts, it is their status as equal citizens that operates as the fulcrum that exposes the injustice they continue to experience. As victims of discrimination, they are not "full" citizens.

While the use of the concept of citizenship as a strategic tool to advance various progressive goals may have led to commendable results, one not so beneficial consequence has been that it blinded policy makers and activists alike to the position of individuals of whom Salmond seemed to be acutely aware in the first years of the century: non-citizen residents who were subject to legal obligations and burdens but restricted from important legal benefits; residents who contributed to the country's

development but who were prevented by both legal and political means from participating politically and whose continued presence within the community depended solely on their utility.

Many other factors could be listed to justify the claim that a non-residency-based concept of citizenship consolidated its position of importance during the twentieth century and as years passed entrenched itself at the centre of public law. Nonetheless one can alsompoint to more recent changes that seem to have altered this state of affairs and one could even justifiably hail Salmond as laying the groundwork of the theoretical framework that underlies such cases as *Andrews* which characterized membership status as a suspect ground of discrimination, analogous to those specified in s.15 of the *Charter*.

However, *Andrews* is at most an ambivalent source of support. Admittedly, it recognizes that differential treatment of citizens and long term residents is suspect because of the vulnerability of the latter, and thereby appears to be according long term residents the status of full members. However, instead of taking aim at the source of vulnerability , namely the law's failure to accord a political voice and the right of representation to permanent residents it merely holds that the distinction is presumptively unconstitutional. The result of this is that where the government can convince a court (on section 1 grounds) of the importance of reserving privileges for citizens (which should be relatively easy to do if, as was stated in *Lavoie,* citizenship is regarded as the glue that keeps "us" together) discriminatory treatment of non citizens is tolerated. The end result is that a concept of citizenship based on factors other than residency becomes further entrenched in our law. Moreover the *Andrews* decision seems powerless as a tool to challenge legal re-definitions of the term "permanent resident" . With the introduction of onerous requirements on permanent residence (physical presence in the country for lengthy periods over each five year period) as well as apparently incoherent requirements (no matter how long a person is out of the country it is only physical presence over the last five years that counts) the government/legislature has revealed its retention of supreme control over the question who shall share the privileges and entitlements of citizenship.

Although Salmond's abilities as a trendspotter may have been woeful, he makes a second interesting claim in the excerpt quoted above , this time normative rather than prophetic. This is the intriguing claim that citizenship and its remaining privileges are the outcome of a primitive conception of the state. Although we may have founded our understanding of the state on the idea of a permanent and personal union we ought not to be doing so. Salmond's point seems to be that because it is difficult to regard the enjoyment of benefits as a corollary of the obligation of permanent allegiance owed to the Crown, it also becomes difficult to justify reserving the benefits for those who have been received into that allegiance. The continuing diminution in potency of the idea of allegiance, particularly in times of peace may have led Salmond to conclude that it can no longer provide the underpinnings for a theory of membership. Moreover residency is the best candidate as a surrogate because the power base of the modern state is territorial and the rights of residents should be seen as the corollory of their legal obligations to the state.

In sum, he appears to be suggesting that instead of regarding the state as under an obligation to act in the interest of those with whom it is in a permanent relationship, the more justifiable position is that it is under an obligation to act in the interest of those who are subject to its powers of administration.

While Salmond leaves open some very problematic issues with which citizenship lawyers are more than familiar (such as what he means by residency and whether he is equating it with physical presence) his claim is an interesting one because it raises issues around which current debates revolve. Why should permanent residents not have the right to vote? Why should temporary workers who have contributed to Canadian development not have the right to remain? Why should non-citizen residents have to endure the processes of naturalization before gaining recognition as members? Why should residency not be the sole criterion for naturalization?

Salmond's defence of the claim that residency should be the foundation for membership appears to be based on a "faute de mieux" argument – that any attempt to underpin citizenship on other grounds seems to be doomed to failure. While residency

offers a justifiable ground for selection - that those subject to the power of the state should also be subject to its benefits – other alternatives provide inadequate support. However, he does not consider other alternatives and this may be because it is so difficult to construct a theory of citizenship that could account for the various legal criteria. And indeed both historical record and modern debates reveal the flimsiness of the traditional grounds for granting or recognizing citizenship. Place of birth is highly problematic as a source of membership. Since as early as the 14th century there has been statutory recognition that individuals born outside the realm may be as entitled to the benefits of membership as those born within. Conversely, current arguments raging in the United States about birthright citizenship are prompted by the perceived arbitrariness of recognizing as citizens children born in the country when their parents have no established connection.

The idea that citizenship should be acquired through ancestry is regarded as similarly problematic. Recent amendments to the Citizenship Act in Canada, reflect suspicion of this idea by providing that citizenship cannot be passed on to children by descent if the parents also gained their citizenship through descent. (Even as early as the 17th century some problematic aspects of the idea of citizenship by descent were being noted. As a thought experiment, Sir Francis Bacon posited the case of groups of English people who left the country to settle elsewhere and who interbred solely amongst themselves. He seems to suggest that all later generations would be subjects of the king.) Moreover, were kinship seen as the central idea underlying citizenship, naturalization would be a difficult practice to justify.

Theoretically, there is a deeper reason for turning to residency as the source of the benefits of membership. It avoids a paradox that others accounts of citizenship seem to fall prey. Where membership is accorded only to some individuals who are subject to the power of the state (on the ground of some independent characteristic) it becomes difficult to resolve whether the state has the capacity to change these rules of membership for instrumental reasons. If it is to the benefit of existing members to recognize new members who do not meet established criteria of membership, then can the new members

ever be considered full members? Their status being dependent on their utility to current members will always appear suspect, or improper. This is the paradox exposed recently by Nicolas Sarkozy, when he claimed that naturalized citizens should be stripped of their status after being convicted of killing a police officer. The idea that he is expressing is a simple one: if it is for the benefit of the existing population that we naturalize new citizens, then for the benefit of the citizenry we may also cancel the grant. Consequently, the naturalized citizen can never obtain full citizenship status. This paradox is avoided where the state and population concede that being subject to the powers of the state is the necessary and sufficient ground for enjoying its benefits. Residency is a non-instrumental reason that applies to old members and new members alike.

It is tempting to adopt the position that Salmond advocates. It offers a simple and clear basis on which to argue for the rights of individuals who participate in the development and cultural relations of the polity. However, there are also some reasons to resist the temptation. Most importantly, like other criteria of citizenship it is both crudely over- and underinclusive. First, Salmnd's position is based on view that the powers of the state are defined territorially. His argument that a state owes obligations of protection only to members and that membership should be determined solely by residency leads to the conclusion that a state owes no obligation to non-residents, including those whom it prevents from taking up residency. While we may want to acknowledge that a state's power is asserted over everyone within the territory it administers, the state also has powers beyond these territorial limits. The obligation owed to individuals at the border or attempting to reach the border should be congruent with that owed to those who find themselves within the territory. Thus the position of refugee claimants on the high seas or arriving at a port of entry should be no different than those who are already here. Yet, the choice offered by Salmond (accord membership solely on the ground that they are subject to the powers of the state) seems inherently problematic. Missing from Salmond's account is the idea that a government may act on behalf of the members of a community without acting in their interest. That is to say a government's obligation is to fulfil the moral responsibilities of those on whose behalf it acts, rather

than meeting their personal interests. An obligation can be owed by a government to a person who is not a member. If we recognize this, we are faced with the question whether we should regard residents as having entitlements and claims against the government that do not give rise to a claim of membership. The membership issue can be separated from other questions of political morality. We can disaggregate the package of rights that attaches to membership and can ask whether each of the rights should attach to residents or non-residents alike. The question is not Who belongs? but who is entitled to participate and benefit.

Instead of denying the importance of the network of intergenerational projects and relationships that gives rise to a sense of belonging amongst a group of individuals who experience a divide between insiders and outsiders, we may ask about the obligations that those individuals as a group have to others. A nuanced approach may accord the right to vote to residents but not because they are members. Similarly it will address head on the moral obligations owed to guest workers instead of employing a utilitarian matrix to their situation.

Of course while these theoretical considerations may give us pause, we may for strategic reasons wish to dismiss them. In one respect, Salmond's account captures an important truth that is missing from this alternative approach. We experience politics not as a realm in which the moral obligations to others are fairly and openly considered. It is experienced as self- interested conflicts of those who have a voice in the halls of representation giving rise to compromises of convenience rather than reasoned principled and fair decision making. In this world, the interests and well being of individuals identified as outsiders may never be adequately represented, or weighed properly. Only by adopting Salmond's position ,can the proper results be achieved. Only if those who are subject to the state's power are regarded as insiders will this be achieved. However, while we may endorse the results that this approach will achieve, we may question whether it avoids the critique that Salmond launches against its competitor: that it is founded on a "primitive" conception of the state.