THE TRANSFORMATION OF CITIZENSHIP

VOLUME 2

Boundaries of Inclusion and Exclusion

EDITED BY
JÜRGEN MACKERT AND BRYAN S. TURNER

The Transformation of Citizenship, Volume 2

This volume *Boundaries of Inclusion and Exclusion* examines the many different and newly emerging ways in which citizenship refers to spatial, symbolic and social boundaries. Today, in the context of citizenship we face processes of inclusion and exclusion on national and supranational level but no less on the level of groups and individuals. The book addresses these different levels and discusses processes of inclusion and exclusion with regard to spatial, social and symbolic boundaries, referring to such different problems as political participation, migration, or identity with regard to religion or the EU. This book will appeal to academics working in the field of political theory, political sociology and European studies.

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This is a timely and thoughtful set of essays on citizenship's bordered dimensions, with a particular focus on the European context. Addressing the production and defense of boundaries within various domains, including the market, civil society, the administrative state and at territorial frontiers, the collection highlights multiple ways in which regimes of citizenship divide and exclude precisely in the course of constituting collective social life. – *Linda Bosniak, Rutgers University*

Over the last decade in the face of growing social and political instability, citizenship has been restored as a critical component of social solidarity. However, social solidarity based on citizenship involves an exclusionary principle and it is challenged by the contemporary crisis around migration, religious diversity and terrorism. National sovereignty and national boundaries have become problematic bases of inclusionary citizenship. This volume offers an authoritative overview of, and commentary on, these dilemmas of modern politics. – *Gerard Delanty, University of Sussex*

By bringing together the study of citizenship and that of spatial, social and symbolic boundaries, this volume could not be more timely. Its various essays provide essential tools for understanding some of the most important political and social developments of the contemporary era. I highly recommend this book to anyone concerned with mounting challenges in Europe and beyond. Michele Lamont, President, American sociological association. – *Michèle Lamont, President, American Sociological Association*

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Volume 2: Boundaries of Inclusion and Exclusion

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1 Introduction

Citizenship and its boundaries

Jürgen Mackert and Bryan S. Turner

Among the many far-reaching transformations that both societies and citizens have faced in recent years, the European migration crisis of 2015/2016 has most urgently brought back to mind the fact that modern citizenship has always been about boundaries and about processes of inclusion and exclusion. Boundaries that once seemed to be fixed and solid can change rapidly – and vice versa, as we could see in the case of militarily fixed border crossings on the Balkan route after only a few weeks of the 'politics of open borders'. It is obvious that already the proclamation of the 'Rights of Man and the Citizen' in the French Revolution drew clear territorial boundaries not only between France and adjacent sovereign territories but no less between Frenchmen turned peasants (Weber, 1976) who were included in the rights of the citizen and other persons who remained excluded from them. Thus, from the very beginning citizenship was one of the core institutions of modern societies that shaped people's access to rights and membership, their belonging to a community and their conception of themselves, namely their identity. In times of 'embedded liberalism' (Ruggie, 1982), when the nation-state was conceived to be the only recognised sovereign actor in world politics, the economy being state-led and strictly regulated and the citizenry being conceptualised as a homogenous community, processes of demarcation appeared to be unproblematic, decisive and a matter of quite simple regulations.

However, a closer examination reveals that this idea is misleading. From the beginning, modern citizenship did not conform to its own claims of being a universalistic institution and it did not match any expectations for comprehensive inclusion. In fact, national societies operate as 'exclusive clubs' that deny access to both their territories and their institutions. This means that, although citizenship operates inclusively for a clearly defined group of individuals, it is not only a means of inclusion but also a powerful instrument of social closure that triggers processes of exclusion (Brubaker, 1992; Mackert, 1999). While the boundaries that citizenship draws between citizens and non-citizens come to mind at once, this differentiation is just one aspect among many others.

In this volume we conceptualise boundaries in terms of a number of dimensions. These can be bureaucratic in terms of the ownership of passports, residential visas (such as the famous Green Card in the United States, and other indicators of membership such as driving licences, tax records and indeed criminal records).

However, boundaries and borders can be spatial, symbolic, cultural and religious. Because of their complexity and significance, boundaries are inevitably sites of struggle and contestation. Struggles for inclusion by outsiders or struggles for exclusion on the part of insiders play a crucial role not only for migrants but for domestic politics and obviously for the evolution of citizenship as a legal status defining membership and entitlement.

Despite these spatial, cultural and legal struggles over the boundaries defining citizenship, for a long time sociology has conceived of citizenship as primarily an instrument of social integration. Thus, we first briefly consider this idea of citizenship as inclusion in the classical sociology of citizenship.

Citizenship as inclusion: the classical sociological idea

In developing the sociological model of modern citizenship, T.H. Marshall (1950) developed his argument in a context where nation-states were effectively separated outwardly from one another by strictly monitored and policed geographic frontiers. Inwardly these societies were organised by a state-led economy, political democracy and a welfare state that had to serve the needs of the members of a political community, which was assumed not only to be culturally homogeneous but also united by a shared sentiment of national belonging. Further, Marshall was convinced that citizenship rights could tame the disruptive class struggles of competitive capitalism by turning the worker into a citizen. The theory of citizenship was a response to the Marxist idea that class struggle could not be contained and that in the long run it would undermine capitalism and usher in a new mode of production and a new type of society. Marshall was convinced both that citizenship would include ever more social groups and that the citizenship status itself would be enriched with more and more rights. Following this interpretation of British history in terms of the evolution of citizenship, Talcott Parsons (1977a) further developed this model of citizenship as an instrument of integration and inclusion within national societies by citizenship rights. In both an evolutionist and a functionalist perspective, this complex and complicated process of societal integration would be ensured by simultaneously institutionalising status equality and the legitimation of social inequalities. Following the functional differentiation of the social system, enhanced adaptation to the environment, cultural upgrading and value generalisation, Parsons was convinced that the 'societal community' had an enormous capacity for social inclusion (see Münch, 1984). This inclusion is accomplished on the basis of citizenship rights: 'The concept of citizenship . . . refers to full membership in what I shall call the societal community' (Parsons, 1966: 709). For that reason, there is a necessary and inevitable process of including previously excluded groups into the societal community: 'The long-run trend, however, is successful inclusion' (Parsons, 1977b: 185).

Of course, in the United States racial segregation continued to be a major barrier to successful integration into citizenship. No doubt, the Marshall–Parsons perspective set the stage for understanding citizenship as inclusion, and it was

subsequently supported by a number of sociological analyses. They also argued in favour of citizenship as an instrument of inclusion by either integrating the working class into capitalist society (Lipset, 1960; Dahrendorf, 1959; Bendix, 1964), overcoming voters' apathy in democratic societies (Rokkan, 1960) or including ever more social groups into citizenship status through the social right of education (Dahrendorf, 1965).

Although citizenship was well established in the sociological canon by Marshall, Parsons and Dahrendorf in the 1950s and 1960s, sociological interest in citizenship waned in the 1970s. After this period of scholarly neglect, it enjoyed something of a revival as an important instrument of sociological analysis in the 1980s and beyond. However, this rediscovery of citizenship as a critical institution of modern societies was not going to be restricted to the old debates. Rather, it challenged taken-for-granted assumptions associated with 'citizenship as inclusion' and opened the door for broad debates on the status of both the sociological concept itself and its functioning in modern societies. For example, debates started by looking at the relevance of citizenship for coming to terms with the nature of capitalism, class society and class struggle (Giddens, 1982). Turner discussed the character of citizenship both as a modern status (Turner, 1986) and in the context of capitalism (Turner, 1988), while Mann (1987) pointed to the fact that citizenship was not only a revolutionary instrument but also, under certain conditions, a means of taming conflicts and thus a strategy of ruling classes. Against this background, Turner (1990) argued that the idea of struggles for citizenship had long been restricted to working-class struggles, thereby neglecting the critical role of 'new' social movements in struggles for rights. Further, he also made a strong plea to take into consideration the struggles for women's rights, the role of religion, civil society and the public sphere, and processes of globalisation that obviously challenged the national conception of modern citizenship.

The different strands of this broad debate show that the rediscovery of citizenship involved a sociological reorientation because these new directions did not treat citizenship merely as a mechanism for an expanding inclusion of more and more social groups into 'full citizenship'. Quite the contrary, new approaches pointed to the importance of a number of aspects that so far had been left out of consideration – among them and highly critical was the significance of boundaries and processes of inclusion and exclusion. Further, citizenship was put into a contextual relationship with important debates about the social, economic and political processes that historically had transformed pre-modern into modern society, that characterised its state of development with regard to citizens' rights, and that pointed to perspectives beyond the nation-state.

Tensions within the modern concept of citizenship

Starting with the Declaration of the 'Rights of Man and the Citizen' in the French Revolution that first codified the modern idea of citizenship, this core institution of modern societies established clear boundaries, thereby necessarily setting off processes of inclusion as well as exclusion:

As a bourgeois revolution, it created a general membership status based on equality before the law. As a democratic revolution, it revived the classical conception of active political citizenship but transformed it from a special into what was, in principle if not yet in practice, a general status. As a national revolution, it sharpened boundaries – and antagonisms – between the members of different nation-states. As a state-strengthening revolution, it 'immediatized' and codified state-membership. National citizenship as we know it bears the stamp of all these developments. (Brubaker, 1992: 49)

Brubaker's differentiation of the ways in which citizenship operates nicely shows that citizenship is not just a 'unitary' institution that develops and transforms with regard to changing political, economic and social conditions that are external to citizenship as such. Rather, it is obvious that the dynamics of inclusion and exclusion lie within modern citizenship itself. From an analytical point of view, citizenship is characterised by at least three critical tensions. First, there have always been various approaches to understanding citizenship as status or praxis. Second, modern citizenship has been viewed as a mechanism for establishing a formal equality among citizens while at the same time allowing for social inequality within the citizenry. Third, there is the unresolvable tension of citizenship as a universal category in contrast to its particularistic realisation (Mackert, 2006). We find these contradictory conceptualisations – be it one of them or in their mutual interaction – in all processes in which citizenship operates. We take a brief look at the constitutive basis of each of them.

Status versus praxis: Thinking about citizenship as being a general status and/or political praxis at once refers to the philosophical underpinning but artificial distinction of the individual being an economic or a political subject. On the one side, liberalism argued in favour of the bourgeois as the model of modern man as a 'possessive individual' (MacPherson, 1962). One of the most important catalogues of individual civil rights can thus be found in John Stuart Mill's ([1859] 2000) famous essay *On Liberty*. Against this conception of citizenship being a passive (economic) status, the tradition of republicanism made a strong plea for conceptualising the modern citizen as a political subject, the *citoyen*. Most prominently in Rousseau ([1762] 1997) it is not the passive status but the active citizen's political praxis in the *res publica* that is decisive for an adequate conception of the modern citizen.

Formal equality versus social inequality: Institutionalising a general status of citizenship by declaring all members of a society to be formally equal while accepting social inequalities between them is the critical moment in citizenship, especially for coming to terms with the tension in democratic capitalism. From its foundation, the formal commitment to equality in modern citizenship does not aim at 'absolute equality' (Marshall, 1950: 77). Rather, as Marshall argued, citizenship operates as a common status that is bestowed upon every person in order to counterbalance the market-driven inequality among citizens by political democracy.

Universalism versus particularism: In historical perspective, modern citizenship is the first model of membership that argued in favour of turning all members of society into citizens. Not a single member of society was supposed to remain excluded from the single and general status of the citizen. However, by simultaneously declaring the 'Rights of the Citizen' and the 'Rights of Man' the French Revolution institutionalised a clear difference between those who were accepted as citizens and those who did not count as Frenchmen. This differentiation resonates today in the tension between citizenship rights and human rights. Thus, the claim to 'full' inclusion was realised but in particularistic terms within the borders of the nation-state, thereby only referring to the members of a nation that was supposed exist as a homogeneous community.

Constituting the internal tensions of the modern concept of citizenship status versus praxis, formal equality versus social inequality and universalism versus particularism establishes certain boundaries. Conceiving of citizenship as a *passive status* proposes to define the citizen in terms of economic behaviour within a liberal economy while at once taking the market as the very model of society. On the grounds of guaranteed rights to possession, citizens in this liberal society exchange goods, thereby necessarily increasing both their personal wealth and that of the nation, as Adam Smith ([1776] 2008) argued. In contrast, conceiving citizenship as *praxis* in the republican tradition following Rousseau points to political activity and to political processes, in that the status of citizenship may be enriched or broadened, thus pointing to social change and struggles for citizenship rights. Both conceptions include those who behave in the way which they prescribe – be it as market individuals or as politically active citizens – while excluding those who do not.

In a similar way, thinking about citizenship as a formal legal status that institutionalises equality of all citizens before the law bestows a unitary legal identity upon them; while doubtlessly this legal status is an enormous historical achievement in establishing equality of all citizens before the law, it does not say much about the actual living conditions of citizens. However, the ability to make a living presupposes access to resources and goods in a capitalist society that is characterised by their extremely unequal distribution. Thus, the tension that emerges from extreme differences in class society points to social conflicts of redistribution and political strategies that help to avoid the dynamics of social disintegration.

Taking citizenship to be a universal status immediately evokes questions about this claim. This refers not only to the boundary that separates citizens from non-citizens but also to problems within societies, for example with regard to social, religious, linguistic and other minorities, the pluralisation of sex and the family, or processes of migration. In contrast to the assumption of societies being political communities that are supposed to be culturally homogeneous nations, we observe that the universal claim necessarily has to be implemented particularistically; thus, in many regards to both internal and external processes of pluralisation and heterogenisation, societies operate in an exclusionary way.

It seems obvious that the three tensions within citizenship trigger the specific dynamics of modern citizenship, thereby including and excluding people from citizenship rights. Unsurprisingly, the debates about citizenship that followed the rediscovery of the concept either implicitly or explicitly referred to one or more of its critical tensions, thereby more clearly perceiving citizenship as an instrument of inclusion *and* exclusion.

Inclusion and exclusion: the main strands in the analysis of citizenship in the 1990s

In the transition to the 1990s, a number of factors brought back to mind that there was 'no more dynamic figure in modern history than The Citizen' (Dahrendorf, 1974: 673). The collapse of the Soviet Union, the fall of the Berlin Wall and the revitalisation of civil society in the countries of the former Eastern bloc were important historical events that lay behind the re-emergence of citizenship as a field of research in sociology. More recently, economic and fiscal crises in the West as well as the beginnings of the dismantling of the welfare state stimulated interest in citizenship as a vital tool of research. Thus, the 1990s saw not simply the 'return of the citizen' (Kymlicka and Norman, 1994) but an ever growing and vivid debate on the character of modern citizenship (Turner, 1990). A brief examination of these debates shows how they fit to the analytical distinction of tensions within citizenship.

The liberalism/republicanism debate about how to adequately conceptualise the citizen initially returned to 'communitarianism' as a somewhat modified debate about status or praxis. Starting from Rawls' (1971) *A Theory of Justice*, liberals and communitarians struggled over citizens' rights and duties; they juxtaposed the liberal 'unbound self' and the communitarian privilege of the 'community' as reference points of modern society and concentrated essentially on the relation of social integration, legitimation, conceptions of 'the good life' and, not least, citizenship. As most representatives of both parties insisted on their own world-view, the debate did not produce many fruitful results (Taylor, 1992; Mouffe, 1992; Benhabib, 1993) until Michael Walzer (1992) developed a kind of synthesis, referring to a concept of civil society that allowed the conceptualisation of the citizen – a rights bearer – as an active participant in civil society, that is, in a community.

At the heart of debates about both neo-liberal and neo-conservative attacks on the welfare state and social citizenship alike lay the formal equality/social inequality divide. 'Redefinitions of the social' argued on the grounds of neo-liberal belief systems in favour of privatisation and marketisation of social services as being more efficient than public services (Crouch, 1998), transforming citizens into dependents of large bureaucracies. Conservative opponents of the welfare state advanced moral arguments in order to reject citizens' entitlements. Social citizenship, they argued, would be an obstacle to individual initiative; social entitlements would endanger personal freedom and impede personal responsibility for making a living (Saunders, 1993).

Not least, the universalism/particularism boundary was activated in an almost infinite plurality of debates and issues. Although these debates also referred to both the status/praxis and formal equality/social inequality divide, for the sake of argument we can remain with our analytical distinction. One of the liveliest issues concerned the gender-specific concept of citizenship that drew attention to the many facets of the marginalisation of women from citizenship (Pateman, 1989; Lister, 1995; Dietz, 1994; Walby, 1994; Vogel, 1991). Cultural pluralists developed alternative concepts, such as Iris M. Young's *differentiated citizenship*. Young (1990) problematised traditional bases of citizenship as being insufficient to grasp processes of cultural pluralisation in Western societies. She argued against the assumption of a unitary concept of citizenship, arguing in favour of women, lesbians, gays, and cultural and religious minorities whom she saw in need of group rights to be able to overcome exclusion. Ethnic and cultural heterogenisation as a consequence of global processes of migration stimulated further debates on the relationship between liberal law and different kinds of group rights, special representational rights, minority rights and so on. This conflict turned into a focal point about citizenship as a highly exclusive instrument, far from enabling all members of society in universal terms to behave as citizens, and therefore excluding quite a significant part of the population (Kymlicka, 1989; 1995; Habermas, 1992; 1994; Taylor, 1992).

This brief examination at some of the main strands of recent citizenship debates after its re-entry into the social science agenda shows that we can trace them back to the concept's internal tensions. However, this is just a kind of analytical assignment of these debates to one of the tensions within the concept of citizenship discussed above. In reality this is a more ambiguous process, as we see that the main debates refer to different aspects of inclusion and exclusion that concern not only one of the tensions but usually at least two of them, such as the fact that excluding migrants from full citizenship generally triggers exclusion from social rights in many countries.

Thus, far from arguing that the debates in the 1990s merely revived old concerns, thereby bringing nothing but 'new wine in old skins', they made obvious that citizenship itself was profoundly transformed by far-reaching processes and necessarily had to (re)adjust to a new environment, be it the neo-liberal transformation of its economic foundations, the dismantling of the welfare state, the emerging European Union as a supranational entity, or internal pluralisation and heterogenisation. All these transformations had a deep impact upon citizenship. Although implicitly 'boundaries' were always present in these debates, only recently have new developments in the sociological debate on 'boundaries' allowed us to see more clearly their relevance for understanding the way citizenship actually operates.

Boundaries

If citizenship is (also) about boundaries, we need to know in more detail what kind of boundaries are critical for understanding new patterns of inclusion and

exclusion (Somers, 2008). In order to do so, we can follow Lamont and Molnár and differentiate between spatial, symbolic and social boundaries in order to come to terms with the more general relevance of boundaries for citizenship rights. *Spatial boundaries* may be the most familiar kind of boundaries, referring to the sovereign territory of a national state: 'Borders provide most individuals with a concrete, local, and powerful experience of state, for this is the site where citizenship is strongly enforced (through passport checks, for instance)' (Lamont and Molnár, 2002: 183). This first kind of boundary refers to a world separated into nation-states, their frontiers demarcating visible and influential sites at which access to the territory can be allowed or denied. *Symbolic boundaries* can be conceived as 'conceptual distinctions made by social actors to categorize objects, people, practices, and even time and space' (ibid.: 168). Not only is the citizen/non-citizen divide critical with regard to symbolic boundaries, but this kind of boundary points to all processes of social pluralisation, and religious, ethnic and cultural heterogenisation, of modern societies. *Social boundaries*, finally, are 'objectified forms of social differences manifested in unequal access to and unequal distribution of resources (material and nonmaterial) and social opportunities' (ibid.). In a certain sense, the creation of social boundaries materialises the previously made symbolic classifications. Further, it refers to the distribution of resources and opportunities but also to people's rights. Given that citizenship is the most valuable good a political community has to give (Walzer, 1983), social boundaries refer to the exclusion of newcomers but no less to the generation of more or less equal opportunities among social classes and social groups.

To be sure, these kinds of boundaries are dynamic and may change their character in the face of altered economic, political and social conditions. This in turn means nothing less than that access to rights, belonging and identity, as well as life chances, are consequences of new and socially contested boundaries. Against the background of the analytical distinction of spatial, symbolic and social boundaries, we can now look at such newly emerging boundaries that pose challenges to citizenship.

Shifting boundaries of inclusion and exclusion in the twenty-first century

Against the background of the debates in the 1990s that followed the re-emergence of the notion of citizenship as a core institution in modern society, recent debates make very clear that today we are confronted with new and different boundaries that challenge modern citizenship. During the last decade or so, economic, political, social and cultural transformations have not only shifted spatial, symbolic and social boundaries but also promoted the reorganisation of established patterns of inclusion and exclusion with regard to citizenship.

We have referred already to the global neo-liberal transformation that rocked the different 'worlds of welfare capitalism' and established new criteria for access,

thereby setting new boundaries that separate the wealthy elite from the rest as well as those who are eligible for social provisions from those undeserving poor who are not. Further, the economic crisis that we have lived with since 2008 has allowed powerful elites in politics and the economy to establish a new sovereignty regime (Vogl, 2014; 2015) that has promoted austerity as a powerful 'TINA'-politics ('There Is No Alternative') (Blyth, 2013; Mirowski, 2013; Streeck, 2014). This regime can be seen as a powerful instrument of new global elites, being parasitic with regard to their avoidance of taxes and naturalising social differences and thereby constructing new boundaries within the citizenry.

The politics of austerity has further consequences insofar as it has dangerously affected the delicate plant of an emerging common identity of European citizens by economically positioning them against one another. Thus, it has also created new social frontiers both within Europe and within the nation-states at the southern fringe. The social consequences of the bank crisis (or private capital), followed by austerity politics, has not only led to poverty in Greece, Spain, Portugal and Cyprus but created lost generations in those countries with unacceptable unemployment rates among 15–24-year-olds: in Greece 50.4 per cent, Spain 43.9 per cent, Italy 36.9 per cent, Portugal 28.6 per cent and Cyprus 27.9 per cent, in May 2016.[1]

As today many young Europeans are moving northward looking for jobs, the then British Prime Minister David Cameron unleashed a populist debate about banning EU migrants from social assistance in the UK for up to five years that finally ended in Brexit.

This recent populist debate is especially revealing with regard to the tensions of the citizenship concept. Joining this debate, Cameron, in the face of the threat of Brexit, activated not only symbolic boundaries of belonging (British versus European) but also social boundaries of being eligible for social support (citizens as market participants versus undeserving migrants). This in turn also refers to the symbolic boundary between citizens and non-citizens; and it activates the boundary between the *bourgeois* and the *citoyen*. This again makes clear how dynamic a concept citizenship is and how parts of its meaning can be politically used and exploited in bringing people into conflict with one another.

With regard to the territorial borders within Europe, the Schengen Area (1985) created a new space in which member states agreed to dismantle their internal borders while at the same time enforcing external borders, thereby creating a new kind of sovereign territory. Today we see the consequences of this creation of a supranational space. What we observe in the case of the EU is a kind of *internal inclusion* and *external exclusion*. Necessarily, this process puts enormous pressure on those countries at the fringes of the Schengen Area, since these external frontiers become critical, as we have seen in recent years not only in Greece and Italy but in the Spanish exclaves of Melilla and Ceuta alike. The role of Frontex in the European Union as an agency to protect its external borders in the Mediterranean from irregular or 'illegal' migration is examined by **Sara Casella Colombeau** in her chapter in this volume.

Contrary to claims that national borders are becoming less and less important, the refugee crisis that began in 2015 has disabused us of that naïve notion. In the face of massive and uncontrolled migration, European nation-states have returned to strict controls over their borders, closing them through the use of extensive fences and the deployment of their military against people who try to apply for asylum. While we not only see a renationalisation and closing of national borders but also, in the face of large-scale migration, it becomes very obvious that open borders and the free movement of people within the European Union have always been a very exclusive endeavour, nevertheless **Ludger Pries and Natalia Bekassow** reflect about the possibilities of an emerging European asylum system. Europe obviously is an arrangement for European citizens only – and for some privileged non-citizens that becomes obvious, as in the Swiss case discussed in the chapter by **Gianni D'Amato and Noemi Carrel**.

With regard to the influx of migrants to Europe, on the one hand we see support for refugees who were allowed access but also at times violent resistance against them where citizens are not willing to share resources. On the other hand we see catastrophic developments not only in the countries that people fled from but also in the so-called 'borderlands' where they are stranded, remaining excluded at the frontiers of wealthier societies. However, excluding them is not only a means whereby national governments satisfy the demands of their own citizens, but quite often a decision that is driven by hostility towards migrants' civilisation, their religion and culture. In the face of these developments and the multiple forms of migration on a global scale, in his chapter **Juan M. Amaya-Castro** elaborates on the ways citizenship operates as a means of 'migration control' from a global perspective.

Further, one can also argue that the European development itself has shifted boundaries, not only by dismantling its internal national borders but also with regard to posing the questions of what we can expect to be a developing identity of EU citizens. In fact, this is an ongoing debate, as becomes obvious in the contributions by **Dieter Gosewinkel**, **Klaus Eder** and **Richard Münch**, who discuss critical aspects of this point from a historical perspective, the perspective of communication theory, and in terms of the seemingly paradoxical relationship between European integration and processes that erode social solidarity. It is unclear whether the only weakly developed institution of 'EU citizenship' will be of great help in order to develop something that points beyond the European market citizen. While Münch refers to a cosmopolitan membership idea within Europe, **Sandra Seubert**, in her chapter, points to the possibility of a transnational membership regime that, however, bears certain antinomies that also point to unresolved problems.

Symbolic boundaries also come into play whenever liberal right is opposed to religious practices such as wearing the veil, the circumcision of young boys or demands for prayer rooms in public buildings such as universities, or to the norms by which animals are slaughtered to satisfy kosher or halal norms. Without any doubt, the most pressing question in this respect is the debate about

the compatibility of Sharia with secular law, posing questions about a legal pluralism as **Christian Joppke** discusses in his chapter (see also Turner, 2011). Nevertheless, religion is just one case in point that refers to the symbolic boundary that differentiates between those who are in and those who are out. There are further important conflicts in democratic societies, such as the pluralisation of family forms or same-sex marriages and the reactions not only of Christian churches but of Jewish and Muslim organisations alike against the background of secular law. Further examples include women's struggles for equal status and equal pay, the identity discourse with regard to LGBTI, minority rights with regard to religious or national groups, special-representation rights – just to mention a few. All these differences promote identity politics that are based on people classifying others by drawing boundaries between 'us' and 'the others' and by separating people into groups (Epstein, 1992: 232). With regard to the plurality of boundaries that are in play with regard to citizenship, in his chapter **Jason Pridmore** offers an interesting view on the symbolic boundary between the citizen and the consumer, discussing this nexus from the perspective of citizenship studies, consumer culture and surveillance studies.

Social boundaries also play a crucial role when they demarcate the boundary between 'full citizens' on the one side, and denizens, refugees, asylum seekers, people being tolerated but having a highly insecure status, or even those living illegally within a country, on the other side. Who should have which rights and why? This seems to be the critical question that, in the face of uncontrolled migration, clearly shows that citizenship rights are still conceived as a scarce good. However, it has been pointed out quite a while ago (Soysal, 1994) that many, if not most, citizenship rights can no longer be seen to be the exclusive good of national citizens. Rather, given that basic rights – the human rights codified in national constitutions – have to be granted to all human beings, social rights being the same for citizens and non-citizens at least within Europe, and political rights with regard to European elections or local elections refering to EU citizens, there are no longer too many differences left.

With regard to the processes so far discussed, we see that citizenship faces profoundly altered conditions in that it operates also as an instrument of social closure (Mackert, 2012). It should be clear that new boundaries have emerged and become critical for the way citizenship operates. However, citizenship is a dynamic concept. Given its openness to political mobilisation and reinterpretation, it is obvious that spatial, symbolic and social boundaries are the very spaces where that mobilisation will unleash processes of inclusion and exclusion. Today, in the face of forced migration, it will also mean that citizenship will be used and will operate as an instrument that excludes people from 'the right to have rights' (Arendt [1948] 1976).

Note

1 See www.statista.com/statistics/266228/youth-unemployment-rate-in-eu-countries/.

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2   Citizenship as political membership

A fundamental strand of twentieth- and twenty-first-century European history

Dieter Gosewinkel

Introduction

Membership is a fact of everyday life. Every human being has a sense of belonging in many contexts: to a family, a club, a party, a religious community; or to a city, a nation or a state – ultimately to humanity.[1] These and many other affiliations are freely chosen and can be changed at will. But what happens if the desired membership is denied or an unwanted membership imposed? What does it mean if this denial or ascription of membership determines the life opportunities or very survival of those affected?

Let us consider two fictional, randomly chosen examples, which tell stories that could have happened at any time. The archives I consult as a historian provide the material.

First example: In March 1939, a Prague family, former citizens of the Czechoslovak Republic of Jewish origin but secular in attitude, fled the German Protectorate to France, seeking refuge in the Third Republic.[2] The authorities took their time processing their application for naturalisation. Although the family had the support of the mayor of the municipality where they had found a home and were well liked, the Vichy ministry of justice rejected the application in September 1940. For the political system had meanwhile changed. The new, authoritarian government, which collaborated with the German occupation regime, not only forbade the nationalisation of aliens of Jewish origin but also began to withdraw French nationality from naturalised Jewish families and to hand foreign Jews over to the German authorities. The Prague family, destitute, not entitled to social assistance, tried to escape this fate by fleeing via a port in the South of France. They were stopped at passport control as stateless persons, handed over to the National Socialist regime via a transit camp for Jewish aliens, and deported to a concentration camp in Eastern Europe.

Second example: In 1951, a young Spanish woman decided to flee the Franco dictatorship, under which as a woman and socialist she could not engage freely in political activities. Atheist by conviction and with close ties to the underground Spanish Communist Party, she managed through contacts at the Soviet mission in Madrid to obtain an entry permit for the Soviet Union. There she soon found a permanent job in an enterprise and married a Russian, but kept her Spanish nationality

and contact with her country of origin. When in the late 1970s political differences of opinion with the manager of her undertaking resulted in her exclusion from the works council, she decided to leave the Soviet Union and was granted an exit visa. She returned to her home country Spain, where a new republican system had been put in place after the death of Franco. She entered politics and was elected to parliament on the Socialist Party ticket, where she contributed to the legislation on the separation of church and state. After the demise of the Soviet Union she found her way back to Moscow as envoy of the Spanish government.

Thesis, questions, concepts

These two scenarios are concerned with the forms and effects of membership in situations where individuals rebel against ascribed membership or its limits and make their own choices – with success or tragic failure. The (ascribed) memberships at issue decide people's opportunities in life, at times even their chances of survival. This involves a special kind of membership, membership of a group, which beyond the private sphere has consequences in the political sphere, which thus defines *political members*:[3] it involves membership of a state, a nation-state. What is at stake is the protection and social existence that this membership provides and the risks that arise if this membership fails or a change is attempted.

Common to the two cases is that the political membership to be renounced or attained is membership of a state. The people involved in our two examples aspire to citizenship and demand the concomitant rights. They want both protection for their elementary physical and social existence and to exercise their political freedom and engage in participation as members of a political community. The protection of their existence and life opportunities depends ultimately on their status as citizens, on the elementary status of political membership.[4] Membership of a religious community, a race, a party, a city or a social class can very well be also a condition for attaining citizen status. But any such conditions never apply alone, only in combination with other criteria. What they have in common is that they contribute to constituting citizenship as the status of political membership.

This brings us to my key thesis: in the European history of the twentieth century the hallmark of political membership is 'citizenship'. This means that, among the many degrees of political membership, citizenship is historically the key legal and sociological category for establishing and distributing individual life opportunities. The outstanding importance of citizenship also distinguishes the twentieth century significantly from earlier periods of history with other forms of political membership.[5]

Two comments are needed on terminology. 'Citizenship' covers two aspects. First, the legally defined, formal membership of a (nation-)state. In German, for example, this 'external' aspect of citizenship is termed *Staatsangehörigkeit*, which we can translate literally as 'membership of the state' in the sense of the English 'nationality'. Second, there are the rights and duties that arise from this formal status, the 'inner' aspect of citizenship. Historically, nationality has developed as a necessary condition for gaining citizenship rights. Membership of a

(nation-)state and membership of a group of right holders would thus go together. But this link between the two aspects of citizenship is historically contingent, not systematically necessary. Fundamental rights to which only nationals were initially entitled can at a later stage be granted to non-nationals, i.e., inhabitants of a state's territory. The development of citizenship in the twentieth century bears witness to this change over time in membership relations.

The historically determinative role of the state in defining central political membership is hence understood as a product of the times and subject to change. The question is thus not only whether and why the state was able to become the focus of political membership in the twentieth century but also whether at the turn of the century this connection began to loosen.

Nevertheless, a point of departure can be identified for a strand that can be followed through the entire history of the idea of *citoyenneté*/citizenship from its beginnings in antiquity. With Paul Magnette, I consider citizenship to have two essential basic functions: (1) The function and capability of defining the exclusion of non-members – and thus implicitly of defining membership.[6] It is this binary structure and the elementary distribution effect based on it that explain the fierce, often violent battles (Marshall, 1950: 29, 68–74; Dahrendorf, 1994: 46–79, esp. 52) fought over the definition of citizenship. (2) Specifying the legal constitution and design of citizenship; citizenship has developed as and remains a predominantly legal institution.

In the five sections that follow, I shall show how and why citizenship developed in competition with other forms of membership to become the determining category of political membership in the twentieth century. In conclusion I discuss the validity of the thesis that citizenship is on the decline.

Citizenship: the development of a dominant category of political membership in the twentieth century

Religion

Does concentrating on membership criteria defined in terms of the state and the law not neglect the importance of religion? Recent studies on the history of religion and religious relations contradict the thesis of the progressive secularisation of Europe from the nineteenth into the twentieth century (Casanova, 1994; Remond, 2000: 271–289; Riesebrodt, 2001; Graf, 2004; Lehmann, 2004). In our example, too, exclusion of the refugee family from Prague from the political community of citizens was grounded in ostensible membership of a religion, the Jewish faith. Throughout the twentieth century, moreover, profession of a religion shaped the membership of cultures, reaching deeply into everyday practices. As far as determining political membership is concerned, however, a different development is in evidence. In the course of the twentieth century, religious membership had often determined membership of political parties and their programmatic orientation. But it is also apparent that this connection had increasingly weakened since the interwar years and still more so since the Second World War (Lijphart, 1981:

26–51, esp. 34).[7] On the whole, by the end of the twentieth century in Europe religion no longer had the force to shape and differentiate parties (Ladner, 2004: 294–295).

This is equally true for the determination of political membership in the institutions of the state. The liberalisation and constitutionalisation of political authority after 1918 and 1945, and again after 1989, had at least thoroughly loosened the ties between state and church, and to some extent reversed them into opposition.

As a result of this development, the political membership connection between religion and citizenship was increasingly delegitimised and to a large extent curbed. The liberal, constitutional legal orders of the twentieth century often explicitly forbade the selection and classification of citizens in terms of religion.[8] Although this by no means prevented administrative naturalisation practices in accordance with religious criteria (Gosewinkel, 2001: 238–240, 261, 269, 274, 284, 299, 318–319; Trevisiol, 2006: 79–82)[9] and preferential treatment for certain religious groups in appointments to positions of authority in the state, a negative or positive profession of religion, particularly under the European dictatorships of the twentieth century, could provide grounds for privileging or excluding people as citizens. This is illustrated by the example of the Spanish woman in her home country as opposed to in the Soviet Union. The case of the Prague refugee family, by contrast, shows how religion could be used only as a tool for ascribing ethnic-racial membership. In all the authoritarian systems of twentieth century Europe, anti-Semitism played a major role in excluding people from membership of the political community under the pretext of religious origin.

Overall, however, it can be said that even in the second half of the nineteenth century conflicting political loyalties, e.g. membership of universal Roman Catholic Church and of a nation-state, were capable of provoking serious political disputes about the primacy of membership.[10] The conflict was defused in the late twentieth century at the latest with the political turn of 1989. The democratic constitutions of Europe guarantee religious freedom as a civil right. However, in the conflict of loyalties, the duty of the citizen to comply with the constitution takes precedence over the principle of religious freedom.

Political parties

The importance of religion for party ties might have declined since the nineteenth century, but the political party on the whole, by contrast, developed into a key rallying point for political membership.[11] Parties elaborated political platforms and aggregated interests in consolidating organisations, which constituted often closed politico-ideological milieus. They shaped and realised ideas of political membership with lasting effect. But how did citizenship, membership of the state, relate to party membership? Here we see a change. Whereas in the nineteenth century parties often formed that rejected or opposed the existing state, a counter-trend emerged from the turn of the twentieth century: the nationalisation and statisation of the party system in the framework of the given nation-state. Leaving aside labour movements, which were often in fundamental opposition to their state,

political parties of other provenance began to orient themselves increasingly on their own (nation-)state. To shape the institutions of the state, to exercise influence in and through them, became the prime objective of the political party organisation (Luther and Müller-Rommel, 2002b: 1–16, esp. 14).[12] Moreover, the progressive extension of the franchise and the increasing opportunities for parties to play a part in political will-formation and the exercise of power enhanced closeness and loyalty to the state. This is reflected in the stronger recognition of parties as institutions under constitutional law,[13] and their constitutional commitment to loyalty to the constitutional order of the state (Pütz, 2004: 254).[14] Furthermore, parties focused increasingly on the interests of the voters (Ladner, 2004: 294–295), who wanted to see their parties in positions of power in the state. This statisation of party interests[15] also intensified their distinctive nation-state quality (Luther and Müller-Rommel, 2002a: 325–346, esp. 341). For, in all the democratic constitutional orders of Europe after 1945, the right to vote and stand for election (Wiessner, 1989: 235)[16] and the core political rights of citizenship were tied to membership of the state. This meant that both the voters and the candidates put forward by parties approached political will-formation on the basis of and in the interest of their membership of the (nation-)state.

With the growing dissolution of narrow, socio-moral party milieus[17] in Germany and other European party states after 1945, the cohesive force of parties decreased. The decline in religious ties (Lijphart, 1981: 26–51, esp. 34) and the shift towards large, ideologically and socially plural catch-all parties diminished the relevance of party membership in relation to the state and the citizen's ties of loyalty to the state.

Nation and state

In the course of the European nineteenth century, an awareness of belonging to a nation developed into a determining category of political membership. National movements made a major contribution to the creation of new states; existing states underwent a process of nationalisation, i.e., the transformation of state institutions in accordance with national objectives (Gosewinkel, 2001; Weil, 2002: 143–145; Gammerl, 2010: 30–72; Müller, 2004; Fahrmeir, 2007: 89–91). Policy on nationality, for example in the newly founded German Empire in the late nineteenth century, was gradually adapted to national patterns of thought and notions of membership in which Poles and immigrating Jews, in particular, had no place on principle (Trevisiol, 2006: 148–150; Gosewinkel, 2001: 263–265). In a Europe-wide process, the nation-state developed on the definitional basis of membership of the nation, a model which persisted until the end of the twentieth century. Although the nation remained an important definiens of political membership throughout the twentieth century, the state gained increasing weight in the composite concept of *nation-state*. Membership of a nation was now only one criterion among others in determining membership of the state, nationality. Nationality policy became more and more a tool of comprehensive population policy. In defining inclusion in the status of citizen, this population policy – often for a mixture of reasons – invoked

national and racial categories, as well as economic and political considerations. Membership of the nation, which was often based on the criterion of language, began to lose its priority as a political criterion of membership after the First World War. Nation was joined by a contingent sequence of changing criteria of ethnicity, 'Volkstum, and race' (Gammerl, 2010: 386–270; Gosewinkel, 2008: 92–108). In consequence, the close link that had pertained in the nineteenth century between membership of the nation and of the state[18] began to weaken. This process continued after 1945, and especially after 1989. With the slow opening of citizenship under the influence of growing migration flows in Western and Eastern Europe since the 1950s, the acquisition of citizenship has been determined not only by membership of a nation but increasingly by other criteria of personal suitability, political loyalty and willingness to integrate, as well as by considerations of economic utility.[19] If we consider Europe as a whole, this is not contradicted by the renaissance of national efforts at exclusion in reconstructing the Eastern European world of states after 1989 (Howard, 2009: 174, 178); attempts to achieve the homogenisation of citizenship have come up against the limits set by superordinate, international legal obligations and – so far – have proved unable to circumvent the concomitant prohibition of discrimination (Lange, 2001: 279–292; Howard, 2009: 175–179; Bauböck, Perchinig and Sievers, 2007).

Class

The notion of political membership that competed most strongly in the course of the twentieth century with citizenship was membership of a (social) class. It is a characteristic of the first half of the twentieth century that the concept of class advanced from its originally scientific, analytical meaning to become a political catchword around which parties formed and which shaped ideologies (Kocka, 1979; 1990). What is more, it gained political, institutional state-building force with the foundation of the Soviet Union. This state-building legitimation was accompanied by an antithetical political movement transcending the state, aspiring to the development of international class consciousness. The Socialist International defined the politically relevant membership as that of a (working) class drawing its strength from transcending the borders of the nation-state and the narrow, particular interests of the state. This position was often in marked contrast to membership in a nation-state system, which it was supposed to overcome by revolution.[20]

However, looking at the twentieth century as a whole, and particularly the second half, class has lost in importance as a political mobilising force for the determination of political membership. There are two main reasons. First, social class struggles in European states not under communist rule were not fundamentally directed against the state; for the state was not seen only as an agent of bourgeois class rule. The purpose was rather to induce the state to implement and guarantee more equality and social security. The aim was not to revolutionise the state but to turn it into a guarantor of equal and broad civil, political and social rights. The epoch-making theory of citizenship advanced by the English sociologist T.H. Marshall draws its analytical force also from its interpretation of

the relative pacification and stabilisation of modern class-divided societies as the result of successful struggles to implement citizenship rights. The state's success in guaranteeing citizenship rights lent it legitimacy. Political loyalty could thus be transferred from the class to the state. This process was posited in Marshall's theory, which also took positive, empirical stock of the development of the welfare state up to the mid-twentieth century. Not least for this reason it has faced fundamental criticism. The social harmony line taken by Marshall, mitigating rather than fanning class conflict, runs counter to a revolutionary theory of class struggle (Mann, 2000: 207–228).

The second reason for the loss in the political importance of class membership over citizenship lies in the stagnating or decreasing attractiveness of communist internationalism during the second half of the twentieth century. Although the statisation of European communism under state socialism systems did not cancel out awareness of belonging to a cross-state communist bloc, it did, with the persistence of 'real socialism', strengthen awareness of belonging to a particular state.[21] Regardless of propagandistic professions of faith in communist internationalism, the idea persisted of belonging to a politically and culturally separate state nurturing cultural reference to a historical notion of the nation. Awareness of belonging to a (nation-)state then also gave a decisive boost to aspirations for political independence and thus to reject the doctrine of communist internationalism under Soviet supremacy in the period preceding 1989.

Membership in the mass state: citizenship and its politicisation

Finally, the importance of citizenship as the badge of political membership in the twentieth century grew out of the politicisation of the institution of citizenship itself. This process of politicisation reflects the greater strength and radicalness – compared to the eighteenth and nineteenth centuries – of struggles for membership fought out in the European societies of the twentieth century. The politicisation of citizenship occurred on two mutually reinforcing levels: in struggles for membership within states and between states.

The internal politicisation of citizenship rights developed because these rights were increasingly won in societal struggles and not simply granted. The politicisation of citizenship that set in in the nineteenth century reached a new climax after the First World War with the democratisation of state rule. Struggles for membership were increasingly fought out not only in the arcane recesses of the state apparatus but in the public political arena, where swords were crossed on the criteria and extent of inclusion and exclusion. For example, the criteria for naturalisation (and thus for membership of the nation-state), for the franchise and for the new social rights became the subject of public debates and parliamentary decisions, which more and more citizens were able to influence by exercising their political rights. Citizenship rights were therefore no longer determined and granted 'top-down' but also won 'bottom-up'. (Turner, 2000: 229–263, 241–243; Marshall, 1950: 28–29).

The expansion of participation in the constitution of citizenship rights made the struggle for political membership more attractive and therefore more consequential than in the past. Social demands (and rights) gained a new, special status in the emerging welfare state. It is therefore not by chance that Marshall's influential theory of citizenship in the twentieth century regards the struggles for social rights as a key driving force in the development of citizenship (Marshall, 1950: 78–85). According to T.H. Marshall, citizenship in the twentieth century culminated in the development from civil rights to political rights and finally social rights. Social rights realised the principle of equality underlying citizenship particularly effectively; for social equality was understood as the logical conclusion of legal equality and no longer as independent of the latter. Among Marshall's lasting achievements is to have explained the attaining of social rights historically as the result of social struggles. The more even distribution of resources – and thus of life opportunities[22] – immanent in the realisation of social rights also implies an attack on property and power relations dominated by market power. The protracted and not infrequently violent combat conducted by social movements (ibid.: 12–31, 41–42) culminated, in the second half of the twentieth century, in a range of legal positions that covered broad domains of social welfare. They were to become the collectively achieved, individually actionable substratum and hallmark of the welfare state. In Marshall's words:

> Citizenship requires a bond of a different kind, a direct sense of community membership based on loyalty to a civilisation which is a common possession. It is a loyalty of free men endowed with rights and protected by a common law. (Marshall, 1950: 40–41)

The social rights now added to the political rights of citizens also strengthened loyalty to the given democratic welfare state. Overall, they strengthened the view of citizenship as the form of political membership that most lastingly determines the concrete political and social life opportunities of the individual.

However, this immanent tendency towards extension is not to be equated with universalisation; for citizen status was directed towards the *community* and bound by it, a status whose contours were characterised by exclusion. This is demonstrated by the criteria of access to citizenship applied by all European states in the course of the twentieth century: gender,[23] political loyalty, ethnicity, etc. Nevertheless, by the end of the twentieth century in comparison to its beginning, the legal safeguarding of citizen status had been extended and strengthened at all levels of the law in all European countries.[24] Apart from these internal changes provoked by social shifts and group struggles, citizenship changed in response to outside pressure exerted by conflicts between countries (Fahrmeir, 2007: 231). The conflicts fought out between European nation-states were unprecedentedly radical and violent (put in a nutshell by Mazower, 1998). They were especially ferocious because control of particularly densely populated areas was at stake. There are essentially two sorts of change in relations between citizenship and territory: first, changes in the citizenship of a resident population owing to forcible

military occupation and concomitant changes in the political affiliation of the territory; second, changes in citizenship due to the mass expulsion of the resident population from a territory.

Let us look more closely at the consequences of forcible occupation for citizenship, taking the example of the exiled Prague family. The immediate consequence of an occupation regime establishing itself for the long term was often a radical change in the criteria for inclusion and exclusion, for membership and non-membership. In the case of the Jewish family exiled from Czechoslovakia who had been naturalised in France shortly before the outbreak of the Second World War, the German occupation radically altered their legal status. In the part of France occupied by German troops, the racial legislation of the Nuremberg Laws applied as did the legal tools of Germanisation, which had been developed step by step after the destruction of Czechoslovakia and its incorporation into the German Reich (Gosewinkel, 2001: 401–420); segregation of French and foreigners classified as 'Jewish', their concentration in camps and subsequent deportation were the direct result.[25] In the unoccupied part of France, a collaborationist regime headed by French politicians introduced new laws on membership demonstrating concurrence with the key exclusion criteria of the German occupying power. One of the first measures undertaken by the collaborationist regime in July 1940, following the legal model of the National Socialist state, was to eliminate 'undesirable elements' from citizenship by expelling certain groups and rescinding naturalisation. These exclusion measures were – for a variety of reasons – directed on racial policy grounds primarily against Jews, and on political and ideological grounds against regime opponents, especially republicans (Weil, 2004: 140, 144, 307).

Despite many differences, the parallel measures taken by the National Socialist occupying power and the collaborationist regime in France reveal a key aspect of the National Socialist occupation of Europe; among the first measures taken was the introduction of new selection rules for membership. In the directly occupied areas, legal grades of membership ordered in a strict hierarchy under racial selection criteria were established. On the lowest level were people classified as 'Jews' or members of 'inferior races'. Reduced to a minimum, their membership status, poles away from full citizenship, did not even guarantee survival. At the apex of the hierarchy were the population groups in the occupied territories classified as 'superior', who to some extent and after elaborate approval procedures were rewarded by the granting of German citizenship and membership of the German national and racial community (Gosewinkel, 2001: 404–415). Countries that were not occupied because they were allied or collaborated with the National Socialists introduced membership rules that at least corresponded to the measures taken by the hegemonic power, or adopted these measures up to and including active cooperation in the race-based policy of eradication and extermination.[26] Both political measures, the selection of the population in the occupied areas and mass expulsion, intensified in a completely new manner the need for new rules on membership and citizenship. The compulsion to classify people, to decide clearly who belonged to which conflict party, became an existential necessity, indeed, a condition of survival. As in the case of the Jewish family from Prague, statelessness meant

existential defencelessness. Millions of stateless persons in the interwar years, 'displaced persons' from the territories and camps of European dictatorships, could not clearly be ascribed citizenship, membership of a state. As Hannah Arendt put it, they were 'de facto outlawed' (Arendt, 1955: 434). George Mosse, the German-Jewish historian, wrote this of his flight from Germany and his exile:

> I was aware that I was a Jewish refugee from Germany. My statelessness now defined my place – or rather my displacedness – in the world. An Italian Fascist once described the stateless as the 'bastards of humanity'. (Mosse, 2003: 123)

This was the age in which the deprivation of citizenship, exclusion from the community of citizens, was invented and used *en masse* as a tool in political conflicts about membership. The variously motivated deprivations of citizenship had one thing in common, their intention: the circle of those entitled to the protection of the state was to be narrowed, access to citizenship rights was to be redefined and the value of the citizenship of the country in question was to be politically and symbolically strengthened by the more radical exclusion of non-members.

The misery of mass statelessness and defencelessness of the interwar period and wartime persisted massively during the Cold War – in the need for protection and unambiguous membership.[27] While United Nations international agreements laid down the right of the individual to citizenship of a country,[28] the confrontation of political memberships between the ideological blocs in Europe and the need for protection by the state remained. The need for clear ascription to a state and guaranteed protection was intensified by the need to provide legal protection for ethnic groups wanting to migrate to their co-national country; protection for political dissidents whom oppression had obliged to seek refuge in another political system; and, finally protection for labour migrants who did not wish to give up their country of origin or settle permanently in the host country.

In addition to protection against 'hard' exclusion, citizenship offered the 'soft' inclusive advantage of extended participation in the democratic welfare states of the flourishing industrial societies in Western Europe. The spread of political rights, in particular civil equality for women,[29] as well as the extension of social rights to greater areas and groups,[30] enhanced the status of citizenship both materially and then symbolically.[31] For the broad majority in many European countries, it became the hallmark of material security and political freedom.

The future of citizenship: erosion of a concept of political membership?

In 1989, on the threshold of the twenty-first century after the 'short' twentieth century, citizenship as a principle of political membership celebrated a triumph. With the downfall of the Soviet power bloc, 'class' had forfeited its predominance as a competing structural principle of membership in the Eastern half of Europe. The constitutions of the new democracies centred on the right of the

individual to protection of a private sphere against state authority, to political participation in the community, and to social security and support.[32] The key categories of Marshall's development model had thus also been incorporated into the constitutional orders of the former dictatorships of Eastern and Southern Europe. The Spanish woman in our introductory case would thus no longer face the choice between a clerical and an atheistic dictatorship but – at least in principle – be able to rely on her freedom of religion being respected in all member countries of the Council of Europe. The idea and legal practice of citizenship thus attained their greatest geographical extent and constitutional protection after 1989.

There is nevertheless good cause to warn of the decline, the erosion of citizenship and its binding force as a principle of political membership. The decisive impulse has been given by transnationalisation, i.e. the transcending of national boundaries in establishing and granting rights. The transnationalisation of social rights brings a fundamental change, which encroaches on the central function of national citizenship as a tool of social closure (Mackert, 2004: 164–166, 186–188). Unlike at the beginning of the twentieth century, at its end social rights were increasingly granted by institutions beyond the nation-state or independently of national membership (Soysal, 1994).

These and other processes of transnationalisation pointing in the same direction have been theoretically underpinned and legitimated. In the name of human rights norms, universalistic theoretical approaches attack the function of closure, especially where justified by national arguments. They are guided by notions of overcoming national limitations in the image of an avant-garde of cosmopolitans, establishing global links in the metropolises of the world and developing membership of a 'global city' independent of place[33] rather than of a territorially and nationally limited state. Contrary to the self-appraisal of many of these current approaches, we can also see them as a return to obsolete principles of membership: to membership of a city and a class, i.e., to a transnational 'economically active class' of global functional elites (Fahrmeir, 2007: 231).

But how profoundly did these phenomena of transnationalisation and globalisation affect the main function of citizenship in the twentieth century, namely the establishment and definition of political membership at the beginning of twenty-first century?

Finally, I shall answer this question with historically grounded scepticism – by a two-stage argument. First, I will make a fundamental comment on the function of the state as guarantor of individual rights in the present structure of the European Union. Second, the problem of political membership in the European Union will be treated. Since 2015, mass immigration has confronted this union of European countries with a challenge unprecedented in the history of European integration. In this crisis the problem of political membership beyond the state has come to the fore.

First, on the level of concepts, I argue that the idea that an ongoing – and irreversible – process of transnationalisation is making citizenship obsolete as an institution of the nation-state is based on a conceptual simplification. This simplification consists in the blanket delegitimation of the *nation*-state as a whole.

However, the compound concept 'nation-state' comprising the two elements 'nation' and 'state' is now a contingent phenomenon. The loss in importance of the national sphere in the course of transnationalisation is thus also seen as fare-welling the state, which historically had been associated with the nation only in certain phases, namely in the process of nationalisation. What can be said is that *ethno-national* homogeneity as an excluding definiens of the nation in Europe has been lastingly delegitimated. A systematic, racist policy of exclusion and even extermination as in the case of the Prague refugee family would be severely sanctioned as a violation of the elementary political values and legal foundations of Europe. But since its emergence, ethnic nationalisation has never been a necessary but only a contingent phenomenon in European statehood in a particular phase of development. This means that the end of an ethnically defined nationality has not put an end to the state as the point of reference for political membership (for a broad discussion on this topic see Koopmans and Statham, 1999; Feldblum, 2007; Weil, 2011; Bös and Schmid, 2012). The state continues to mediate and codify individual rights, to guarantee the elementary opportunities to enjoy civil liberties and to engage in political participation. The granting of these rights will in the future remain fundamental to the establishment of political membership – as long as there is no world citizenship and no world government.

The second argument concerns the specificities of transnational membership in relation to national citizenship in times of deep political crisis. Unlike the citizenship of the twentieth century, citizenship of the European Union (European citizenship) has established political membership based not on a state but on a community of law that transcends states. This new legal construction of the twenty-first century guarantees the rights of individuals grounded in their membership of the European Union. Citizens of the Union – unlike nationals of third countries – enjoy the elementary right to free movement and the protection of the Union's Charter of Fundamental Rights across internal national borders within the EU. They elect a European representative body, the European Parliament, can participate in local elections in other member states and enjoy the diplomatic protection of these states throughout the world (Schönberger, 2005: 301–303).

To what extent does this constitute a breakthrough to a post-national or even post-state form of membership in the political community of Europe? Such an assertion provokes fundamental counter-arguments that draw on both the politico-legal construction of European Union citizenship as such and on political practice in the virulent, far-reaching crisis of European migration policy since 2015. For one thing, the external border of the European Union corresponds in conception and function to a traditional national border and in practice is becoming more and more like one. The more Europe as a continent and economic area becomes the destination of mass migration, the more the institutional structures of a territorial border control regime will come to resemble the control tools used by European states prior to the introduction of internal freedom of movement within Europe under the Schengen system. In critical times of a massive increase in immigration from non-EU countries, the distinction between EU citizens and non-EU citizens, between members and non-members of the European community of law

and protection, becomes an existential economic and political issue for the Union. Non-membership in the EU does not constitute an absolute reason to deny admission to the EU territory. Humanitarian reasons for granting asylum and protection afford legal entitlement to enter the European Union and possibly stay there permanently on human rights grounds. However, only citizens of the Union, due to their membership status, have the inalienable right to permanent access to and residence in the EU territory. To give legal shape and practical substance to this privilege intended by the legal order of the EU, the external border of the EU can, with the growth of uncontrolled and potentially illegal immigration, be expected to become a zone of control and selection like the national borders within the Union before it. European institution plans to expand the European border control agency Frontex while limiting the sovereign rights of member states point in this direction (Kirchner, 2015).

The close affinity to traditional European statehood is evident, however, not only in the analogy between European and national border regimes. The European crisis in migration policy has shown that the citizenship of member states is not only the model but also the legal basis for citizenship of the EU. Under European constitutional law, a person is a European citizen only if he or she is a citizen of an EU member state; as the Treaty of Amsterdam puts it: 'Citizenship of the Union is hereby established. Every person holding the nationality of a member state shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship' (Art. 8(1) Treaty of Amsterdam, 2 October 1997). This establishes constitutionally that the national citizenships of member states continue to exist alongside Union citizenship and that they are not only the sufficient but also the necessary condition for European citizenship. There are no citizens of the European Union who are not also citizens of a member state. Significantly, the European Union has never been given the competence under Community law to regulate citizenship in member states. The latter have preserved their freedom to determine the law pertaining to citizenship as a core area of their national sovereignty and tradition.

It is this claim to national sovereignty underlying the concept of European citizenship – never put to the test in over a quarter of a century of peaceful expansion and consolidation of European integration since 1989 – that is now profoundly challenged by the migration crisis. This explains the vehement reservations about and opposition to the efforts of European institutions towards coordination and burden-sharing between member states, including the refusal by some member states to accept refugees, to implement agreed distribution quotas or to cede sovereign rights to the European border control agency Frontex. Furthermore, old border installations have been reactivated and new ones constructed – between member states of the European Union. The self-evident exercise of the right to the sovereign control of one's own national borders against unwanted immigration, and even to defend it by force, points to a fundamental deficiency in the construction of European membership: as long as the distinction between members and non-members, those entitled and those not entitled to access, is not effectively drawn at the external borders of the EU, member states will take this power

into their own hands once again. Union citizenship is the sole personal status that overcomes per se all these border precautions and closure mechanisms. This distinguishes it from every other legal status of third-country nationals. Union citizenship as a membership status not only derives from citizenship of member states but, in this crisis, is also most effectively enforced by these member states. This points less to any renationalisation of the membership status of Union citizenship than to its institutional affinity to the model of national citizenship, and its both practical and political dependence on enforcement by member states.

Nevertheless, this legal and institutional dependence of Union citizenship on the national citizenship of member states is not inevitable. There is neither legal-historical path-dependence that imposes national citizenship as the necessary condition for EU citizenship nor any politically imperative reason for this to be so. There is nothing to stop member states from making European citizenship an independent status that no longer derives from national citizenship and which is granted by institutions of the European Union. There are already signs that EU citizen status is gaining in autonomy and strength from within the legal structure of the Union. The rulings of the European Court of Justice, in particular, tend towards developing EU citizenship into a genuine European citizenship status (Gosewinkel, 2016: 618–620). The development of a specifically European border control regime also points in this direction. But even if institutional change establishes a genuine European citizenship status transcending nation-states, a fundamental functional analogy will remain. Like national citizenship, Union citizenship is and would remain a membership status that includes and excludes certain groups of people.

To conclude, membership must always be grounded in the distinction between membership and non-membership. The one is not to be had without the other. Citizenship – bringing us back to our point of departure – makes this distinction. And in the countries of today's Europe it does so by the means of democracy. If we thus do not renounce exclusion, the establishment of non-membership – and how could we? – citizenship remains indispensable for determining political membership.

Notes

1 This article takes up ideas from Gosewinkel, 2013: 15–31.

2 This example takes up – and alters – elements of the biography of the historian Saul Friedländer, who relates it in his autobiographical report, see Friedländer, 1978.

3 On citizenship as an institution, defining membership and (social) closure, which necessarily provokes struggles for membership, see Mackert, 1999; on citizenship as the legally constructed form of membership in the national community see Graser, 2008.

4 On the function of citizenship rights in establishing the fundamental legal status of the individual as a whole and thus for political membership see Janoski and Gran, 2002: 13–52; Leggewie, 2004: 316–333, esp. 325–327.

5 On the crucial importance of citizenship as status of political membership from a critical, 'radical-democratic' and deconstructivist perspective see Trautmann, Gamm and Luserke-Jaqui, 2010: 17–20, 65–90.

6 On the dialectics of exclusion and inclusion, which replace the characterisation of citizenship as the prime institute of exclusion (according to the literature on 'new citizenship'/'*nouvelle citoyenneté*'), see Schnapper, 1998: 448, 413–414 on '*nouvelle citoyenneté*'.

7 Deviating from this development is the emergence of conservative nationalist parties with a religious orientation and parties of religious-ethnic minorities in the new party systems of Eastern Europe after 1989, which are to some extent on the periphery of the democratic spectrum. By contrast, Christian democratic parties (Catholic, Protestant or Orthodox) developed only slowly and unevenly in the democratic centre; see Bugajski, 2002.

8 In the classical wording of Article 136 (2) of the constitution of the Weimar Republic dating from 11 August 1919: 'Neither the enjoyment of civil and political rights, nor eligibility for public office, nor rights acquired in the public service shall be dependent upon religious affiliation'; Article 106 (2) of the Czechoslovak Constitution of 29 August 1920; Articles 111 to 113 of the Polish constitution of 17 March 1921 (however, primacy of Roman-Catholicism: Article 114) in Gosewinkel and Masing, 2006: 399, 825, 1843); in contrast the Charter of the Spaniards of 17 July 1945, Article 6 (1), a constitutional text of the Franco dictatorship: 'The profession and exercise of the Catholic religion, which is that of the Spanish State, shall enjoy official protection' (ibid: 631).

9 Weil, 2004: 167–202 with reference to Jews; on the British Empire: Gammerl, 2010: 270–274; Endelmann, 2002: 184–186.

10 Osterhammel, 2008: 1254; on the formation of religious parties as a consequence of Kulturkämpfe, see Winkler, 2009: 829; on Germany Wehler, 2006: 892–894.

11 See Fisch, 2002: 286–292; Duverger, 1951: 1–16; for Germany: Kaack, 1971: 21–23.

12 On the direct influence of state regulation on the party system, see Müller, 2002: 250–292, esp. 262–266.

13 As in the case of parties in the German Basic Law according to rulings by the Federal Constitutional Court, see Kunig, 2005: 297–356, esp. 352; e.g., on France: Burkhardt and Niedhart, 1981: 173–178, esp. 177. Art. 4 of the 1958 French constitution: von Albertini, 1961: 529–531; for the UK: Wende, 1981: 235–238, esp. 238; on Germany: Kaack, 1971: 365–366, esp. 400; Dähn, 1981: 67–72, esp. 70.

14 See in the Basic Law Kunig, 2005: 316–328; cf. *Political Parties in Central and Eastern Europe In Search of Consolidation,* EEC report on the development of the Central and Eastern European party system after 1989: rules on banning parties (25) and on state financing of parties (26–27); on France: the new, system-stabilising force for French parties under the Fifth Republic compared with the Third and Fourth Republics, see Kempf, 2007: 173–174.

15 Embodied in the continuous transformation into a 'cartel party', see Ladner, 2004: 243–244; von Beyme, 1982: 256, 263, 386, on the 'statisation' of the party system.

16 On France: Constitution of 3 September 1791, 2nd Section, Art. 2; Constitution of 27 October 1946, 1st Title, Art. 4; Constitution of the Czechoslovak Republic of 29 February 1920, §14 (quoted from Gosewinkel and Masing, 2006: 170, 361, 1829).

17 For Germany: Lepsius, 1993: 25–50, esp. 33, 36, 47; Luther and Müller-Rommel, 2002b: 12–13.

18 This has been put in basic terms by Gellner, 1983: 1: 'Nationalism is a theory of political legitimacy, which requires that ethnic boundaries should not cut across political ones'; for an analytical differentiation of state and nation in the literature of the early twentieth century see Joseph, 1929: 321; against the argument of the particular instability of multi-national states (ibid.: 325); for the distinction between citizenship and nationality: Jewish citizens of France and UK feel a 'national affinity' notwithstanding their different citizenship (ibid.: 331).

19 For a comparison of this development in five Western European countries between 1980 and 2002 see Koopmans *et al.*, 2005: 35–41.

20 Benner, 1992; Miller, 1995: 4; in summary on orthodoxy see Mommsen, 1985: 85–98, esp. 87–89.

21 Amplified by the formation of an 'authoritarian socialist' citizenship (Mann, 2000: 209, 222–224.), which guarantees no civil and hardly any political rights but grants social rights and thus social security.

22 See Dahrendorf, 1979: 46–48: 'Life opportunities are . . . the totality of possibilities or opportunities that the individual is offered by his society, and in a specific social position', going back to Weber, 2001: 253, 256.

23 Lister, 2002: 191–208. On criticism of the lacking gender dimension of citizenship in T.H. Marshall see Vogel, 1991: 58–85.

24 See the influence of international law and human rights arrangements on the delegitimation of ascriptive, absolute exclusion criteria (gender, race, origins): UN Charter (26 June 1945): Chapter I, Article 1 (3); European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950): Article 14; and Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the prohibition of discrimination (4 November 2000): Article 1 General Prohibition of Discrimination. On the time threshold of 1945 in reaction to the crimes of fascist regimes see Joppke, 2010: 149.

25 For Lorraine, Alsace, see Heinemann, 2003: 306, 319; for the rest of occupied France and the Vichy government see Meyer, 2000; 35–47.

26 See Förster (1983): on, e.g., Romania and Bulgaria and the anti-Semitic measures coordinated with Germany (ibid.: 328, 333); on preferential treatment for ethnic German groups in the context of the 1940 territorial reorganisation of Hungary (ibid.: 352): for an outline of 'ethnic reorganisation' in the German sphere of influence, which consisted first in resettlement measures, which forced so-called 'undesirable population groups' to emigrate and promoted the settlement of '*Volksdeutsche*' ethnic Germans; and second in the systematic genocide of Jews, Roma and Sinti; see Umbreit, 1999: 1–274, esp. 232–242, 243–258.

27 Therborn (1995: 47) writes of the unprecedented level of 'ethnic homogenisation' achieved in about 1950 in European countries before a new wave of (labour) migration and heterogenisation set in (ibid.: 48–50).

28 Two agreements: UN Charter, ban on double nationality. See Hailbronner, 1998: 95–99; Ziemske, 1995: 132–140.

29 On the implied final separation of membership of families from membership of the state see Heuer, 2005: 202.

30 On the development of the welfare state in Europe see, among others: Alber, 1989: 58–67, 133–153; Kaelble (2007: 340–342), who speaks of the 'heyday of the welfare state in Western Europe', and suggests a convergence of the European welfare systems from the 1960s on (ibid.: 352); Therborn, 1995: 89–99.

31 For a European overview see Therborn, 1995: 85–99: 'Rights to claim: Membership and Welfare', 'Rights to act' (ibid.: 100–133), including property and labour rights.

32 See, for example, the Constitution of the Republic of Poland of 2 April 1997, which, in keeping with Marshall's development model, guarantees in separate sections civil, political and 'economic, social and cultural rights', inter alia Article 67: 'A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute.', www.sejm.gov.pl/prawo/konst/angielski/kon1.htm; see also the constitution of Czechoslovakia in the 'Charter of Basic Rights and Freedoms' 1992, Art. 28–33.

33 Sassen, 2002: 277–292, esp. 287–288; Sassen, 2001; for an opposing view see Schnapper, 1998: 413–414, 448), and Miller, 1995: 5.

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3 Secular law and Sharia
Accommodation and friction

Christian Joppke

Introduction

There has been much debate in Europe about the 'retreat of multiculturalism', particularly in the context of problems surrounding Islam and Muslim integration (Joppke, 2004). There is little understanding of how liberal law, short of any explicit policy commitment to multiculturalism, has conditioned multicultural outcomes that are resistant to the ebb and flow of the policy of the day (which today is distinctly not in multicultural colours). But the positive role of liberal law is slowly being recognised.

In a recent review of Islam in liberal Europe, Hafez likens liberal society to Dr Jekyll and Mr Hyde, formally inclusive in its liberal law and institutions, yet factually exclusive in popular sentiments and views that are often hostile to Muslims and Islam, not only for 'liberal' reasons. Hafez thus identifies a 'growing chasm between the Islamophobic attitude of much of the European population and the gradually increasing integration and participation of Muslims in European political and legal systems' (Hafez, 2014: 149). While the difficulties surrounding Islam and Muslim integration tend to get more press than the successes, Muslims themselves have recognised the positive role of liberal law. Take, for instance, Europe's most prominent Muslim, Tariq Ramadan, who is not known for liberal views and otherwise a master of ambiguity:

> The fact that after more than 40 years of presence in Europe the Muslims are generally allowed to practise their Religion in peace, to build mosques . . . and to found Islamic organisations is clear evidence that the various European constitutions and laws respect Islam as a Religion and Muslims as Believers who have the right, as others, to enjoy freedom of worship. This is an indisputable fact and the increasing number of mosques and Islamic centers or institutions supports this assertion. (Ramadan, 2002: 121)

Socio-economic and other integration failures, as well as 'racism', Ramadan continues, are not to be 'confused' with failing religious integration, for which there is no evidence. On the contrary, Muslims in Europe 'live in an atmosphere of security and peace regarding religious matters'. While Europe's 'legislation, laws

or rules' are all fine, the main problem is 'spiritual life in a modern society'. But this falls squarely within Muslims' own 'responsibility' (ibid.: 138).

Ramadan's celebration of liberal law is all the more remarkable as it is by someone who favours a conservative Islam, one that has 'not undergone the process of historization and contextualization of God's revelation' (Grimm, 2009: 2370), and thus an Islam that is a strongly multicultural element in a secularised society. A similar pairing of conservative Islam with an astonishing appreciation of liberal law can be found in the Islamic Milli Görüs organisation in Germany. An authoritative account describes Milli Görüs as 'committed both to a dogmatic (*rechtgeleitet*) Islam and to the Constitution of the Federal Republic' (Schiffauer, 2010: 326). In his meticulous ethnography of Milli Görüs, Werner Schiffauer identified the rise of a court-going, 'Postislamist' second-generation leadership for whom an 'initially abstract commitment to the Constitution' has grown over time into an 'inner habitus, a second nature' (ibid.: 325–326). He quotes a legal activist as 'impressed' by the 'freedoms and possibilities provided by the German Constitution' (ibid.: 273). Ground for the activist's optimism is a series of pro-Muslim decisions by German courts on ritual slaughtering, the headscarf and the exemption of Muslim girls from co-educational sport and swimming lessons, in many of which cases the legal service of Milli Görüs was critically involved.

Alas, after the terrorist attacks of September 2001, a more substantive and 'ethical' reading pushed aside a procedural and 'liberal' reading of the Basic Law within Germany's political elite, symbolised by the *Leitkultur* (dominant culture) that Muslims were now expected to embrace. For the then CDU Interior Minister, Wolfgang Schäuble, whoever wants to call Germany 'home' must 'respect' its 'Christian roots and traditions'.[1] This obviously goes beyond the procedural liberalism required by the constitution, and Germany's religious Muslim leaders, within the 2008 *Islam Konferenz* (a dialogue platform established by the federal government), coolly rejected identification with the 'German value community' (*deutsche Wertegemeinschaft*) (see Amir-Moazami, 2009). Rather, Germany's religious Muslims, as represented in the *Islam Konferenz*, favoured a political liberalism that is procedural and neutral, and that in its cultural minimalism is compatible with a conservative Islam. Schiffauer (2010: 326) similarly describes the young 'Postislamists' of Milli Görüs as 'reflected (conservative) Muslims', for whom 'the issue is not to reform Islam, to make it compatible with liberty, but to show as "religious person" that Islam is at heart liberal (*freiheitlich*)'. Whatever one thinks of it, the bottom line is the embracing of liberal law from a conservative religious position. Similarly, the Islamic Charta, passed by the Central Council of Muslims in Germany (an umbrella organisation of non-Turkish Muslims), combines a traditional understanding of Islam as simultaneously 'faith, ethic, social order and way of life' with an 'affirmation' of the German constitutional and 'local legal order'.[2]

In the following, I will map two ways in which liberal law has empowered Muslims, with a special focus on Germany. This is a particularly interesting case, as Germany can be called 'multicultural' at a legal but not at a political level. First and foremost, there is constitutional law, with its principle of religious freedom,

which in a secular state protects all believers irrespective of their majority or minority status. A second inroad for legal multiculturalism is the legal pluralism that results from private international law and civil law. The two factors combined explain why even states such as Germany, which never were multicultural in their self-perception, still look distinctly multicultural in their legal processing of Muslims and Islam. However, in a third and final step, I will also look at the shadow side of liberal law, in which it functions more as constraint on than resource for certain illiberal practices, which looms large in the post-2001 period.

Constitutional law and religious freedom

Article 4 of the German Basic Law guarantees the 'inviolability' of the 'freedom of belief', as well as the 'undisturbed practice of religion'. It applies to the private and public exercise of religion, by individuals and by groups. It is a right of all persons residing in Germany, irrespective of their citizenship status. And it is granted universally, without a 'Christian cultural reservation' (Rohe, 2010: 173). It even protects the freedom *not* to believe. Its universal scope, including negative religious freedom, is based on the logic of secularism, according to which the 'common good' is not religious but the 'security and welfare of [the state's] inhabitants', with religious truth being privatised (Grimm, 2009: 2372). Finally, the right to religious freedom under the German Basic Law is granted without a statutory provisory. This means that it can be limited only at the level of the constitution itself, by other constitutional rights or principles, not by ordinary law.

Basic Law Article 4, parallels to which can be found in all Western state constitutions, but also in the European Convention on Human Rights (ECHR),[3] explains why mosque building permits are privileged under German construction law (outweighing neighbours' interest in nocturnal tranquillity); why the Muezzin call for prayer is in principle allowed (though rarely practised, for prudential reasons); why halal meat can be produced against the odds of tough animal protection laws; why social security has to reimburse the costs of religious circumcision or of the ritual washing of deceased Muslims; why, until recently, Muslim girls were easily exempted from co-educational sports lessons; and why the Islamic headscarf is generally allowed in the private and public sectors, lately even for public school teachers (for most of these items, except the last, see the overviews by Obbecke, 2000, and Rohe, 2004; 2010). Acknowledging the extensive religious freedoms that Muslims enjoy in Germany, a prominent Muslim functionary even deemed Germany to be 'more Muslim than Saudi-Arabia' (Rohe, 2004: 334).

Let us look more closely at some high court decisions that paved the way. In 2002, the Federal Constitutional Court ruled that for the sake of religious freedom, but above all the professional liberty of Islamic butchers, the production of halal meat had to be allowed, despite an animal protection law that prescribes electric stunning before killing (to lessen the pain).[4] While a swift inclusion of animal protection into the Basic Law partially reversed its gains, the halal decision established two important principles. First, Muslims, despite their non-church, decentralised type of organisation, constituted a 'religious association' (*Religionsgemeinschaft*)

under German law. Accordingly, the requested exemption from the Animal Protection Law, which had long been granted to the Jewish *Religionsgemeinschaft*, could not be denied to Muslims. Previously, the non-centralised structure of Islam had been a pretext for denying to Muslims many a privilege that hinged on the status of 'religious association', which had been analogised too closely to the structure of the Christian church; henceforth, this was no longer possible. Second, the determination of what religion prescribes could not be objectively determined but was in the eye of the religious beholder. Previously, the state had arrogated to itself the definition of the content of religion, which plainly violated the neutrality obligation of the secular state; now it was up to the believers to decide what their religion *is* and what it tells them to do or not to do.

However, as in other European countries, the biggest drama has been about the Islamic headscarf, the restrictions on which are often taken as exception to a general rule of growing inclusiveness (e.g. Joppke, 2015: 173–176; Schlanger, 2014: 217). Indeed, at European level, every single headscarf decision by the European Court of Human Rights left the restriction by the respective convention state in place, mostly arguing that a remote court was ill suited to decree on such sensitive religio-cultural matter (Joppke, 2013: 101–109). But at state level the situation is often much less grim. In Germany, as in all European countries (except France and Turkey), the pupil's headscarf has always been tolerated, in line with the German regime of 'open neutrality' that does not expel religion from but equally includes it in in public space. The issue in Germany was rather whether the headscarf was to be allowed in private and public employment, above all for public school teachers. With respect to the private sector, the Federal Labour Court, in a decision of October 2002, later confirmed by the Federal Constitutional Court,[5] found the firing of a headscarf-wearing employee in the perfume section of a department store 'socially unjustified'.[6] The court dismissed the store owner's insistence on her professional freedom, guaranteed by Article 12 of the Basic Law, which she saw as being impaired by the headscarf, in view of the 'rural-conservative clientele' of her store that in her view might be put off by it.[7] The headscarf-wearing employee, argued the court, could well be moved to another part of the store, away from the image-sensitive perfume section, and anyway no 'concrete disturbances or economic losses' had been demonstrated by the owner. '[Such] real threats' to her operation had to be 'concretely' proved, considering the 'high importance of the basic right of religious freedom',[8] which moreover left it to the subjective discretion of the believer 'which religious symbols she recognizes or uses'.[9]

The court-ordered headscarf permissiveness of Germany's private sector is less known than its public-sector reticence, especially with respect to the teacher's headscarf. The seminal Ludin decision of the Federal Constitutional Court in 2003 was double-headed. It held that a deep restriction of a religious freedom required a statutory basis, which in this particular case did not exist. Yet it also threw the switches for the swift passing of restrictive laws in *Land* after *Land* in its immediate wake (see Joppke, 2009: 65–78). However, in a second headscarf decision in January 2015, the court surprisingly reversed its position, now plainly

declaring that 'teachers are allowed to wear a headscarf'.[10] Concretely, the court held that the *Land*-level prohibitions of religious expression (as, in this case, in North Rhine-Westphalia), which had been justified by reference to their 'abstract' threat to the school peace, were 'disproportionate', considering their 'considerable compromising of the constitutional right of religious freedom on the part of teachers'.[11] Instead, a 'concrete threat' had to be demonstrated, to be evaluated case by case. A 'general prohibition' was only possible if a 'considerable number of cases' had been reached, but such prohibition still had to be limited to specific schools or school districts.

Not the least important aspect of the German Constitutional Court's 2015 headscarf decision was to also declare unconstitutional the state-level exemptions for Catholic nun teachers. Never convincing many, the nun's veil (but also the Jewish kippah) had previously been declared not 'confessional' but 'representative' of 'Christian and occidental values', which the state was entitled, even mandated, to instil in young minds. In its second headscarf decision, the constitutional court refuted the arcane distinction between 'confession' and 'representation' proffered for the Christian and Jewish exemptions, and it found the respective clause in North Rhine-Westphalia's education law a 'discriminatory disadvantaging (*gleichheitswidrige Benachteiligung*) on the basis of faith and religious beliefs'.[12]

Already the Ludin court had held a differentiated view of the Islamic veil, which could not be reduced to the oppression of women (see Joppke, 2009: 68–69). The 2015 decision, which was even more unambiguously pro-headscarf, naturally continued this line. In contrast to the crucifix in the classroom, the wearing of a headscarf on the part of 'some pedagogues' could not entail an 'identification of the state with a specific faith'.[13] On the contrary, in light of Germany's tradition of open neutrality, the public school had to 'mirror . . . the religiously pluralistic society', and to be open for 'Christian, Islamic, and other religious and spiritual (*weltanschauliche*) contents and values'.[14] The headscarf itself was not 'proselytizing or missionary', and a 'blanket conclusion' that it 'violates human dignity and the equality of man and woman' was 'out of the question (*verbietet sich*)'.[15] As a result, the teacher's headscarf has moved from illegal to legal, which constitutes a milestone of legal multiculturalism in Germany and Europe.[16]

Legal pluralism

To be distinguished from the religious rights provided by constitutional law or international conventions is the limited recognition by a legal order of the facts created by other legal orders, which I shall refer to as 'legal pluralism'. A classic paper argued that 'virtually every society is legally plural' (Merry, 1988: 871), in that, next to a 'system of courts and judges supported by the state', one was also likely to find in it 'nonlegal forms of normative ordering' (ibid.: 870). Such limited legal pluralism is not to be mistaken for the existence of full-blown 'parallel legal systems' (Malik, 2012: 6). Not even the most extreme case of Islam-induced legal pluralism in the West, the so-called 'Sharia councils' that

have operated with tacit government approval in Britain for several decades now, could be described in such terms. 'Minority Legal Orders in the UK, mainly accept the supremacy of the state system', argues the authoritative paper on the subject (ibid.). Similarly, a chronicler of Islamic legal pluralism in Germany states that the 'legal system' itself is 'not "multi-cultural"' (Rohe, 2010: 149). This is because in the first instance there is always 'the rule of a uniform law' (ibid.: 191), which has to decide how far (or not!) to relax its reach for the sake of other, foreign sources of law.

One may distinguish in this respect between private international law and civil law as two sources of Islam-linked legal pluralism. To begin with private international law, it deals with 'conflict of laws' that, in the majority of cases, result from foreign nationals' having got married or divorced in their home country, but whose effects need to be recognised in their place of residence, to safeguard vested private relationships and following the diplomatic principle of 'comity of nations'. This recognition is controlled by considerations of *ordre public*, because different societies have different views of what constitutes proper family life, such as the minimum age for marrying, how many wives a man can have or what (if anything) can dissolve a marital union. Making its first appearance in the French Civil Code, *ordre public* is a 'function of time and place' (Husserl, 1938: 42), a 'weapon for the defence of the Nation's weal' (ibid.: 46). In the present era, *ordre public* equates with human rights constraints. As Paul Lagarde writes about France, '[the] cultural differences that are rejected in the name of public order are those which are contrary to human rights as defined in the major international documents' (Lagarde, 2010: 545–546).

Different states use different connecting factors to decide which law, the domestic or the foreign, to apply in a specific case. The choice is always between nationality and domicile (see again Husserl, 1938). Continental states, such as Germany, prefer nationality, while Britain, Canada or the United States prefer domicile. This has led to the curious result that the application of Islamic family law 'has become everyday business in German courts' (Rohe, 2010: 151). This is because under previously restrictive nationality laws even long-settled immigrants still tend to be foreign nationals. The application of nationality-focused private international law in Germany is a further instance of multiculturalism manqué, in which mother-tongue teaching and other seemingly multicultural measures really mean an unwillingness to integrate and to keep 'guestworkers'' return options open. The propensity of German courts to adjudicate on the basis of immigrants' domestic laws or customs stirred a national scandal when a judge in the local court (*Amtsgericht*) of Frankfurt, in 2007, refused to sanction the divorce of a Moroccan-origin (but naturalised German) wife who had been physically abused by her Moroccan husband. The judge (remarkably, a woman) did so by quoting a Koran verse that attributes to husbands the right to beat their wives (*Züchtigungsrecht*). While this decision was instantly shelved, there was a public outcry about an 'Islamization of German law' (see Rohe, 2007). This is exaggerated because, in principle, the public order exception provides 'a powerful firewall against the conflict of laws rule' (Lagarde, 2010: 525). German courts,

for instance, might recognise a unilateral Islamic *talaq* divorce, even if conducted on German territory (which a French or British court never would), but only if the prerequisites for a divorce under German law are fulfilled, such as one year of prior separation and the proper informing of the wife (Rohe, 2010: 152). In all cases, a 'balancing' has to be achieved between preserving public order, which is tantamount to applying human rights standards, and 'fulfilling individual needs for legal "difference"' (Rohe, 2003: 10) on the part of transnational people.

A second source of legal pluralism is civil law. Civil law is optional. It deals with the relations between autonomous private persons who have wide leverage to regulate their relations as they see fit. This is in contrast to public law, including penal law, which is not optional – it does not depend on the consent of involved parties but is activated even if the victim of a crime would prefer the state to stay out. As civil law deals with the private interests of the involved parties, they are 'entitled to create and arrange their legal relations according to their preferences' (Rohe, 2004: 337). Examples are financial transactions framed to satisfy the Islamic prohibition of paying interest (*ribā*); or matrimonial contracts about the payment of a dowry to the wife, the so-called *mahr*, which is customary in Islam. Many countries, like Britain, in addition have arbitration laws that farm out certain civil law functions, such as the regulation of business or family conflicts, to private tribunals, provided the involved parties consent to this.

An extreme case of a country undergoing Islamic legal influence through this route is Britain. Werner Menski coined the notion of *angrezi shariat* for 'a new hybrid form of Shari'a' (Menski, 2001: 140), which operates in a hazy sphere in which the British state does not officially recognise it but also does not want to prohibit it. What 'recognition' of Sharia might mean is an unclear matter to begin with. As John Bowen (2010: 413) has argued for the English case, recognition could equally refer to Islamic jurisprudence (*fiqh*), the laws and legal practices of Muslim countries, or the procedures and decisions of Sharia councils operating in England. A legal scholar depicted the British situation in unflattering words: '[Often] fearful of accusations of racism, and lately of Islamophobia if cultural practices are questioned, [government actors] have tended to allow communities free rein to "police" themselves in cultural matters' (Sardar Ali, 2013: 114).

As most Sharia councils operate privately, it is not clear how many of them there are in Britain. The estimates range from 12 (Bowen, 2016: 62, quoting a religious scholar) to 37 (Bano, 2012: 85) to 85 (MacEoin, 2009: 69), whereby the middle figure appears the most realistic. There is agreement, however, that the great majority of cases before these councils are brought by women whose husbands deny them a *talaq* divorce. Their only recourse left is the *khul* divorce by an imam, which, however, forfeits the divorced wife's right to her dowry. As the Sharia councils thus fulfil a positive function for British Muslim women, who would otherwise be ineligible to remarry within their community, one is inclined to a positive view of them (as in Joppke, 2015: 162–166). Maleiha Malik (2012: 29) argues reasonably that prohibiting the Sharia councils would 'only alienate minorities', and that it is preferable to make them 'more "women friendly"', within a 'progressive multiculturalism'. But the Sharia councils'

shadowy side should not be overlooked. Sardar Ali reports that 'imams hailing from the villages and towns of rural Pakistan' apply extremely 'conservative and literalist interpretations of Islamic family law' (Sardar Ali, 2013: 131), which have even been abandoned in Pakistan.[17] Pakistani family law actually seems to be more progressive than the Islamic family law practised by the diaspora. An example is the *talaq-i-tafwid* divorce, which was introduced in Pakistan family law as early as 1961. It may be exercised by the wife if delegated to her in the marriage contract. But, as Sardar Ali claims, it 'has not been adopted within the Diasporic community in Britain' and is not 'actively canvassed by Shariah Councils' or 'encouraged' by Muslim leaders (ibid.: 128).

A peculiar legal uncertainty surrounds the few Muslim arbitration councils that claim to operate under the 1996 Arbitration Act[18] – which would make their decisions binding under British state law. In September 2008, the British government was reported to have 'quietly sanctioned' the powers for these councils to rule on financial disputes and family matters, from divorce to domestic violence.[19] However, the home secretary, Jack Straw, denied that a delegation of legal power in family law had ever occurred: 'Arbitration is not a system of dispute resolution that may be used in family cases' (quoted in Zee, 2014: 8–9). Indeed, divorce is a matter of personal status, different from a dispute between individuals that may be privately resolved – it requires state involvement, as marriage in the Western tradition is not just a private contract (as it is under Islamic law) but a publicly instituted status (even under English law, where the contractual element is particularly strong). Accordingly, Muslim arbitration councils cannot issue divorce certificates that are valid under civil law.[20] The dual world of *angrezi Shariat* remains in place: '[Virtually] all ethnic minorities in Britain marry twice, divorce twice, and do many other things several times in order to satisfy the demands of concurrent legal systems' (Menski, 2001: 152). The very fact of having to do things twice confirms the superiority of the civil law system, which is the only one to have enforcement power. By the same token, even the Muslim arbitration councils under the Arbitration Act have not given rise to 'plural legal systems': 'The legal system is still one and the same', argues Lorenzo Zucca (2012: 119–134) about the English case. This is because an act of the legal system, such as an arbitration law, is needed to invest (or not) authority in 'a variety of adjudications'. John Bowen's ethnography of British Sharia councils concedes that 'confusion reigns' (Bowen, 2016: 156) in this domain, but he underlines that 'these councils carry out no actions that have the force of state law' (ibid.: 176). 'English justice abides by its own rules and principles', concludes Bowen (ibid.: 183).

The British state seems to prefer retaining the uncertainty surrounding the current arrangement, which gives the state maximum flexibility to 'pick and choose' (Malik, 2012: 7). According to a legal scholar, 'no formal interaction takes place between the state and a Sharia council' (Sardar Ali, 2013: 125). Proof of the state's tacit approval of *angrezi shariat* is the fact that a private-member 'equality bill' proposed by Baroness Cox to amend the Arbitration Act, which would outlaw Sharia councils' unequal testimony, inheritance and property rules for women, and which would severely punish any claim that Muslim arbitration council decisions

are 'legally binding', never received any political support (Maret, 2013: 276). The case of Sharia councils also proves wrong Prime Minister David Cameron's notion that 'state multiculturalism' is dead.[21] Underneath the official rhetoric, the state's 'liberal multiculturalist policies' seem to persist (Sardar Ali, 2013: 214), if more in a passive than an active mode.

Liberal law as constraint

If one compares the emancipation of two minority groups through liberal law, gays and Muslims (as I have done in Joppke, 2017: ch. 3), one notices an interesting difference: liberal law (particularly privacy rights and non-discrimination rights) has been an unambiguous source of gay emancipation; by contrast, liberal law has been resource *and* constraint for Muslims. The vitriolic notion of 'homonationalism' (Puar, 2007) insinuates that gays have been turned into 'citizens' (lately even with the right to marry) only to better exclude 'illiberal' Muslims (who, as one knows, tend to be hostile to homosexuality). The truth is that certain Muslims' claims sometimes clash with the underpinnings of liberal law. Whether this is a specificity of Islam or inherent in all religions need not concern us here. Islam reformist Abdullahi An-Na'im identified three principles of Islamic law that conflict with contemporary human rights norms: unequal treatment of women and of non-Muslims, and – ironically – the denial of religious freedom (An-Na'im, 1990: 111; see the discussion in Joppke, 2015: 150–156).

Two particularly sensitive issues have been the unequal treatment of women, which for many is symbolised by the Islamic headscarf, and the claim to suppress free speech for the protection of religion, which has been persistently raised from the burning of Rushdie's *Satanic Verses* in 1989 to the Charlie Hebdo killings in 2015. In both respects, extreme Islamic claims are testing the limits of multiculturalism through putting into question its liberal infrastructure of freedom and equality.

If the freedom of religion is the liberal vessel through which to raise illiberal claims, it is not absolute but limited by other constitutional principles, both individual- and collective-level. To the degree that the integration of Muslims and Islam has become a major political concern in the post-2001 period, courts have proved to be less willing to place the freedom of religion above all other concerns. One must distinguish here between equality and exemption claims, the latter being more vulnerable than the former (see Koenig, 2010; Carol and Koopmans, 2013). Equality claims, which amount to treating Islam on a par with the Christian majority religion, are impossible to deny, now as before. The story is different with respect to exemption claims, in which special rights are demanded in deviation from the general norms. To the degree that these exemption claims violate an important liberal norm, such as gender equality or integration in a pluralistic society, courts have lately been less likely to grant them.

A good example of liberal law moving from resource to constraint is the increasing rejection of requests for exemption from co-educational sports and swimming instruction in public schools. The two principles that conflict here are freedom of religion, in combination with parents' educational rights, and the

state's educational mandate to produce autonomous and responsible citizens. A classic decision by the German Federal Administrative Court, back in the mid-1990s, had squarely placed the freedom of religion above the state's education mandate, condoning the parents' wishes not to see their daughter 'emancipated as Westerners understand that term' (Albers, 1994: 987). This German high court decision became the legal inroad for increasingly extreme exemption claims by Muslims, raised also for girls in the pre-puberty phase or on behalf of boys.

In its 'burkini' decision of September 2013, the Federal Administrative Court reversed its course. This was the case of a 12-year old Moroccan-origin girl in 5th grade, who refused to swim in a 'burkini', an all-body swimsuit offered by the school – and widely accepted by Muslims – as an alternative. 'This is a plastic sack that makes you ugly', said the girl, not implausibly.[22] The court argued that the right of religious freedom and the state's educational mandate (according to Article 7 of the Basic Law) were 'equally important' (*gleichrangig*) under the Basic Law, and had to be balanced according to the principle of 'practical concordance'.[23] The novelty was that the balancing went to the detriment of religious liberty. The function of the school was to 'contribute, under the conditions of a pluralistic and individualistic society, to the formation of responsible "citizens"'. The court considered this as nothing less than the school's 'necessary integration function for society (*Gemeinwesen*)'.[24] Notably, the court refused to categorise 'swimming' as less important than other school subjects for furthering integration. Only in 'exceptional cases', in which a 'religious norm exhibits in the view of the believer an imperative character',[25] was an exemption to be granted. This proviso allowed the court to formally leave its own mid-1990s pro-exemption decision intact. But this proviso was not held to apply here, because the burkini offered by the school constituted an 'acceptable alternative' that would have allowed the required 'balancing' of the conflicting constitutional principles.[26] Furthermore, on the supply side, there was no right of females to be protected from the sight of boys or men in 'tight swim suits'. It is particularly noteworthy that the function of the school was not just to educate but to integrate: 'In the confrontation of pupils with the diversity of behavioural styles in society, to which belong different styles of dress, the integrative power of the public school is especially vindicated and realized'.[27]

Interestingly, this argument was similar to the Constitutional Court's diametrically opposed defence of the teacher's headscarf in 2015: both decisions take the school to be the mirror of a pluralistic society. This requires secular pupils to stomach the view of a teacher in a headscarf, but also pious pupils to cope with the vista of boys in swimsuits. The joint diction of both judgments is to embrace diversity and pluralism – only that religious freedom does not always turn out to be the winner. But one must consider that the burkini is a commonly accepted compromise among Muslims. It is difficult to see in its legal affirmation and subsequent refusal of a total exemption claim an undue restriction of religious freedom.

However, not all legal refusals to accommodate claims of radical Islam are in a liberal key. A case in point is the French anti-burka law of 2010, which was recently upheld by the European Court of Human Rights (ECtHR). The burka, which hides the entire body and face of a woman, is radical Islam's most visible

symbol, practiced by a tiny minority of Muslim women. But can the liberal state restrict it without abandoning its liberal values? The European Convention on Human Rights (ECHR) protects the freedom of religion, in its Article 9, yet it also allows restriction of this right if this is deemed 'necessary in a democratic society'. As possible reasons for a restriction, Article 9 lists 'public safety', the 'protection of public order, health or morals' and the 'protection of the rights and freedoms of others'. Curiously, in its argument before the ECtHR the French government justified its case not on 'public order' but on 'the rights of others' grounds. This was more for legal-technical than principled reasons.[28] No less surprisingly, the European court accepted the French government's argument that the burka meant 'breaching the right of others to live in a space of socialization which makes living together easier'.[29] The court approvingly explicates the argument provided by the French government:

> [Individuals] who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question.[30]

But this is an 'illiberal' claim, a 'classic case of legal moralism', exclaims a political philosopher (Laegaard, 2015: 10). It is a case of the majority imposing its particular way of life on everyone. 'France is the country where everyone says "Bonjour"', as a renowned French sociologist paraphrased the stance, however, in support of it (Dominique Schnapper, quoted in Bowen, 2011: 337).

Two dissenting judges in *S.A.S. v. France* correctly objected that there is no right under the European Convention 'to enter into a contact with other people, in public spaces against their will', not to mention that there is 'no right not to be shocked or provoked by different models of cultural or religious identities'.[31] This is because, in application of Hohfeld's classic analytic of rights (1919), 'such a right would have to be accompanied by a corresponding duty', which is 'incompatible with the spirit of the Convention'. As much as one might cherish the value of communication, it is outweighed by the 'right not to communicate and not to enter into contact with others in public places – the right to be an outsider'.[32] In essence, while deceptively couched in liberal colours (as a rights violation), the French anti-burka law 'sacrifices individual rights to abstract principles'.[33] It is an illiberal restriction of a religious freedom.

While the French burka restriction is not really an instance of it, liberal law will continue to function as constraint for some of the liberally sensitive claims raised by Muslims in the name of their religion. Symptomised by the Rushdie, Danish cartoon and Charlie Hebdo crises, the Islamic call for tougher blasphemy or hate speech laws to reign in the freedom of expression is a further instance where liberal law has proved to be more constraint than resource. Blasphemy and hate speech laws have different origins. The older blasphemy laws protect the religious majority against dissenters, whereas the more recent hate speech

laws, which target anti-Semitism and racism, are to protect minorities (see von Ungern-Sternberg, 2009). But both types of law have been adjusted or devised in ways that make them of limited use to curtail the freedom of expression, which is a key requirement for liberal democracy (see Post, 2007). At the last minute, the British Racial and Religious Hatred Act of 2006, which had been meant to compensate Muslims for the abolishment of the old English blasphemy law (that anyway had protected only the Christian religion), was formulated in a restrictive way: the 'intention' to produce hatred has to be proved, for which the hurdles under penal law are rather high (see Joppke, 2014: 602).

Germany has retained its old blasphemy law, which had been on the books since 1871. But it has reformed it beyond recognition, to make it compatible with individual-centred liberal law. Initially, blasphemy laws, which had originated in Catholic canon law, had protected God and religion itself. Something akin to this is demanded today by the Organisation of Islamic States, which has long campaigned for prohibiting the 'defamation of religion' under international law (see Joppke, 2014: 598–600). But even if the concession is made that religious feelings, rather than religion itself, are to be protected, reconstructed blasphemy laws are of little use for reigning in freedom of expression. The German blasphemy law, for instance, in §166 of the *Strafgesetzbuch* (Penal Code), protects 'public peace', and thus neither religious beliefs nor feelings. Crucially, the criterion of 'religious insult' (*religiöse Beschimpfung*), which triggers a persecution under German law, is not the subjective feeling of the believer, who otherwise might bootstrap the breaking of public peace through her own action. Instead, the position of a 'neutral, tolerance-minded observer' is decisive for establishing the fact of a religious insult that 'is suitable to disrupt public peace', as is the law's formulation (Lorenz, 2015). Accordingly, the caricatures of Mohammad, which cost the editors of Charlie Hebdo their lives in January 2015, would easily pass muster. They also pass muster because satire, like all artistic expression, is protected by Article 5.3 of the Basic Law.

Even conservative Christian critics lament the low degree of protection by the German blasphemy law (Hillgruber, 2015). However, they are opposed by liberal critics who would prefer the entire construct of 'blasphemy law' erased from the books. For these critics, other parts of the penal law (such as §130, which prohibits defamation, *Volksverhetzung*) do much of the same work, without unduly privileging religion (Walter, 2012: 64). And abandoning the blasphemy paragraph would send a signal that freedom of expression is 'prior to the diffuse protection of religious sentiments' (Heinig, 2015). The German Lawyers Association (Deutscher Juristentag, 2014) eventually recommended retaining the blasphemy law, because of its 'symbolic' function, above all, to give 'religious minorities the feeling of existential security'. If one considers some broad attacks on the incapacity of 'secular liberal law' to understand the specific religiosity of Muslims (Mahmood, 2007), doubts are allowed about the validity of this claim. As Dieter Grimm concluded his differentiated treatise on conflicts between 'general laws' and 'religious norms': 'There are situations in which the only alternative is adaptation to the secular norm or emigration' (Grimm, 2009: 2382).

Conclusion

The case of Muslim emancipation through liberal law throws new light on the current debate over the 'retreat' or even 'death' of multiculturalism in Europe, which has gained momentum in the post-2001 era. Much of this debate is misguided: a liberal society must be multicultural because it must lend constitutional protection to its minorities. It is not an explicit multiculturalism policy but liberal constitutionalism that is the true engine of multiculturalism. Legal multiculturalism thus understood is an individual- rather than group-centred multiculturalism. The story of Muslim empowerment through liberal law is fundamentally a story of legally ordained multiculturalism.

However, there is a rub, and this is that Muslims, unlike many other minority groups (such as gays but also ethnic or national minorities), often raise claims that are in friction with liberal law. Out of this friction arises a tendency of liberal law to take on thick, ethical contours. Surely, the liberal-secular state must treat Islam equally to the Christian majority religion, both at individual and at collective-organisational level. However, Muslims face a simultaneous thickening of liberalism into a public morality, whereby liberalism is refashioned as a particular way of life – akin to the late Martin Hollis' witty motto 'liberalism for the liberals, cannibalism for the cannibals' (Hollis, 1999: 36). Contemporary 'civic integration' policies for immigrants are not free of this (see my discussion of 'repressive liberalism' in Joppke, 2007). But the prescription of liberal identity is above all the cause of a new brand of populist parties that play the liberal card as a cover for exclusion (see Halikiopoulou, Mock and Vasilopoulou, 2013). Stephen Macedo is right that liberalism must mean more than procedures to ground a liberal democracy: 'No liberal democracy can survive without citizens prepared to tolerate others, to act more or less responsibly, to take some part in public affairs, to stay informed, and to act for the good of the whole at least sometimes' (Macedo, 2000: 10). To navigate the two extremes of liberalism as either too thick or too thin is the major challenge that Europe is facing today.

Notes

1 Wolfgang Schäuble, Muslime in Deutschland, *Frankfurter Allgemeine Zeitung*, 27 September 2006: 9.
2 Zentralrat der Muslime in Deutschland, *Islamische Charta*, Berlin, 20 February 2002, www.zentralrat.de/3035.php.
3 Article 9 of the ECHR guarantees 'the right to freedom of thought, conscience and religion'.
4 BVerfGE, 1 BvR 1783/99, decision of 15 January 2002 (Ritual Slaughtering).
5 BVerfGE, 1 BvR 792/03, decision of 30 July 2003.
6 BAG, 2. Senate, 2 AZR 472//01, decision of 10 October 2002; at par. 31.
7 Ibid. at par. 21.
8 Ibid. at par. 45 and 46.
9 Ibid. at par. 44.
10 1 BvR 471/10 and 1 BvR 1181/10, decision of 27 January 2015 (Teachers' Headscarves).
11 Ibid. par. 82.
12 Ibid. par. 123.
13 Ibid. par. 112.

14 Ibid. par. 105 and 115.

15 Ibid. par. 116 and 118.

16 Curiously, one of the two 'headscarves' adjudicated by the German Constitutional Court in 2015 was really a 'wool cap' (*Wollmütze*) plus turtleneck, which one plaintiff had silently put on in lieu of the sanctioned headscarf, without ever commenting on her new dress. Even the two dissenting judges found no problem with the *Wollmütze*, but only with the regular headscarf worn by the second plaintiff.

17 But see Bowen (2016) for a more sympathetic and differentiated view of British Sharia councils.

18 The main such council seems to be the Muslim Arbitration Tribunal (MAT), run by a charismatic Sufi barrister from Nuneaton, a small town 40 km east of Birmingham. John Bowen called MAT a 'legal-sounding framework for what is really an age-old process of seeking guidance from a spiritual guide', see Bowen, 2016: 166.

19 Abul Taher, Revealed: UK's First Official Sharia Courts, *The Sunday Times*, 14 September 2008.

20 See Joshua Rozenberg, What Can Sharia Courts Do in Britain?, *Telegraph*, 14 September 2008.

21 David Cameron, speech to the Munich Security Conference, 5 February 2011, www.number10.gov.uk.

22 Muslimas müssen mit Jungen schwimmen, *Die Welt*, 28 September 2012.

23 BVerwG 6 C 25.12, decision of 11 September 2013 (Burkini); at par. 12.

24 BVerwG, Burkini decision, par. 13.

25 BVerwG, Burkini decision, par. 22.

26 BVerwG, Burkini decision, par. 25.

27 BVerwG, Burkini decision, par. 30.

28 While ECHR Article 9 contains a 'public order' limitation, ECHR Article 8 (that protects 'private and family life') does not. Accordingly, public order concerns would not be sufficient to restrict an Article 8 right. Because the burka restriction had to satisfy the requirements of both articles, the French government defended it before the Strasbourg court in terms of the 'rights and freedoms of others' (as this formulation can be found in both articles).

29 ECtHR (Grand Chamber), *Case of S.A.S. v. France*, application number 43835/99, decision of 1 July 2014; at par. 122.

30 Ibid.

31 *Case of S.A.S. v. France*, Justices Nussberger and Jäderblom (dissenting), at par. 8 and 7, respectively.

32 Ibid. at par. 8.

33 Ibid. at par. 2.

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4 The consumer–citizen nexus

Surveillance and concerns for an emerging citizenship

Jason Pridmore

Introduction

Consumption practices in the contemporary world have irrevocably changed the conception of citizenship. Citizens are increasingly idealised as consumers; their relationship to government services is seen in terms of consumption; and citizens are increasingly subject to monitoring and evaluation both to improve services to and shift behaviour by citizens. This chapter draws together three strands of research in relation to these transitions in contemporary citizenship: citizenship studies, consumer culture and surveillance studies. It argues that there is a broad overlap between the critical concerns of surveillance research and emerging forms of citizenship and that our understandings of the interconnections of research in these areas will significantly help to evaluate and prioritise potentials and concerns within the changing nature of citizenship. To do so, this chapter will first focus on the connection between citizenship and consumer culture and then detail the role of surveillance as a lens through which to examine consumption and marketing practices. Then the chapter describes what an understanding of consumer surveillance tells us about the changing nature of citizenship. This will be based on a few specific examples that highlight the intersections of citizenship and consumption and how consumer surveillance focuses attention on the role of visibility and relational power in the contemporary consumer–citizen nexus.

Intertwining citizenship and consumption

The relationship between the ideal citizen and her consumption has a long and storied history, perhaps most strongly rooted in and aligned with values in the United States, but likewise prominent in other neo-liberal Western countries. One of the most visible moments to see the interconnections between citizenship and consumption came in the days after the events of 11 September 2001, when then US president George W. Bush asked people for their 'continued participation and confidence in the American economy'. This was interpreted within mainstream media as an encouragement for Americans to 'go shopping' (Pellegrini, 2001) as part of a return to normal citizen behaviour. Arguably, in a 'consumer society' (Baudrillard, 1988), consumption is seen as *the* way to experience membership in

society. The idea of consumer citizenship is 'at once *descriptive* of the relationship between government, consumers, and businesses, and *ideological*, in that it promotes a particular vision of the social good' (Cabrera and Williams, 2012: 350).

This particular vision, as well as its 're-description' of social relations, can be seen to occur in two ways. First, the citizen is seen as a 'consumer' of government services which involves re-evaluating these practices in market terms the same way that patients are seen as consumers of health services and students as consumers of education. The taxpayer – a term emphasising the financial contributions of the citizen to his own governance – becomes a consumer of government-funded (support) infrastructures. Secondly, the consumer is reimagined as an idealised citizen, the driver of economic growth and stability. She is described and acted towards as a rational actor who helps direct social interests beyond individualistic needs and wants through consumption processes. Marketers have been seen to reinforce this view 'through advertisements linking the satisfaction of consumer desires to the country's best interests' and suggesting that serving one's country amounted to consumption that would 'satisfy their personal material wants in the marketplace' (ibid.).

These two interconnected descriptions and ideological visions – the *citizen as consumer* and the *consumer as citizen* – constitute an expansion of previous understandings of citizenship:

> Citizenship is expanded beyond obeying laws, serving one's country, voting in elections, and keeping an eye on government. Newer understandings also integrate concerns for global human well-being, biodiversity, and nature, thus extending citizenship responsibilities beyond one's own community to include an expanded notion of equity and caretaking. (Micheletti and Stolle, 2012: 91)

In order to integrate these new concerns, citizens need to 'consider carefully and wisely how their consumer life-styles affect the conditions of workers, producers, animals, and nature globally' (ibid.). This integration of consumer concerns into citizenship reveals a new set of social relations, the development of a consumer–citizen nexus.

Unsurprisingly, this intertwined vision of citizenship and consumption has been heavily critiqued. For Zygmunt Bauman, seeing the *citizen as consumer* suggests a hollowing out of a shared public domain (Bauman, 2001; see also Trentmann, 2007). This critical point is a long-standing one in which the relationships within society are reduced to economic frameworks that threaten 'solidaristic, collective foundations of the public sphere as individuals increasingly come to perceive themselves – and consequently act – in marketised terms' (Ellison and Hardey, 2014: 34). The idea of the *consumer as citizen* likewise is problematic in conflating these two terms: 'In many contexts, people acting in their capacity as citizens, favor measures that diverge from the choices they make in their capacity as consumers' (ibid).

However, negative assessments of the intertwining of citizens and consumers are subject to some debate. There are significant potentials for a consumer-oriented conception of citizenship and a view of the citizen as consumer to produce

positive social outcomes. This can be seen within forms of citizen mobilisation that are both explicit and implicit. Consumption shapes citizenship even while citizens are themselves aligning their practices within communities of (consumptive) choice. 'In addition to openly political forms of action (such as boycotts or political mobilisation), consumers through their everyday practices, consciously or unconsciously, leave an active mark on these larger social systems' (Trentmann, 2007: 155). Any efforts to delimit the role of citizen as somehow separate from his consumption is inherently problematic, something that is readily apparent in the consumption of social media. Although sometimes readily decried as 'slacktivism', participation in political discussions within digital forums have had a positive correlation with political engagement outside these spaces (Christensen, 2011). As Ellison and Hardy note:

> Social media platforms such as Facebook and Twitter in fact encourage an amalgamation of 'governance' and 'consumption', and this feature of Web 2.0 should not necessarily be perceived negatively. Fans, tweeters and image sharers, should they choose to engage in local issues, are unlikely consciously to distinguish between their 'service user' and 'citizen' identities. (Ellison and Hardey, 2014: 34)

Social media has served to reinforce an ongoing blurring within the consumer–citizen nexus, but this requires an acknowledgement of a crucial point about consumption itself and social media. While often consumption is articulated in terms of purchases, it is better understood in terms of use (see Shove *et al.*, 2007). Whereas consumers purchase groceries, automobiles, travel packages and mobile phones, they are at the same time consumers of media and information – including social media. The attention given to issues and the responses towards forms of civic engagement within social media platforms are even further indicative of how citizens are being seen as consumers and consumers are being engaged with forms of civic action (as noted below).

The surveillance of (consumer) citizens

The blurred boundaries between citizen and consumer is connected to the idea that the consumer is 'the novel product of an "advanced liberal" form of governmentality' in which people 'are not merely "free to choose", but obliged to be free, to understand and enact their lives in terms of choice' (Rose, 1998: 87). In our contemporary world, the primary expression of choice is through consumption (see Slater, 1997). These choices are of significant interest to marketers, as they are employed to move consumer choices towards their own products over others. Marketing practice, since its inception, has always been predicated on the 'surveillance' of consumers (see Pridmore and Zwick, 2011). Describing these practices as surveillance focuses attention on certain aspects of consumer culture. There is productive critical value in the use of surveillance as a concept, as crucial issues come to the fore when loyalty cards, radio-frequency identification

(RFID) tracking, the use of internet cookies, sharing data through application programming interfaces, algorithmic processing or 'clickstream' analytics are seen as a form of surveillance. For instance, this raises particular questions regarding exclusion and inclusion, the allocation of particular resources, and normative expectations embedded in these practices of control that business-focused orientations like 'relationship marketing' or 'service dominant logic' do not capture.

However, surveillance here is not always a negative descriptor – there are always two faces of surveillance, that of care *and* that of control (Lyon, 2001). The constant monitoring and measuring of consumers makes good business sense as this is the way to know 'where your customers are' and 'solve their problems', as contemporary business and marketing rhetoric declares. Efficient and intense consumer surveillance is akin to providing an important public service because making consumers happy with products they desire, now elevated to something of a social policy, depends on the best possible intelligence about those same consumers (Applbaum, 2011). Through consumer surveillance, marketers are able to overlay or map classifications onto existing conceptions of consumers based on consumer surveillance data that allows for the targeting of 'look-alikes' – 'people with similar profiles to groups of individual consumers' (Stone *et al.*, 2004: 311).

While this targeting may help to predict the needs and desires of consumers, it is also about directing them towards specific consumption patterns, distributing resources and paying attention to particular consumers that 'matter'. That is, monitoring, aggregating, analysing and projecting consumption patterns onto those same consumers suggest that these patterns are no longer simply descriptive, but increasingly prescriptive as well. This has particular advantages for certain consumers over others – issues surrounding life chances and the reinforcement of social inequality through market dynamics are of significant concern. For instance, there is the potential for forms of cumulative disadvantage, through which automated support systems reproduce and exacerbate disparities over time, particularly in relation to race/ethnicity, class and gender (Gandy, 2009).

It is here where surveillance and more specifically the surveillance of consumption begins to significantly overlap with concerns about citizenship. If the concept of citizenship denotes at a minimum the means by which persons participate within larger (political) structures and through which the allocation and flow of resources are determined, these are the very sets of concerns that a surveillance perspective on contemporary consumption raises in relation to markets. Specifically, concerns about the surveillance of both *consumers as citizens* and *citizens as consumers* helps us focus on three general issues within this nexus. First, as noted in surveillance studies, there is a significant concern about levels of exclusion and inclusion. Second, there are concerns with regards to the allocation of resources. Finally, a surveillance perspective draws attention to the normative expectations embedded in situational power dynamics. As such, surveillance provides a lens by which we can see the subtle directing and reorienting of (consumer) citizens in a manner similar to those that occur within marketing practices. The allocation of beneficial resources to certain citizens in lieu of others, the production of (intended?) barriers to those less valuable, and hidden algorithms that

predict and reinforce patterns of life and direct collectivities become more visible. In a number of ways, surveillance begins to provide a framework for thinking about issues in the emergence and development of the consumer–citizen nexus.

The potentials and problems of surveilled citizen consumers

Two of the primary 'sensitising concepts' embedded in surveillance studies research are the production of visibility (and invisibility) and the relational production of power dynamics (Foucault, 1977; Lyon, 2001). The appropriation of (consumer) surveillance concerns to understand the consumer–citizen nexus allows insight into how citizens are made visible (or invisible) and 'managed' by (state) institutions, and what the potential of these practices may be for emerging citizenship. In the process, the appropriation of a surveillance lens indicates significant risks and harms as well as more positive benefits. The complexities of experience and practices within emerging forms of citizenship are likewise pregnant with both concern and potential. There is an ongoing worry within surveillance studies, articulated a number of years ago by Reg Whitaker, that the 'technologies of surveillance and repression may be developed in the private sector for profit, but they will be deployed and exercised more and more by states, and state networks' (Whitaker, 1999: 182). However, while this surveillance and repression remains a concern, an evaluation of the consumer–citizen nexus reveals both areas for caution and prospects of hope for emerging notions of citizenship.

To more fully illustrate how surveillance is a useful lens through which to evaluate emerging forms of citizenship, this chapter focuses on three key examples of how consumption and its surveillance have significantly intersected with citizenship and how this replicates some aspects of the ideological visions of *citizen as consumer* or *consumer as citizen*. First, this chapter examines the interest of the state in consumptive practices for security concerns. Second, the reformulation of identity provision from exclusively being part of the state to private actors is discussed. Finally, the participation of 'users' on privately owned and consumed social media as the exercise of citizen engagement is discussed. To interrogate these examples, and in light of visions of *citizen as consumer* or *consumer as citizen*, the focus will be on the following questions: What is occurring in this example? What are the implications? And what is it that a focus on consumer surveillance highlights or reveals in these circumstances? All three examples serve to indicate the dynamics at play and the emerging potentials and concerns for citizenship and consumption.

State interests in consumption data

What is occurring?

In the years following September 11 2001, within the United States and elsewhere, the application of techniques predominantly occurring in marketing contexts,

such as data mining, data discovery and related modes of data analysis and distribution, were appropriated for law enforcement and security purposes (see O'Harrow, 2006). These techniques are based on the ongoing calculation of risk and potential for corporate relationships with customers – which consumers respond to which advertising, which consumers are most profitable, which consumers require a disproportionate level of customer service. The calculations based on such data determined appropriate courses of action for a company: whether to provide increased customer service or proactively dissuade the customer from future business transactions (see Pridmore, 2012). It is a process predicated on routinised data collection – point-of-sale transactions, search patterns, internet cookies, clicks, survey participation and more.

Data mining and data discovery are the processes used to evaluate data within large databases to discover patterns of previously unknown and potentially useful information (Birrer, 2005). Predictive analytics further make more detailed assumptions about a person's likely behaviours or indicate implicit connections between behaviours of differing persons (ibid.). These tools and techniques specify a range of likely actions based on previous patterns and a comparison to others, and are driven by robust algorithms that integrate multiple sources of data. This is seen as significantly beneficial to corporations, as a better understanding of a consumer allows for a more effective response to that consumer's behaviour and actions.

However, as noted, these techniques have become reshaped in the past decade and a half for the purposes of security and intelligence agencies. Without going too deeply into this history, the move from the market to domestic security concerns two dimensions. On the one hand, methods used to predict customer worth or consumer behaviours were seen as useful initially for predicting things like terrorist proclivities. To date, these methods have expanded far beyond initial concerns about terrorism and into border, customs and immigration control more broadly.[1] On the other hand, intelligence and law enforcement agencies are themselves seeking increasing access to private data warehouses in an attempt to trace and profile likely terrorists. Information about 'financial transactions, locations and communications' has arguably become increasingly 'important and valuable' for national security (Ball *et al.*, 2015: 14).

Most recent iterations of such interest in this data – monitoring and scrutinising the mundane activities of citizens for suspicious behaviour – have been focused on two specific areas: the financial and travel sectors. Within the financial sector, concerns about money laundering, organised crime and the support of terrorist activities are central. Within the travel sector, passenger records and affiliations are a significant means of reducing threat to travel infrastructures, most evident perhaps in the security measures put in place around (international) flights. The security practices within these sectors, while robust, are limited and problematic but also simultaneously visible and hidden. There are legal protections around access given to and the collection of data by security and intelligence agencies, yet little is known about what can be or is accessed on a routine basis by these agencies. The revelations of Edward Snowden significantly increased

these concerns by demonstrating a wilful and purposeful disregard for legality in seeking a mass surveillance of citizens (see Lyon, 2015).

Despite these more ominous concerns, there is an ambivalence apparent in practice. The distribution of this data comes up against some significant limitations as compliance with statutes to report on activities deemed suspicious or even to effectively supply mandated data is confronted with the ongoing and competing demands of business practice and personal experiences. Quite frequently, as noted by Ball *et al.* (2015), the realities of reporting suspicion and the production of data for security and intelligence agencies are complicated even in the best of circumstances. This corresponds to the differences between intentions of marketing practices to identify key consumer groups and the ongoing 'slippage' that occurs in practice (see Sunderland and Denny, 2011).

What are the implications?

Producing false positives in the security domain – defining a person as suspect or criminal – has very different and more detrimental effects on that person than wrongly identifying him as being in the market for a commercial good or service. But the idea that consumer data is seen as valuable for security and subject to increased state surveillance and scrutiny (even if this is not always legally or practically accessible) produces a dubious relationship between the *consumer as citizen* and the state. That is, no longer are citizens only idealised as consumers, but their consumption becomes of significance as a means for increased security surveillance simultaneously. Like the more aggregated interests in consumption by marketers, there is a paradoxically limited interest in the consumptive activities of individual citizens and an intensive focus on outliers from normalised consumption. That is, collected data on mass consumption is primarily of interest only as this becomes indicative of specific patterns and norms. It is at a later point when personal data that exists outside of these patterns and norms raises suspicion, when individual consumer citizens or small groups of these persons become of interest. In the consumer–citizen nexus, focused surveillance occurs primarily in relation to personal data that indicates an anomaly.

As such, for the most part, citizens as consumers remain invisible en masse. This can change swiftly when particular practices trigger some sort of alert, but even then data access remains problematic for a number of reasons, from jurisdictional complications to incompatible legacy systems. Regulations, particularly within the financial and travel sectors, have sought to mandate a more uniform reporting and availability of consumer data, but there remain significant limitations in access and useable knowledge about how data is systematically organised, let alone how this might be integrated for other purposes. The end result of security and intelligence services both using consumer data and replicating these surveillance techniques is an increase in the potential for robust levels of detail on individual citizens' daily life, but also a significant increase in the complexity and difficulty of accumulating such information in a coherent way.

Despite the practical limitations in effectively accumulating data on *all* citizens and responding at a more individual level to all of this data, the implications of state institutions using consumer data and the monitoring and targeting techniques of commercial organisations are multiple. Most importantly, these practices shape engagement and everyday behaviours by their very presence. The issue here is the 'chilling effect' that such surveillance has on the exercise by citizens of their rights (Birrer, 2005). Further, citizens remain ignorant of how state institutions (alongside commercial ones) may be using their data or aggregated data of others to respond to and evaluate their everyday behaviours. This lack of transparency reinforces the (perception of) distance between citizens and their government.

What does consumer surveillance highlight here in relation to citizenship?

Seeing marketing as surveillance (see Pridmore and Lyon, 2011) highlights the importance of consumer data for defining, categorising and targeting specific persons for differentiated forms of attention and offers alongside ongoing 'test and learn' scenarios occurring within marketing (Pridmore, 2013). The (potential) use of consumer data in relation to security concerns demonstrates the flexibility in use and potential migration of data collected for one purpose, to serve another. Such potential has long been part of data protection initiatives to limit this. However, it is not simply that this data might be significant in different scenarios purely dependent on the interests of the organisation interrogating that data. Rather the visibility produced, and the means by which this occurs, become a central form of how different persons or groups of persons are deemed important or of interest or not – determining, in surveillance terms, both levels of inclusion/exclusion and the allocation of resources. Some consumers are sorted out for special attention, some consumers are deemed less valuable, some consumers are seen as productive and others are not. The same can be said in the monitoring by the state of citizens.

The desire both for similar data and for similar interrogation techniques, albeit for different ends, indicate the inherent political nature in this consumer–citizen nexus. Daily practices of consumption are both significant and inconsequential given the enormous distribution of data, and the interpenetration of 'consumer' data with the lives of daily 'citizens' is indicative of the difficulties in separating these concepts from one another. Citizenship, then, is bound up in the inherent complexities of data gathering and analysis occurring in the commercial sphere, both changing the importance of this and being subject to its potential and problematics. The concepts of (consumer) surveillance here highlight several concerns, particularly of targeting and classifying persons, along with the more normative expectations such as the chilling effects such surveillance may have on citizen behaviours, as well as noting the complexities in effectively coordinating surveillance practices.

Shifts in the provision of identification

What is occurring?

The demarcation of a person's identity, of confirming that a person is who she says she is or is alleged to be, has in the past several centuries been allocated to governmental institutions and the production of official documentation. The creation of passports, identity cards, social insurance numbers and driver's licences, even fingerprinting and DNA records, are or have largely been within the purview of governmental agencies. These have been the primary means for identifying citizens (and their citizenship status) and the means for securing interactions, controlling forms of access, providing services, assessing rights and entitlements, tracking people's movements and more (Lyon, 2009). Identification documents are a crucial part of 'how you get things done' – they are basic requirements for bank accounts, employment, education, health care, travel and beyond. Although it is not the case that these formal identification documents have significantly shifted from the realm of the state – their intrinsic importance to citizenship is undeniable – it is the case that they have become increasingly less important in a world filled with and driven by commercial platforms and devices. On a routine basis, the wide range of systems and methods to authenticate identity outside of more government-controlled and regulated identification practices have become crucial to contemporary life.

Private companies now serve to identify persons in ways unheard of previously. Within IT and information and computer science, these practices are called 'identity management'. Identity management systems authenticate (confirm an assertion of identity) and authorise (determine access to resources) people in the daily actions of checking emails, entering a workplace, logging into a computer, paying for a purchase, participating in social media, communicating with friends, family and colleagues, and more that facilitate much of our interactions (see van der Ploeg and Pridmore, 2015). The authentication and authorisation processes are embedded in the connection between persons and particular knowledge, artefacts or characteristics. For instance, authenticating identity may occur based on something a person knows, like a PIN or password, something a person has in her possession, like a smartcard or (electronically enhanced) document, or biometric traits such as fingerprints, iris patterns or a facial image. Each of these connections that provide initial points of access are dependent upon behind-the-scenes systems and databases that authenticate these identifiers in relation to personal files, track records and previous service access. This process renders persons as being 'known' to the system, and recognisable as such in subsequent interactions and exchanges.

While many of these privatised systems work in tandem with official documentation – international travel requires the use of a passport, formally paid labour requires a social insurance number, renting a car requires a driver's licence – there is a reliance in these actions upon commercially owned spaces. Plane tickets are sent by email; payments are sent electronically to a commercial

bank; car rentals require a credit card. It is no longer the case that the ability to act – as a consumer, employee or citizen – is primarily dependent upon state-verified identification practices. Instead, the historic growth of commercially owned digital communications, interactions and transactions has produced technological processes that are arguably more important for establishing who someone is and how one can act in today's world. As these identity management systems are designed to log information on every action, they generate and store significant details of peoples' behaviours and allow for ongoing tracking and verification of their actions.

More importantly, these modes of identification have become the default means by which citizens routinely identify themselves. Technologically mediated and automated interaction has replaced many physical and face-to-face encounters, changing trusted and historical ways of establishing identity through new identification practices (digitising identities). The assertion of identity happens now more often in the context of automated and online systems than has ever been the case in the relations between citizen and state. Again, these instances of identification have not eliminated state identification practices connected to official forms of documentation. Neither have more social forms of identification practices – face-to-face personal and workplace introductions remain; however, these mediated forms of identification have supplanted their primacy. Social media accounts, email addresses, user names and web 'handles' are the way identity is both asserted by and requested of persons on a daily basis.

What are the implications?

The shift in importance of identification services from government-implemented forms to more commercially developed means of identification have some significant implications for contemporary citizenship. At least two significant changes occur in this context. First, this process serves to renegotiate the importance of the state as a provider and arbitrator of identity. While the importance of the state for providing citizens with legitimate documentation and artefacts for identity purposes remains, this becomes one form amongst many others provided by the commercial sector. Second, the increased importance and use of non-state-managed identities changes expectations of citizens in relation to the services and interfaces provided by state institutions. An increased demand and desire for consumer-like products with similar functionality becomes a central demand for citizen provisions. Recent developments and funding for servicing citizens through new tools for co-creation and collaboration with government are based on such experiences.

In the commercial sector, a number of efforts have been made to make aspects of commercially available identification management systems interoperable. Application programming interfaces, or APIs, allow for and determine levels for the exchange of information between various commercial identity management systems (Pridmore, 2015). That is, a person can 'log in' with commercially available identifiers such as provided by Facebook, Google, Twitter or Microsoft to a number of unaffiliated services and systems. Such interoperable successes have

led state agencies to experiment with and implement the use of these identity authenticators in relation to their own constituents. This underscores how experiences with commercial identification systems that create (perceived) demand by citizens for similar functionality are in fact reiterating the vision of *citizens as consumers* of government services.

What does consumer surveillance highlight here in relation to citizenship?

The provision of identity, whether by a state or a commercial institution, requires the ongoing monitoring of that person's activities in some form or another. Identity authentication routinises this form of surveillance and helps to produce digital 'biographies' of personal practices in relation to various systems. By focusing on the surveillance aspects of these practices, several things become evident. First, this shift is a clear indication of the multiplicity of surveillance practices that extend beyond the power of the state. This produces normative expectations of citizens who have become subject to increased 'identity checks', even as these may be seen as much less coercive than may have occurred solely in relation to state agents. There are also normative expectations of the state produced in citizen monitoring and measuring of state practices in the allocation of identity.

Further, by focusing on levels of inclusion and exclusion and the allocation of resources, a surveillance reading of this shift in identity reveals the inherent complexity and interconnectedness between state and commercial actors. Consumer citizens are increasingly made visible in a variety of contexts and ways, but these are loosely organised and there are a number of power dynamics at play. Negotiating all of these explicit and implicit boundaries may take enormous effort and work, but much of this has become a normalised set of patterns and practices accepted within the consumer–citizen nexus.

Participatory engagement

What is occurring?

In the past two decades, the mechanisms and mediums for civic engagement have seen a movement towards online practices and participation. These include the organisation of protests and demonstrations, the facilitation of various social movement groups, the dissemination and collection of diverse petitions, ongoing dialogues within social media spheres, and more. While the productivity of such practices remain questionable, as does whether or not this has increased political engagement, mediated discourse around various forms of politics has at a minimum become increasingly visible online. Recent examples, from the London riots of 2011, Occupy Wall Street, Kony 2012 and the 'With Syria' campaign (Amnesty International), to the equal (=) campaign for same-sex marriage by the Human Rights Campaign, were either reliant or totally dependent upon the use of privately owned social media platforms. At present, any civic action and

expression of citizenship rights is increasingly unthinkable without a Facebook page or a Twitter or Instagram account. Messages, status updates, images and video are all spread through these de facto semi-public spaces. They are now prerequisites for types of civic engagement.

As a most significant example, the 2012 protests against the Stop Online Piracy Act (SOPA) delayed and eventually caused the abandonment of a vote on this legislation in the United States alongside that for the Protect Intellectual Property Act (PIPA) (see Benkler *et al.*, 2015). These protests were based on a groundswell of citizen opposition that emerged from a loosely coordinated campaign by internet activists. It included the darkening of numerous websites and services, most notably that of the site Wikipedia, which provided no access to any of its entries for two days in January. The site indicated its concern that SOPA and PIPA was legislation that would 'fatally damage the free and open internet'. On the day of the darkened sites, protests poured into US congressional legislative offices in the order of millions (ibid). Given this outpouring of concern, legislators quickly reversed their positive stances on the legislation. Over the course of the next several months, similar legislation introduced worldwide was blocked, such as the Anti-Counterfeiting Trade Agreement (ACTA) in the European Union. Although critiques of these actions suggest a mode of minimal civic participation, in this case only caused by the duress of losing access to desired sites, there was at least for one moment a dramatic engagement with civic discourse.

Mediated aspects of citizen engagement are not new phenomena. The importance of and processes by which differing concerns in the public sphere become issues of more widespread concern is dependent upon the messages spread. What has begun to change is the speed and variance at which this can occur and that these are embedded more clearly in the everyday experiences of social media use. That is, political messages, whether desirable or not, show up in the connections produced through the routine and daily use of internet services. This can be seen to produce increased tensions and divisiveness rather than healthy and sustained dialogue, but it is part and parcel of increased forms of what can be seen as participatory surveillance. While the meaning of participatory surveillance remains the subject of dispute (see Bruno, 2012), it suggests that new forms of communication technologies serve not (only) to discipline their users, but to motivates users to take an active part in their own surveillance. This is sometimes seen in a positive light, allowing for empowerment through the mutual, voluntary and horizontal nature of surveillance in these networks (see for instance Albrechtslund, 2008). Yet it is also seen as constituting a transparent society continuously monitored not by states and large corporations but by the citizens themselves. The concerns here are about how the participation required by these interactive formats reproduces surveillance practices historically linked to forms of governmental control.

What are the implications?

It is clear that the increased participatory engagement through online forums allows for an increased potential for citizen activism and dialogue. The barriers

for engagement have been dramatically lessened through new mediums of communication, but this positive democratic potential creates other issues, as the multitude of competing civic concerns and voices make purposeful and sustained action sometimes problematic. On the one hand, making one's voice heard is a significant concern, while the importance and seriousness of a particular movement is a concern on the other hand. The latter concern is connected to the fact that activism on social media requires minimal commitments for participation – it increases the likelihood of 'feel-good' political activism which may have no actual impact outside of these spaces (see Christensen, 2011). But the presence of and participation in social media as part of the consumer–citizen nexus requires some form of institutional participation on privately controlled sites. The question for state actors is how 'to leverage participation in ways that could . . . enhance citizen engagement' (Ellison and Hardey, 2014: 24), but in recognition that these sites have commercial interests driven by advertising revenues. Though most social media services are free to the public, paid promotions have the potential to supersede more grassroots forms of civic engagement and action.

What does consumer surveillance highlight here in relation to citizenship?

Public discourse and active citizen participation has often transpired through mediated channels, but these have been mostly semi-public – primarily forms of news media. The arrival of social media networks as forums for participation highlights even further the intricacies of the consumer–citizen nexus. A (consumer) surveillance perspective focuses on transitions in the dynamics of visibility and power relations – while the inertia previously needed to create active and sustainable change in state practices and engage in public discourse and dialogue has dramatically decreased, it is afforded not within public spaces but private ones. Likewise, it is also dependent upon the mundane and routine levels of interpersonal 'surveillance' engaged in by ordinary persons. These normative expectations and the variance in levels of visibility through social media suggest that the idealised versions of the internet as democratising prove too optimistic. A surveillance perspective notes the complexities and entrenched control processes involved in routine social media participation.

Being active in the consumer–citizen nexus

Each of the above examples are focused on the intersection between citizenship and consumption in a 're-description' of social relations as consumer–citizen nexus. They illustrate a range of issues and, drawing on a (consumer) surveillance lens, they focus attention on the role of visibility and relational power in these contexts. Although somewhat diverse, the interests of the state in consumer data, the shifts of identity provision and the new forms of participatory engagement demonstrate several surveillance concerns.

First, different forms of inclusion and exclusion are present. Consumer data and its techniques allow for the isolation of abnormal behaviour and the mechanisms to allocate differentiated resources to different groups. The issue here is connected to Gabriela de la Paz's concern about 'how individuals and groups have differentiated opportunities of becoming competent members of society' (de la Paz, 2012: 2). She suggests that 'citizenship identity, the sense of belonging and solidarity, is necessarily connected with the problem of unequal distribution of resources in society' (ibid.). A surveillance perspective focuses on the data-driven mechanisms that produce these inequalities within consumption practices and how this might be increasingly inextricable from emerging forms of citizenship.

Second, and related, the allocation of resources can shift consumer–citizens' social and political being dependent upon identification practices. That identification is more and more intertwined between state and commercial organisations may destabilise priorities towards more commercial ones. This is not to suggest a simple reframing of identifying citizens as a product of capitalist impulses, but highlights the need to be aware of how these practices may simultaneously solve certain problems and create others.

Finally, and perhaps most importantly, surveillance allows us to see more clearly the normative practices embedded in these contexts. Data has become central to governance structures, both in the consumer world and in citizenship. The consumer–citizen nexus only amplifies normative expectations of how persons are expected to behave and engage in social contexts and how exercising citizen rights is dependent upon and integrated into commercial spaces. There is a mutual shaping of consumer citizen expectations of the state and how the state monitors, responds and views citizenship.

What is perhaps most notable in a surveillance-focused understanding of the consumer–citizen nexus is that there is a 'complex cluster of relationships' occurring, more than 'just the traditional one between national government and its people' (Micheletti and Stolle, 2012: 91). These complexities are a reminder of the dynamic nature of emerging forms of citizenship – consumption itself is an ongoing and active practice and its interconnection to citizenship both reminds us of and requires a perspective that citizenship has to be 'done'. This idea of what might be seen as 'citizenship in action' opens the way for new possibilities and problems revealed by a surveillance perspective. The challenge is perhaps not to fight against or delegitimise the consumer–citizen nexus, but to encourage its productive aspects while minimising the concerns already articulated through (consumer) surveillance studies.

Note

1 Details regarding the use of data mining technologies within the United States and their impacts on citizen privacy since 2006 are available at www.dhs.gov/publication/dhs-data-mining-reports.

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5   Contentious citizenship

Denizens and the negotiation of deportation measures in Switzerland

Gianni D'Amato and Noemi Carrel

Escaping deportation: the case of Mariella V

Born in the Eastern part of Switzerland, Mariella V. grows up, graduates school and makes an apprenticeship in an office in her canton of birth. She is the off-spring of Italian migrants who came to Switzerland in the 1950s during the apex of the Swiss Guestworker recruitment programme. Until today, Mariella holds only Italian citizenship. Her residence is, however, guaranteed by the permanent residence permit C.

Today, Mariella is over 50 years old, drug addict, HIV positive and carrier of Hepatitis C virus. She participates in a methadone programme and receives disability benefits. The same holds true for her long-term partner, Aldo R., a second-generation foreign national with Italian citizenship like Mariella. Despite the difficult circumstances, they manage to preserve their relationship with their daughter, who was taken away from them in 2004 at the age of 12 (Judgment of the Swiss Federal Tribunal: FT/2C_407/2013; Tages-Anzeiger, 2014).

The situation of Mariella, highly problematic in social, economic and health terms, got even more difficult with the loss of her rights to reside in the country as a consequence of her criminal record. At the age of 20, Mariella was convicted for the first time after violating narcotics law. The offences continued, and by 2011 she had been convicted 24 times, including fines and sentences to imprisonment, namely 15 months in 2008, 10 months in 2009 and 32 months in 2011 after having sold 5.5 kg of heroin. This last offence was decisive for the cantonal migration office of St Gallen: shortly after the conviction, it decreed the withdrawal of her residence permit and a removal order (for the legal basis, see the following section). Her partner, who was sentenced to prison in 2011 as her accomplice, faced the same fate (Judgment of the Swiss Federal Tribunal: FT/2C_407/2013; Tages-Anzeiger, 2014).

Leaving their country of birth was no option for Mariella and her partner, so they initiated legal and judicial proceedings to fight the administration's decision and made an appeal up to the Federal Tribunal, the Supreme Court in Switzerland. None of this was successful. According to the Federal Tribunal, selling drugs is a serious offence. It is perceived as a concrete and immediate danger to hundreds of citizens and for this reason a threat to public security, health and order. Since

Mariella repeatedly violated the law and did not leave the drug scene, a high risk of relapse was assumed in her case. In consequence, the interest in expelling Mariella was estimated as very high. Furthermore, the Federal Tribunal concluded that Mariella was not integrated in Swiss society and highlighted the fact that she had not had proper work for more than 20 years. Although the fact that she was born in Switzerland and had spent her whole life in the country was a strong argument in favour of Mariella's request, her expulsion was nevertheless perceived as reasonable. The Federal Tribunal argued that she was conversant enough with life in Italy and that her relocation would not derogate her family life, since her partner faced the same sanctions. Because her daughter had already reached the age of majority, the preservation of their relationship was considered possible even from abroad (see Judgment of the Swiss Federal Tribunal: FT/2C_407/2013).

Consequently, the Federal Tribunal confirmed the administration's decision to withdraw Mariella's residence permit and to decree an expulsion order in November 2013. But then a final appeal for reconsideration of her case to the Security and Justice Department of the Canton of St Gallen did succeed. What was decisive for the re-evaluation was the positive personal development of Mariella, resulting in good behaviour and a more stable health situation. The administration argued that her expulsion could harm this regained stability and might cause a threat to public health. An administrative appeal by the Swiss People's Party (Schweizerische Volkspartei SVP)[1] against the reconsideration of Mariella's case was rejected by the judicial committee of the Parliament of St Gallen and Mariella's right of residence was finally conformed (Neue Zürcher Zeitung, 2015; Tages-Anzeiger, 2014).

Denizenship: a status protecting foreign nationals?

Deportation is a powerful technique of states to get rid of 'undesirable foreigners' (De Genova, 2013; Walters, 2002). The degree of protection granted to non-citizens is therefore an object of contention. In Switzerland, a popular initiative[2] (accepted in 2010 and implemented in 2016) caused important legal changes regarding the expulsion of foreign residents. This raises questions about foreigners' deportability and their protection against 'disproportionate' expulsion. In particular, the legal developments regarding the rights of those residing in Switzerland for a long period or in the second generation need serious attention. In this regard, the case of Mariella impressively exemplifies the underlying norms that characterise the expulsion law. It thus presents the starting point for the following discussion focusing on denizens' deportability, the current legal developments and the consequences regarding denizens' status.

Denizens are persons with a status quite similar to that of a citizen, but according to law still considered aliens. These immigrants have resided in their 'destination' countries for long periods without becoming naturalised citizens but nonetheless have substantial sets of rights (Hammar, 1990). According to the European Union Observatory on Citizenship (EUDO) glossary, this applies for long-term resident foreign nationals whose rights include at least the

following: '[Long-term] residence permit, access to employment, enhanced protection from deportation/expulsion [compared to short-term residents] and provisions for family reunification in the country of residence'.[3]

Some perceive denizenship as a transitional status that will finally end with naturalisation, i.e. like a 'citizen in waiting'. Even though this assumption may partly correspond with the foreign residents' experience, we also have to consider the fact that a significant number of denizens may never be naturalised. If foreign nationals acquire a status that guarantees a set of rights that are to a large extent similar to citizenship rights (see EU Directive 2003/109), naturalisation may not even be perceived as a necessary step in the process. Therefore, denizenship can be considered a permanent status too. Still, there are serious differences between denizenship and citizenship. Denizens only have limited political rights and their protection from deportation is not absolute. The inviolability of the citizen's residence rights therefore still makes a serious difference (Huddleston and Vink, 2013: 6, 23; Pelacani, 2015).

In Switzerland, denizens represent an important part of the population. As of 2014, 24.26 per cent of the permanent residents were foreigners. 62.84 per cent of the foreigners had an unlimited long-term residence permit (permanent residence permit C) and 26.49 per cent had been in Switzerland for 15 years or more. Furthermore, 19.45 per cent of the foreigners were born in Switzerland, i.e. 4.72 per cent of the total permanent resident population (see Table 5.1).

Table 5.1 Permanent residents in Switzerland and four neighbouring countries

	CH	DE	AT	IT	FR
Population in total	8.237.700	81.197.537	8.507.786	60.340.328	65.800.000
Resident foreigners	1.998.500 (24.26%)	7.539.774 (9,3%)	1.066.114 (12,5%)	4.235.059 (7.02%)	4.200.000 (6.3%)
Foreigners born in the country	388.700	1.345.000	163.636	572.720	600.000
% of foreigners born in the country; 100% = total foreign population	19.45%	17.8%	15.35%	13.52%	14.2%
% of foreigners born in the country; 100% = total population	4.72%	1.66%	1.92%	0.95%	0.91%
Date of reference	31 Dec. 2014	31 Dec. 2014	1 Jan. 2015	2009	1 Jan. 2014

CH: Bundesamt für Statistik, STATPOP; see Swiss Federal Statistical Office: *The Statistical Encyclopaedia*.
DE: Zensus, 2011; Mikrozensus, 2014.
AT: Statistik Austria, Volkszählung, 2001; Statistik des Bevölkerungsstandes, ab 2007.
IT: Communi Italiani, www.comuni-italiani.it.
FR: Estimations de population basé sur le recensement de la population, 2012.

In this respect, it has to be stated that a large part of the population is subject to the law on expulsion, whereby a considerable number of them are to be considered denizens.

The consequences of an expulsion order are particularly serious for persons who have been living in a country for a long period, and even more so for persons born in that same country. Although this fact is considered by the Swiss law as well as by administrative and judicial practice, expulsion orders in according cases are no exception but an established part of the expulsion practice. Based on a survey of Swiss cantons regarding their practice in decreeing expulsions, a study of the Federal Commission on Migration (Wichmann, Achermann and Efionayi-Mäder, 2010: 8) evaluates that in 2009 expulsion orders were decreed for at least 750 persons with residence permits, due to delinquency. Unfortunately, it is not possible to precisely determine what proportion of these were persons with permanent resident permits C or persons born in the country, because there is no consistent cantonal database on expelled persons and their status. But the report concludes that in almost all the cases of serious offences (e.g. violent crimes or drug trafficking) foreigners are expelled regardless of their status (ibid.). In regard to this expulsion practice and the number of denizens living in Switzerland, it is important to pay attention to this specific group within the scientific debate on expulsion.

Of course, Switzerland is not the only country with an important population of immigrants and serious regulations on expulsions. The neighbouring countries Germany, Austria, France and Italy, for example, expel delinquent foreigners and have, compared to the Swiss law until October 2016, to some extent similar regulations.[4] However, these countries have implemented far-reaching protection from deportation for several categories of foreign residents. Second-generation immigrants are among the categories with the best protection from expulsion. In Austria, foreigners born in the country are excluded from expulsion in an absolute way. In Italy and France, they are almost absolutely protected from expulsion. Germany has stricter regulations regarding expulsion and is much closer to the Swiss legal framework. But, in contrast to Switzerland, Germany has also implemented a form of jus soli within the naturalisation law so that a much smaller proportion of second-generation immigrants are actually foreign citizens. Taken as a whole, these neighbouring countries guarantee a much higher level of protection for second-generation immigrants. Nevertheless, they can, even though in a more limited range, expel delinquent denizens, if they present a serious threat to public security (Fargahi, 2015; Fornale *et al.*, 2011; Kurt and Leyvraz, forthcoming). Consequently, the necessity of discussing the situation of denizens regarding expulsion law prevails beyond the Swiss case. However, the discussion of the Swiss case is of particular importance due to the strict formulation of the expulsion law, the low protection of denizens from deportation and the high number of denizens within the Swiss population, as well as the high number of second-generation immigrants without Swiss citizenship. Furthermore, the current adaptation of the Swiss law exacerbates the regulations on expulsions and seriously expands the reasons that can give rise to deportation. In this sense the law on

expulsion has taken a serious turn and the discussion of the situation of denizens, especially of second- or third-generation immigrants, has become even more important.

In the light of the above, this chapter will in the following discuss the legal context of Switzerland by presenting the expulsion regulations and current legal changes. Thereby the situation of denizens, and of second- and third-generation foreigners in particular, is reflected in more detail. As the discussion shows, denizens' rights are subject to modification. Thus, their position as quasi-citizens is under pressure and their belonging to Switzerland is questioned.

The legal context for denizens' deportation

While foreigners' deportability is stated in Art. 121 of the Swiss Federal Constitution, the provisions regulating the deportation of foreigners are listed in the Federal Act on Foreign Nationals (FNA) of 16 December 2005 (Federal Assembly of the Swiss Confederation, 2005/2015). This legal frame is further complemented by the Agreement with the EU on the Free Movement of Persons (AFMP, see Die Schweizerische Eidgenossenschaft, 2015), by the Asylum Act (AsylA) and by the Swiss Criminal Code. Other regulations of reference are the provisions of the European Convention on Human Rights (ECHR), addressing the protection of individuals from illegal and illegitimate state interventions. The most important legal acts for removal decisions in case of legally convicted foreigners with a permanent residence permit, as well as the legal developments, are presented and discussed in the following sections.

Denizens' deportability until 2016

One of the core values of the FNA is the maintenance of public security and order (Der Schweizerische Bundesrat, 2002). Public order is understood as a form of well-ordered cohabitation of individuals within society. Respect for the legal system and the protection of public and individual goods are constitutive for the concept of security. If foreigners offend laws or administrative decisions and therefore violate public order, then the state authorities have the right to remove and keep people away (see Staatssekretariat für Migration, SEM, 2013). The provisions that end a foreigner's residence in Switzerland are defined in the FNA's chapter 10, entitled 'End of the Period of Stay'.[5]

Removing people from the territory requires the withdrawal of their residence rights. Therefore, residence permits are revoked before issuing a removal order. People with a permanent residence permit have the right to reside in the country for an unlimited period of time. Their rights are to some extent better protected, especially for those having resided in Switzerland for more than 15 years, i.e. denizens including second- and third-generation foreigners. But their residence permit may be revoked in case of a long custodial sentence and if they violate or represent a threat to security and public order. Therefore, the Federal Act on Foreign Nationals affirms:

Art. 63:

1   The permanent residence permit may be revoked only if:

    a   the requirements of Article 62 letter a or b are fulfilled;
    b   the foreign national has seriously violated or represents a threat to public security and order in Switzerland or abroad or represents a threat to internal or external security;
    c   the foreign national or a person they must care for is dependent permanently and to a large extent on social assistance.

2   The permanent residence permit of foreign nationals who have resided in Switzerland in a law-abiding manner for an uninterrupted period of more than 15 years may be revoked only on the grounds set out in paragraph 1 letter b and Article 62 letter b.

And referring to foreign nationals in general, Art. 62 states:

The competent authority may revoke permits . . . if the foreign national:

a   or their representative in the permit procedure makes false statements or conceals material facts;
b   has been given a long custodial sentence or has been made subject to a criminal measure in terms of Article 64 or Article 61 of the Criminal Code.

The FNA's regulations are furthermore completed by the AFMP, which entered into force in 2002. It restricts the deportability of EU/EFTA citizens to cases where an individual currently presents a real and serious threat to public order, security and health (see appendix I Art. 5 AFMP). Thus, persons covered by the AFMP undergo a different regime and are much better protected from a removal order irrespective of the residence permit or the length of residence (Wichmann, Achermann and Efionayi-Mäder, 2010: 29). In consequence of the revocation of a permit, the administration has the right to issue a removal order (Art. 64, FNA) and foreign nationals have thereafter to leave the country.

Within the application of the presented regulations, proportionality as addressed in Art. 96 FNA has a strong position. The type of crime, the length of penalty, the integration and length of stay in Switzerland, and also the behaviour after the criminal deed has to be taken into consideration (see Spescha *et al.*, 2015). Furthermore, a removal order and its enforcement are only admissible in compliance with Art. 8 ECHR (Protection of privacy and family life) and Art. 25 of the Swiss Federal Constitution (Protection against expulsion, extradition and deportation).[6] Until 2016,[7] the legal practice was therefore based on a case-by-case review (Achermann, 2013: 250; Wichmann, Achermann and Efionayi-Mäder, 2010: 32–35).

Usually, the cantonal administration in charge is informed about a foreign resident's criminal conviction and has to decide how to act in the specific case.[8] The revocation of a permanent residence permit from a person who has resided in Switzerland for more than 15 years is only possible when the person is sentenced to prison for a longer period and if she or he has seriously violated the public security and order or is perceived a serious threat to it. According to the Federal Tribunal (see Judgment of the Swiss Federal Tribunal BGE 135 II 377 E. 4.2 and 4.5: 379–383; Judgment of the Swiss Federal Tribunal BGE 137 II 297 E. 2: 297–302) imprisonment of more than 12 months is considered a long custodial sentence. In the case of spouses of Swiss citizens, the practice that prevails is to only consider a removal order when the person is sentenced to prison for 24 months or more (Reneja case). Some administrations also apply this practice to a wider range of people (Wichmann, Achermann and Efionay-Mäder, 2010). Beside the length of imprisonment, it is the type of crime that is considered to determine the seriousness of the violation of public law and order. In particular, violent crimes, sex crimes and drug offences are perceived as serious crimes and therefore meet these requirements. Whether or not a person has to be considered an actual threat to public order heavily depends on the likelihood of future offences. Therefore, the offender's current behaviour and the scope of committed crimes are relevant (Achermann, 2013: 248–252).

The requirement of a decision's proportionality is met through balancing the offender's interest against the state's interest. The heavier the violation or threat to public security and order that is perceived, the more likely becomes the removal order. The more a person is perceived as integrated and his or her life as related to Switzerland (i.e. place of birth, length of stay in Switzerland, social ties, employment vs. receiving social benefits, good behaviour vs. activity against law and norms), and the less a life in the country of their nationality is reasonable (based on knowledge of the country, language skills, social ties, potential hazards), the higher the requirements for removal orders. Removal orders in the case of second-generation immigrants are therefore only legitimised after heavy violent crimes and drug crimes with unfavourable prognosis for the future (ibid.; Judgment of the Swiss Federal Tribunal: FT/2C_407/2013).

A careful reading of the Federal Tribunal's assessment indicates how different factors, which basically favour the retention of the permanent residence permit, did not work in the case of Mariella V. mentioned above. Even though her whole life was anchored in Switzerland, this did not play a decisive role. She was even considered not to be integrated (Judgment of the Swiss Federal Tribunal: FT/2C_407/2013). Thus, it is obvious that within the legal practice, integration does not primarily refer to socialisation in the Swiss context or social ties, nor does it refer to participation in society in general. Otherwise, it would have been recognised that someone has to be very well integrated in order to maintain his/her position in a criminal milieu over a long period of time. In the legal practice, integration is only acknowledged if the person conforms to the definition of a 'good citizen'. The 'good citizen' lives in conformity with the written and unwritten

social norms. He or she earns money in an orderly way, pays debts, does not rely on social benefits, respects law and order and does not commit crimes.[9] That is why a member of the second generation committing heavy crimes seems to be by definition excluded from orderly integration in Switzerland and can legitimately be deported abroad.

In strong contrast with this legal practice that refers to the 'good citizen' when evaluating integration to justify the denizen's deportation, are the positions of the Federal Chief Justice Andreas Zünd (1993) and the lawyer Babak Fargahi (2015). They focus on questions of belonging and argue in favour of a consequent protection from expulsion for people whose home country is Switzerland. Fargahi (2015) points to the limitation of the administration's discretionary power when issuing removal orders. To evaluate the reasonability of a denizen's expulsion, the administration has to consider the foreigner's relations to the country of citizenship. The absence of such relations seriously hinders the administration in issuing removal orders. He argues that these restrictions support the idea that people who do not have a real alternative to residence in Switzerland actually belong to Switzerland and therefore may not be expelled to other countries (ibid.). This approach conforms to the position of Andreas Zünd, who claimed already in 1993 a right to have a 'Heimat', i.e. an unlimited right of residence for second-generation foreigners. According to his legal opinion, second-generation immigrants belong to Switzerland irrespective of the acknowledged degree of integration. They do not have to earn the protection of their resident rights by successful integration. They belong to Switzerland because they do not belong anywhere else and therefore they should be excluded from expulsion in an absolute way (ibid.). The current legal practice that justifies the deportation of second-generation foreigners by referring to a lack of integration and focusing on the protection of the public order and security is in strong contrast with this perspective.

Plot-point: the 'deportation initiative'

In 2008, the SVP (Swiss People's Party) successfully submitted a popular initiative 'for the expulsion of foreign criminals' that seeks to implement an automatic removal of criminal foreigners and foreign nationals who engage in welfare fraud.[10] The political debate that followed identified several problems regarding the initiative's implementation. For the Federal Government it was obvious that the proposal went against international law and basic constitutional rights, but it declared it valid in order not to prejudge and limit the popular rights. It further pointed to difficulties Parliament would face in creating a list of clearly defined offences all resulting in automatic deportation. As the extra-parliamentarian Federal Migration Commission affirmed, the abolition of the case-by-case review is highly problematic regarding the continuity of the rule of law. The commission also emphasised incompatibility with the AFMP (Wichmann, Achermann and Efionayi-Mäder, 2010: 9).

To avert the initiative's acceptance and implementation, the Federal Government presented a counter-proposal that considered the claim of the popular initiative to

implement a more restrictive law regarding the removal of criminal foreigners, but sought to comply with the current legal frame. The draft foresaw the expulsion of foreign nationals convicted of serious crimes while allowing a review of each case (The New York Times, 2010).

After heated debates and a campaign utilising controversial 'black sheep' posters (Maire and Garufo, 2013), Switzerland's radical right-wing party won the voters' support. Final results of the poll on 28 November 2010 showed that 52.3 per cent of voters and a majority of Switzerland's cantons supported the rightist SVP's initiative. The counter-proposal by the government and centre-right parties found support from only 46 per cent of voters and was therefore rejected.

With the acceptance of the popular initiative, the Federal Constitution of the Swiss Confederation adopted the following formulation of Art. 121, §§ 3 to 6:

§3   Irrespective of their status under the law on foreign nationals, foreign nationals shall lose their right of residence and all other legal rights to remain in Switzerland if they:

a)   are convicted with legal binding effect of an offence of intentional homicide, rape or any other serious sexual offence, any other violent offence such as robbery, the offences of trafficking in human beings or in drugs, or a burglary offence; or

b)   have improperly claimed social insurance or social assistance benefits.

§4   The legislature shall define the offences covered by paragraph 3 in more detail. It may add additional offences.

§5   Foreign nationals who lose their right of residence and all other legal rights to remain in Switzerland in accordance with paragraphs 3 and 4 must be deported from Switzerland by the competent authority and must be made subject to a ban on entry of from 5–15 years. In the event of reoffending, the ban on entry is for 20 years.

§6   Any person who fails to comply with the ban on entry or otherwise enters Switzerland illegally commits an offence. The legislature shall issue the relevant provisions.[11]

Immediately after the vote, opponents undertook a last step to undo the voters' momentous decision. An immediate appeal to the Federal Tribunal was lodged that sought to void the direct democratic decision by reason of the initiative's incompatibility with human rights obligations and with agreements on the Free Movement of Persons (i.e. the AFMP). The Supreme Court rejected the appeal, reasoning that the voters were correctly informed by the government about the difficulties of implementation and that political parties are not obliged to inform objectively in their campaigns (Judgment of the Swiss Federal Tribunal: FT/1C_514/2011).

The implementation of the deportation initiative

The implementation of the initiative had to be realised within the period of five years. To initiate this process, a working group was charged with finding a solution that respected the new provisions and addressed the various legal conflicts.

In autumn 2012, the Federal Tribunal declared that the legal implementation had to respect and preserve the unity of the Constitution and referred in particular to the rule of law as addressed in Art. 5 of the Swiss Constitution. Even if Parliament would have considered adopting the new constitutional article automatically and transforming it unconditionally into law, the Federal Tribunal affirmed that the principle of proportionality and the right to legally claim a judicial review of singular cases in respect of the ECHR's 'right to respect for private and family life' (Art. 8) had to be respected.[12]

In June 2013, the Federal Government submitted an implementation provision to the Parliament that kept some distance from automatic deportation of foreign offenders and was in line with respect for human rights. In the meantime, the SVP created new pressures on the Parliament, submitting a second initiative with the objective of enforcing the result of the first deportation initiative. Moreover, at the time of writing, another initiative is in the pipeline that seeks to ensure that domestic law prevails over international law. It would therefore guarantee strict implementation of the constitutional amendment on the 'deportation initiative' and of future initiatives that conflict with the European Convention on Human Rights.

The National Council,[13] the larger House of Representatives in Parliament with the SVP as strongest party, favoured by a large majority in March 2014 the unlimited implementation of the 'deportation initiative'. It even adopted articles of the recently submitted 'enforcement initiative' of the SVP. Civil society, professional legal organisations and media responded and started a major debate. Finally, members of the Senate, the State Council (see endnote 14), significantly changed the National Council's proposition and took the implementation in a different direction. Emphasising the importance of the judiciary and legislative powers division, it decided with a large majority to object to absolute automatism in expulsion law and to introduce a 'hardship case'. This should enable the judge to prevent expulsions and bans in specific cases, such as, for example, members of the second generation born and raised in Switzerland. In this sense, the principle of proportionality should prevail. Within the Senate's debate the question on the deportability of second-generation foreigners received increasing attention and a motion to generally forbid their expulsion was submitted, but did not pass the Senate's vote (Neue Zürcher Zeitung, 2014).[14] Thus the State Council's proposition does recognise the need for better protection of second-generation immigrants from expulsion, but does not acknowledge an unlimited right of residence. The position of denizens in society is therefore confirmed: they are not perceived as part of the nation. Even those born in Switzerland do not belong to the country unconditionally.

In March 2015, the National Council turned to the opinion of the State Council and accepted hardship cases. The new law passed on 20 March. It contains an exhaustive list of offences that entail an obligatory banishment (*Landesverweis*). The law further affirms that the court might exceptionally refrain from banishment if it caused a hardship case, but only if the state's interest in decreeing the banishment does not overweigh the person's interest in residing in the country. In this regard, it also emphasises the necessity to consider the situation of second-generation immigrants in particular. This narrow margin is furthermore an attempt to enable the judge to comply with international treaties.

Towards a reconfiguration of Swiss denizenship – or, who can stay?

Since the early 1970s, several popular initiatives in Switzerland have urged votes on immigration issues, but have rarely succeeded. However, the situation started to change with the rise of the SVP in the 1990s. The conservative populist right-wing party successfully mobilises on migration issues, the differentiation of the 'true people' vs. the 'elitist government', and the tension between domestic and superior 'foreign' law, where the situation is interpreted as one of a loss of sovereignty and democratic power through the domination by human rights (Ruedin and D'Amato, 2015). At the beginning of the twenty-first century, they represent the largest party in the National Council. At the same time, xenophobic subjects have acquired the ability to win a popular majority. The 'minaret initiative' (2009), the initiative on 'the deportation of foreign criminals' (2010) and the one 'against mass immigration' (2014) were the first successful initiatives that promoted a neo-national agenda (Skenderovic and D'Amato, 2008; D'Amato and Skenderovic, 2009; van der Brug *et al.*, 2015).

Competing liberal and neo-national trends form the context of this socio-political shift. During the twentieth century, immigrants' rights gradually increased, for example in respect of residence rights, access to employment, provisions for family reunification or access to the welfare state. Finally, the Bilateral Agreements between Switzerland and the European Union (EU)[15] have considerably extended the rights of EU citizens since the end of the 1990s. But these liberal reforms have been countered by the assertiveness of neo-national positions. Thus, several reforms to facilitate access to citizenship for second-generation immigrants have failed. New requirements for residency and citizenship have been implemented and integration has become the new buzzword to measure someone's aptitude for naturalisation. Efforts are present to define national membership in exclusive, cultural nationalist terms. Moreover, former far-right positions have been successfully transferred towards the political centre. Consequently, it is quite popular within the political arena to attack the presence of migrants, to question their protection by human rights, and to predicate immigrants' residence rights on their submission to the republican values of the nation and to a life of a 'good' citizen.

This shift is quite similar to developments regarding liberalisation and neo-national trends that have been identified in the European context. As Feldblum (1998) states, the liberal and reform-oriented debate in the twentieth century on the challenges of the nation-state made a potential liberal reconfiguration of citizenship within Western European states thinkable. This optimism, strongly impressed by the end of the Cold War, the continuing evolution of European integration and the first provisions of the Maastricht Treaty (1992), seemed to produce new categories of citizenship and associated rights for EU nationals. Since then, with slightly different nuances, more protected rights for third-country nationals were incorporated in the respective directives of the EU. Consequently, different European polities have extended rights to non-citizens previously associated with formal state citizenship, such as access to social welfare, labour and markets, as much as residency and the right to vote, at least at the local level. These rights include to a certain extent also the liberty of the person to choose his place of stay and the protection from being banned. Therefore, migrants have become if not citizens, at least denizens.

In contrast with the liberal, post-national expansions of rights, there has also been a powerful neo-national reinterpretation of citizenship. Membership in neo-national terms is, according to Feldblum (1998), a reconfiguration of cultural, national and even supranational boundaries in order to ensure new closures. Popular in this matter are nativist positions, arguing for example that successful cohabitation of 'immigrants' and 'natives' is impossible due to 'cultural differences'. Such culturalist arguments focus on difference and favour developments that go against the 'new political economy' that changed the post-war order in Europe. Basically, they demand the reconstruction of European identity as a historical-organic collection of heritage to protect cultural particularities. Thus, a general affirmation of the regimes' liberalisation and de-ethnicisation is still premature. Up until the present, member states and their understanding of national identities have a strong impact in mapping ethno-national hierarchies and in defining foreignness and citizenship (Dumbrava, 2014).

Focusing again on the Swiss context, it can be concluded that the presented legal developments are clearly in line with neo-nationalist conceptions of citizenship. The new law not only dramatically expands the set of offences leading to expulsion, but also abolishes the higher protection of long-term residents. This dramatic loss of rights constitutes a reconfiguration of the denizen's status. By increasing the denizen's deportability, their status is no longer as close to actual citizenship. It can even be argued that denizenship no longer accurately describes their status. According to the EUDO glossary, the status of denizenship implies an enhanced protection from expulsion compared to short-term residents.[16] Since the current expulsion law no longer differentiates between the different residence permits, it no longer corresponds with this aspect of the definition. In regard to this particular definition, it actually abolishes the status of denizenship.

The tendency in Switzerland to degrade denizens' status is further present in another legal project. To implement the initiative 'against mass immigration',

a revision of the Foreign Nationals Act (FNA) is taking place.[17] The current legislative proposal of the Federal Council (executive) lowers the status of a permanent residence permit through a derogation of the rights it grants. Thus, a further decrease of denizens' status is envisaged, and calls for more attention and discussion. At this point, the developments certainly question the actual persistence of denizenship in Switzerland.

Conclusion

The debates on the meaning of national identity and community, the integration of immigrants and the treatment of national minorities have increasingly focused on peoples' rights, and citizens have been successfully mobilised for legal projects that seek to restrict immigrants' rights. 'Who can stay?' is one of the core questions of these struggles in the field of migration and citizenship politics. Beside immigration and naturalisation law, the state's law on expulsion defines to an important extent the frame of action to regulate the population's composition. Especially in the light of the debates focusing on terrorism and security, the state's expulsion politics have gained more attention within academic discussion in recent years.[18] As a complement, this chapter focuses on the expulsion of criminal denizens in Switzerland and seeks to further stimulate reflection on questions of belonging, citizenship and a state's responsibility towards its inhabitants.

Taking the example of Mariella V., whose expulsion was confirmed by the highest Swiss Court but overruled by a judicial decision of the respective Cantonal Justice Department, the logic of the Swiss expulsion law and its underlying norms are illustrated. Considering the social, political and legal dimensions, the discussion further highlights the persistent ambivalences of the political cultures with which denizenship is confronted today.

The discussion of recent legal developments in Switzerland finally points to the fact that the new legal frame increases the demarcation between citizens and denizens, and therefore corresponds to a neo-national trend. With the acceptance of the 'initiative to deport foreign criminals' in 2010, Swiss voters supported the request to be tougher on alien offenders. Although the situation of second-generation immigrants was permanently at the centre of Parliament's debate and the need for their particular protection was often referred to, the implementation of the deportation initiative has not improved but worsened the legal protection of those 'immigrants' born and raised in the country. Their deportability, as well as an extensive catalogue of offences that result in deportation, were confirmed by the Senate and the new law entered into force in October 2016. Obviously, the control over hardship cases prevents a blind application of the new law and therefore an absolute automatism in legal practice. However, this additional provision will only meet its purpose, namely the guarantee of the rule of law, if the respective assessment of individual cases consequently takes place. To what extent this provision will enable judges to prevent denizens, especially second-generation immigrants, from being deported will be proved by judicial decisions in the coming years. In any case, it has to be noted that the law's adaptation has

caused several fundamental changes. Before 2016, the administration's decision on expulsion was based on the level of penalties and the balancing of interests in each case. Under the new law, the judge's decision is primarily based on the list of offences that demand expulsion (Kurt, 2016: 48). To prevent somebody from expulsion, a legitimation for the exceptional adoption of a hardship case is requested. Furthermore, the law abolishes the former extended protection of people with a permanent residence permit. This dramatic loss of rights heavily degrades their status and thus puts the actual status of denizenship at stake.

The current migration politics opposes the immigration of vulnerable persons and those who could become what was once called the 'dangerous class'. Immigration law is supposed to filter out all those who are poor, unemployed and in need of help, and for that reason undeserving of staying in Switzerland. For those who have immigrated, access to citizenship is impeded, especially if their behaviour does not correspond with the life of a 'good citizen'. Foreigners' residence status is not secure, and so they are kept in a deportable position. If these persons should incur undesired costs or not behave according to an orderly life, they can be expelled to their 'country of origin'. This holds true even for people born in Switzerland or denizens in general. Thus, they are not actually perceived as denizens belonging to Switzerland, but as tolerated foreigners.

The way that states deal with 'undesirable' residents is not only the result of conflict between sovereignty and rights, but also an indicator for *civility*. What is the commitment and responsibility of state and society with regard to people who were socialised and became criminal in this particular national context? Would it be legitimate to expel Mariella V. to Italy, even if she was born, became ill and became criminal in Switzerland? Against such a policy, we argue that a modern society holds responsibility towards its entire resident population. This also holds true for individuals who became deviant. Following this logic, denizens born in the country should be excluded from banishment.

Notes

1 The Swiss People's Party (SVP) is a radical populist right-wing party that successfully mobilises on migration issues (D'Amato and Skenderovic 2009). The party's mobilisation regarding the deportation of foreign resident criminals is further described in the sections on the popular 'deportation initiative' and its implementation.

2 The popular initiative is a direct democratic instrument of the Swiss electorate to require a partial revision of the Federal Constitution. If 100,000 eligible voters sign the initiative, the amendment to the Constitution is put to the popular vote. If the initiative is approved, the Parliament has to develop the required legislation to implement the initiative (www.ch.ch/en/popular-initiatives).

3 See www.eudo-citizenship.eu/databases/citizenship-glossary/glossary.

4 Like Switzerland, they weigh up the person's interest in staying in the country against the threat he or she presents to public security and order. Therefore, a case-by-case assessment takes place that considers the personal situation and respects the protection of private and family life according to ECHR (European Convention on Human Rights) regulations. Furthermore, the guideline – the longer a person resides in the country, the greater his or her interest in staying – is respected (Fornale *et al.*, 2011; Kurt and Leyvraz, forthcoming).

 5 In addition to the FNA's provisions, the Swiss Criminal Code formerly enabled the judge to impose an expulsion (*Landesverweis*). In other words, the court and the administration was able to cause the removal of a convicted foreigner based on different legal regimes. To eliminate this dualism in law, the respective provisions in the Swiss Criminal Code were removed in 2007; see Achermann, 2013: 246.

 6 Swiss Federal Constitution, Art. 25, 'Protection against expulsion, extradition and deportation': '1. Swiss citizens may not be expelled from Switzerland and may only be extradited to a foreign authority with their consent. 2. Refugees may not be deported or extradited to a state in which they will be persecuted. 3. No person may be deported to a state in which they face the threat of torture or any other form of cruel or inhumane treatment or punishment.'

 7 The law's adaptation in regard to case-by-case review is described in the subsequent section.

 8 For a more detailed description of administrative practice and procedures, see Achermann, 2013.

 9 In other words, the conception of integration complies to a large extent with the definition in Art. 77 (VZAE) that emphasises, beside language competencies, especially the respect of law and order, as well as economic integration; see also Fargahi, 2015.

10 Even though the initiative used the term 'expulsion' or 'deportation', the content of the claimed regulations concerns the law on the revocation of residence permits and the issuing of removal orders. The execution of a person's removal is regulated in additional articles of the FNA. This includes autonomously leaving the country, along with other forms of a more controlled or even forced expulsion.

11 Adopted by the popular vote on 28 November 2010, in force since 28 November 2010 (Federal Decree of 18 June 2010, Federal Council Decree of 17 March 2011 – AS 2011 1199; BBl 2008 1927, 2009 5097, 2010 4241, 2011 2771).

12 See www.humanrights.ch/de/menschenrechte-schweiz/inneres/auslaender/politik/umsetzung-ausschaffungsinitiative.

13 The Swiss Parliament (legislative authority) has two chambers: the National Council (200 members) and the Council of States (46 members). The members of the National Council and the Council of States are elected by Swiss voters, see www.admin.ch/gov/en/start/federal-council/political-system-of-switzerland/swiss-parliament.html.

14 A particular case made the limited turn of the Parliament tangible. It is the case of A.R. and M.V., which had a certain resonance in press and parts of civil society. One of the members of the State Council campaigning for a change was their defender, and argued his case in the Senate in order to change the implementation of the law.

15 For an overview see www.eda.admin.ch/dea/en/home/bilaterale-abkommen.html.

16 See www.eudo-citizenship.eu/databases/citizenship-glossary/glossary.

17 For further information see www.ejpd.admin.ch/ejpd/en/home/aktuell/news/2016/2016-03-04.html. Of special interest in this matter is the 'Zusatzbotschaft zur Änderung des Ausländergesetzes (Integration)'.

18 See for example http://eudo-citizenship.eu/commentaries/citizenship-forum, and discussion related to 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?', http://eudo-citizenship.eu/commentaries/citizenship-forum/1268-the-return-of-banishment-do-the-new-denationalisation-policies-weaken-citizenship.

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6 'In its majestic inequality'

Migration control and differentiated citizenship

Juan M. Amaya-Castro

Introduction

This chapter aims to illustrate how migration control policies worldwide contribute in the development of a differentiated citizenship. This happens primarily by means of differentiations in the right to mobility. These differentiations are by no means a new phenomenon; their history is very complex and filled with many vicissitudes. Mobility was at one time linked to one's place in the feudal, racial or imperial/colonial order of things (Torpey, 2000). More recently, the globalisation of borders and the nation-state have effectively nationalised political identity, and the right to mobility has been effectively transposed onto this new ordering of things (McKeown, 2008). However, as globalisation rages on, and as hundreds of millions, even billions, of people travel across national borders each year, for whatever reason or period, mobility control has become a global, technologically integrated apparatus that 'manages' the relentless flows of international travel (Geiger and Pécoud, 2010). The institutional mechanisms behind all this control and management may, from a distance, seem less integrated, and formally the production of rules and policies about mobility is overtly decentralised to primarily, but not exclusively, sovereign states (Cholewinski, Perruchoud and MacDonald, 2007). For most travellers it is their nationality that is one of the prime determinants of the value of their international mobility currency. But, the fact that different passports open different doors is only the beginning of this story. The aggregate of migration policies order mobility in very complex ways. This chapter wants to offer a view of these complex ways and illustrate how being a citizen in the world today means different things with regard to one's international mobility, with the many things that this entails.[1] And so, it is argued, citizenship in this way becomes differentiated to the point of stratification.

Much has been written about the legitimacy, ethics or even justice of migration control (Blake, 2003). This chapter seeks instead to offer a first sketch, a broad description of a differentiation rather than a normative analysis. In doing this I aim to adopt a perspective that is 'global' in two ways. First, I work from the perspective of a type of 'global' citizenship, albeit one that is formally scattered across nations and perhaps rather weak from the perspective of political theory. Second, I posit the existence of a 'global' migration control regime, albeit one that

is decentralised. Both these perspectives merit some elaboration before moving to explain how migration control policies contribute to the production of a differentiated citizenship.

Citizenship as a logic of social differentiation on a global scale

I want to begin by approaching the conceptual category of citizenship as pointing to a logic of social differentiation produced by material socio-economic conditions and legitimated by ideological constellations with deep historical roots. Modern, post-enlightenment citizenship based on formal equality before the law offers an example of how such an ideological legitimation conceals a system of social differentiation by means of class, gender and race relations. In the words of Anatole France, 'The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread' (France, 2007).[2] Behind the language of equal formal status and rights, citizenship differentiates between, in France's example, rich and poor. So, and pursuing this critical cue, these are not instances in which formal equality is incomplete, or in which formal equality somehow fails; rather, these are instances in which formal equality is the actual vehicle of differentiation, the discursive or conceptual mechanism that makes differentiation possible (Marx, [1843] 1992). In other words, in the 'backgrounding' of specific conditions and structural alignments, such as class, race and gender, post-enlightenment liberal ideas of citizenship can present themselves as being *about* equality, when in fact they are about differentiation.[3]

So, looking at the moment when T.H. Marshall proposed, in 1950, the idea of *social* citizenship, we can see how he is, in a way, elaborating on Anatole France's observation, by *foregrounding* socio-economic conditions, thereby elevating the contingencies and (mis-)fortunes of economic hardship and success to the level of formally recognised 'status' (Marshall, 1950). This elevation to status makes it possible for him to integrate citizenship with the notion of social and economic *rights* (Pocock, 1992). In other words, in making this ideological intervention he is including socio-economic conditions in what could be called 'attributes of citizenship' or a 'citizenship inventory'.

Clearly, Marshall's idea of social citizenship seems, for now at least, to have taken a back seat, but it is important to consider *how* the social differentiations that he pointed at have been reframed in recent years. And so, and very simplistically, 'the poor' have been reframed as 'those caught in a poverty trap' – or even in a 'culture of dependency' – because of 'insufficient incentives in an over-regulated marketplace'. This reframing is linked to the overall neo-liberal dismantling of the welfare state (McCluskey 2002). From this perspective, what the poor or otherwise disadvantaged need are opportunities, not a patronising state; instead, the state should govern by means of incentives. In addition, Marshall's argument for a differentiated approach, became, in the 1980s and 1990s, dominated by a focus on identity and group-centred politics (Taylor, 1994). Though Nancy Fraser

(1997) and others have pushed back against this development, it is still very much dominant and the idea of a differentiated citizenship may still often be associated with multiculturalism, rather than with socio-economic conditions.[4]

And so, I want to argue that citizenship implies not merely a logic of differentiation, but one that is concealed by an ideological constellation that serves to justify it. The social differentiation that I want to highlight in this chapter is related to migration, and to how mobility across boundaries is not equally accessible to all. Stated in terms of rights, one could talk about a right to mobility, and how this is allocated in discriminating ways. In approaching this question, one should consider what some have called the bias of 'methodological nationalism' (Wimmer and Glick Schiller, 2002). 'Methodological nationalism' refers to the perspective that takes formal (territorial) national boundaries as empirical facts, and has been particularly critiqued as a bias in the empirical sciences. This is, from the perspective of the critique, problematic in that it hides trans-boundary and transnational processes and dynamics. A focus on the formal status of national citizenship would thus be problematic in that it would ignore other, differentiating ways in which mobility is allocated. In contrast, this chapter adopts an unashamedly 'cosmopolitan' perspective, in which citizenship and nationality are constituted globally or internationally. This flies in the face of the conventional account in which citizenship is centred on the connection between people and the political community to which they belong. From this conventional perspective, there is no 'global' or even international political community, and so any idea of a global citizenship is purely aspirational or even utopian. I do not necessarily disagree with that assertion, but want to focus on a more concrete dimension that sidesteps 'belonging', or even membership, and that can be more empirically ascertained: as people – those who are allowed, at least – move around the world, with their credit cards, with their air miles, with global health services, they enjoy protection of all sorts, of their lives, their property, and their ability to leave and go elsewhere. For sure, this globetrotting citizen of the world still formally belongs somewhere, in a nation-state, and will always remain foreign to most places on her path. And so, what this chapter embraces is perhaps an extremely minimal or thin notion of citizenship, but one that is nevertheless global and concrete without being aspirational. But also, what this chapter embraces is the logic of differentiation, the notion of citizenship that centres on the differentiated access to this global/international realm.

Global migration control

Migration control is broadly presumed to be the prerogative of states, and is therefore often referred to as *im*migration control. Immigration control is usually described as a manifestation of the will of sovereign states, which by this means express their prerogative to decide who comes in, for what reason and for how long, and who stays out. Liberal philosopher Michael Walzer has even defended the view, in fact the widely held view, that this right is at the heart of national political self-determination (Walzer, 1983; Miller, 2016). Though his focus is on

membership, and not on presence or mobility, membership exclusivity requires the possibility of exclusion of presence. In this view, a country is hardly a country if it cannot or does not determine who has access to its territory (Miller, 2014).

Interestingly, the preceding sentence used to read 'who *and what* has access to its territory'. This may still be the case, but in recent decades it has become much easier for goods, services and capital to move across borders (Trachtman, 2009). In fact, though states may still control imports and capital flows, the burden is on them to explain why they would stop a good, or an investment, at the border. The opposite is true in the case of international travel, where it is the traveller who requires the demonstration of a right of entry. These recent, but profound, changes in the essence of the sovereign right to control access to territory offer an indication of how sovereignty, and the whole idea of what a country needs to be in order for it to be a real country, is a dynamic concept that is much more malleable and contradictory than people like to think (Rasch, 2004; Koskenniemi, 2006; 2011; Kalmo and Skinner, 2014).

In fact, and with regard to migration, this intrinsic right of states to control immigration has a history – a pre-history even, since it is older than the modern post-Enlightenment state – that relates to the various ways in which persons acquire status or citizenship in the broadest sense of the word (McKeown, 2008). And it is exactly in this way that we can say that migration control is not merely, or not only, or not exclusively, or not at all, an expression of a national political will, but rather, instead or additionally, a manifestation of a global system that attaches people to a nation-state.[5] And so, this global migration regime can be conceived of as a decentralised system, in which the different units deploy a limited set of tools for a limited range of reasons. It is the tools and the reasons that form the subject of the analysis that follows.

Migration control and selection as social sorting on a global scale

To say that immigration countries (those experiencing a positive net immigration rate) use their sovereign power to keep people out is, at best, half true. After all, the number of people legally crossing international borders is massive, with the UN World Tourism Organisation counting over 1.2 billion international tourists in 2015 (UNWTO, 2015), and with each of the world's five busiest international airports registering between 40 and 70 million international passengers a year. There is no counterfactual data indicating how many people would travel if there was no migration control, and, of course, travel is not the same as migration. However, the numbers are very high, even with travel and migration control, and so the function of immigration policies can be said to be to make sure that only entitled people (primarily those with nationality) and 'desirable' people enter. A general look at how the migration control regime operates indicates that what states do fulfils in fact a very specific function: selection (Miller, 2015). Consider the typical line at an airport, where people are asked to identify themselves. They are organised around different categories and with different rights of entry and of

stay, albeit with or without conditions. And so, the very idea of admission is that some are allowed to go through and others not. Seen globally, selection by means of migration control becomes quite generic. In other words, there are a relatively few criteria used to categorise people, even if individual national immigration regimes may be very complex. In what follows I will offer a rough sketch, a first glance at the tools you will find in any national migration law toolbox.

Nationality

A first and essential means of categorisation is nationality. Interestingly, although this is where you would think that the right to determine membership is most applicable, it turns out that things are not so simple. States are more or less bound to accept at least a majority of the people in their territory as their citizens (Spiro, 2011). To begin with, statehood itself is derived from the existence of a population or citizenry. Whenever states have taken their right to determine membership very seriously, for instance by resorting to mass expulsion (or worse) of an unwanted group, this has led to massive humanitarian crises, or even to outright war, and has thus exposed this approach as a major potential for systemic destabilisation, to the point that mass expulsion or other forms of 'cleansing' have been prohibited (Henckaerts, 1995). Likewise, a state could not nationalise the citizens of other states against or even with their will, although this becomes a possibility in a case where there is a political will to adopt a 'foreign' nationality, and as long as the numbers are not so large and geographically concentrated that it would be tantamount to secession and/or annexation by the foreign state.[6] Even so, some states do venture in the direction of enforced or imposed nationality, for instance by not allowing their citizens to renounce their nationality, even after they have acquired another one. Conversely, some states will not grant nationality to people who have lived on their territory for generations. This has contributed to the problem of statelessness, which affects millions of people and is a reminder of how our international 'system' of national identity, certified by a state-issued passport, of people legally being from where they come from, is filled with cracks (Spiro, 2011; van Waas, 2008).

We can see here already one general feature of stratification: some people have a connection to a state, sometimes to more than one, while others do not. This impacts on so many aspects of life that the stratification, the differentiated degree of rights and entitlements, is undeniable. In addition, this particular categorisation creates a differentiation between nationals in their own country and those in a different country, i.e. those we can call 'foreigners' or even 'aliens' (Bosniak, 2008). Here, however, one dimension of our international regime of nationalities becomes visible. To be the bearer of a passport, the holder of a nationality, is to possess a currency, a means of exchange by which one can purchase not just access, but more generally rights, diplomatic protection (Amerasinghe, 2008) and other forms of legal and political leverage. In spite of the 'formal' equality represented by the idea that 'everyone is a national', the fact is that not all nationalities have the same currency. It would seem clear that this particular

inequality overlaps significantly with the more entrenched geopolitical and economic inequalities, although one recently established elaborate ranking shows a slightly more complex picture that would merit a more comprehensive analysis, but which deserves some immediate attention here. This ranking is offered on the website of Arton Capital, 'a global financial advisory firm, specializing in investor programs for residence and citizenship'[7] which offers various services to persons described as 'high net worth' or even 'ultra-high net worth', who are also referred to as 'Global Citizens'. Though the services it offers are various, they seem centred around offering the ultra-rich information and (legal) assistance in obtaining nationality and/or residence status in tax havens or 'global investment hubs'. In what seems to be a global phenomenon, more states are offering up residence visas and even nationality to the wealthy.[8] This is not a new phenomenon, but it has gathered increased visibility and seems to be a growing trend (Shachar and Bauböck, 2014). As it is, the phenomenon by which the very wealthy can get what is effectively 'red carpet' treatment to obtain not just a nationality, but a nationality that offers a high degree of mobility, hardly requires analysis in terms of arguing that the mobility that you have as a citizen relates directly to your 'net worth', which takes us straight back to Anatole France.

Refugees

The international movement of refugees is one instance where many states scramble for some form of control, often in concerted international efforts. In the wake of the Second World War, the international community laid down a regime that combined the ambition of control with the humanitarian dimensions that refugees invoke (Goodwin-Gill and McAdam, 2007). The basic rule became: international refugees may not be sent back into harm's way, also known as the *non-refoulement* principle. Aside from that, there is quite some flexibility. Refugees may be relocated to any country that will have them They may receive asylum in the country that receives them, which may in most cases lead to residence and even full citizenship. But refugees may also linger on in the limbo between *non-refoulement* and absorption by means of asylum. This situation is most visible in the hundreds of refugee camps around the world, which together house millions of people, many of them for many generations, without any prospects of either return or relocation, or adoption by the host state (Amaya-Castro, 2013).

The global map here is complex, and marked by the vicissitudes of conflict and natural disasters. However, here too one sees a political economy of reception and access to assistance. Rich countries pay poor states 'in the region' to receive hundreds of thousands or even millions of refugees. Meanwhile, they will invest considerable amounts of resources and energy in distinguishing between real and 'fake' refugees. This in itself provides a specific type of stratification of citizenship, where victims of particular types of 'persecution' will be recognised, but those fleeing economic hardship or more systemic types of persecution will have a hard time. From a global perspective, one can distinguish clearly between refugees, and determine a hierarchy among those with differing access to humanitarian assistance.

The variations in terms of where refugees might be more likely to be welcomed or to receive asylum depend on geopolitical considerations (Betts, Loescher and Milner 2012). This was very evident during the Cold War, and the fact that Cubans were, at the time of writing, still very much welcome in the US, unlike people from many other worse places, even in the region, serves as a reminder of that era. As for the period since, at times it would seem as if new divides appear, sometimes regional or sub-regional, or religious or ethnic, but the vicissitudes of the phenomenon of forced migration do not allow for a clear picture. The recent refugees 'crises' in the Middle East, and in particular in the context of the civil war in Syria, reaffirm the existence of a complex political economy that benefits some refugees over others.

Visas

Visa requirements offer a third dimension of stratification. Visas are what give states most versatility in terms of designing a migration policy. They play a role, both in terms of limiting immigration or general international tourism as a whole, and in terms of the pursuit of selection and social sorting.[9] It is here where, seen globally, it would seem that the complexity and diversity is largest. However, we can identify a limited number of types of visa, or rather a relatively limited number of criteria that these visas are based on. In very simple terms, a visa means that you have been authorised to enter a country, albeit for a specific purpose or period and with a number of conditions attached. So for instance, tourists may only stay for a specific time and may not work in the host state during that period, on punishment of revocation of the visa and deportation. In recent decades, and in the context of increasing security concerns linking up with migration, a phenomenon referred to as the securitisation of migration (Ceyhan and Tsoukala, 2002), states have increased their means of surveillance. Essentially, in the context of the International Commercial Aviation Organisation (ICAO), a global passport regime has been created that requires all states to use and recognise travel documents, in particular the passport, with very specific requirements, that basically allow for the collection, processing and sharing of information to be digitised – and thereby, at least potentially, globalised (McKeown, 2008; Torpey, 2000). The passport has in this way become the universally accepted identification card. It is also what allows states to track immigrants, not so much as persons, but as administrative dossiers, as files, as people with a regulated presence in their jurisdiction. Increasingly, states produce their own immigrant-identity cards, which represent the visa and its conditions and obligations (Caplan and Torpey, 2001; Lyon, 2009; Sadiq, 2009).

A first criterion implicated in the granting of a visa is related to one's nationality (Hailbronner, 2006). This is the other side of what was discussed earlier: states discriminate according to the nationality of the immigrant or traveller. The limited mobility enjoyed by some on the basis of their nationality is articulated by the requirements imposed on them by virtue of that same nationality. This particular type of visa policy can sometimes be related to geopolitical considerations

(Neumayer, 2006; Koslowski, 2009). States that are on friendly terms with each other will give each other's citizens visa waivers, or may revoke these if relations turn sour. It is often the first thing states do to signal the re-establishment of friendly relations, or to signal that relations are bad. The determinant factors that result in the ranking of a nationality are unclear and seem various. There might be a colonial relation between countries, or a regionalist dimension (Hobolth, 2011). There might be a history of good or bad relations. There could be a situation of path dependency or protraction, where visa policies are either not important or too important in the relation between the two states. A state might also have a proactive policy of seeking lenient visa policies for its citizens (Luedtke, Byrd and Alexander, 2010; Bertoli and Moraga, 2012). If one seeks out a singular factor, it might be tempting to seek, and find, a general correlation between a passport's ranking and a country's GDP. However, it is important to first consider other reasons for which people are targeted, either for rejection or for selection.

A second criterion concerns security considerations (Ceyhan and Tsoukala, 2002). Generally, and beyond nationality, prospective travellers or migrants are screened and people already inside a state may be expelled on this basis. Even though this type of surveillance is part of a broader surveillance that also targets non-travellers, even outside of some states' jurisdiction (Milanovic, 2016), it can particularly be explicit and demanding in relation to travellers and migrants. In some cases, the notion of security goes beyond the threat of terrorism or other forms of violence or aggression, or other activities that the receiving state might feel are threatening. For instance, it can cover public health concerns too. For states, however, as well as for the entire travel industry, it is equally important that overall international mobility is not impeded. As international air travellers can attest, airports all over the world have worked very hard in recent decades to both step up security controls and, at the same time, allow for as smooth as possible a travel experience. A key element in the pursuit of this dual goal is the development of surveillance technology, in particular biometric and other data-gathering and -processing technology. This surveillance characterises itself by targeting everybody, friend or potential foe. However, as a selection mechanism, it operates on two levels, both of which have been referred to in surveillance studies as 'social sorting' (Lyon, 2009). First, it allows for 'pre-checked' fast-track options for those who can afford it. Second, security profiles intersect strongly with geopolitical considerations as nationals from certain countries, in addition to those of certain ethnicities or religious identities, can be deemed to be of higher risk, a practice that, in various contexts, has been referred to as 'racial profiling' (Bonikowski, 2005). In addition, and for the purpose of this chapter, it may translate to more restrictive visa policies towards citizens from certain countries. In practical terms this means that screening will be much more incisive and intensive, the expense of which may be borne by the applicant, and more visa applications will be denied. This criterion may vary and not merely intersect with geopolitical considerations but also with economic and other criteria.[10] As such, it may be more or less determinant in the bigger picture of citizenship stratification, depending on the case and situation. Even so, there will

be strong correlations between visa requirements and the national position on the international geopolitical, geo-ethnic, and geo-religious pecking order.

A most important third criterion, or set of criteria, relates to economic considerations. These come in varying forms and sizes. They can be as oblique as requiring information about your financial situation and/or income, with the idea of selecting people who will not potentially overstay their welcome and become undocumented migrants or become 'dependent' on the welfare system. Even within a regional free mobility regime, such as the European Union, EU citizens need to fulfil a number of requirements before qualifying for a residence permit and various types of social welfare (Boeles *et al.*, 2014). Additionally, dependents may also only be allowed to join if the migrant fulfils an income requirement. All this is designed to prevent so-called welfare dependency, but basically skews international mobility capacity in favour of people with more job security and a higher income.[11] Sometimes there are specific visas for so-called 'knowledge migrants', which is purportedly aimed at people with specific 'high-end' skills, such as doctors, engineers, programmers, scientists, etc. In the EU, this option is even given a special corporate-sounding name: the blue card visa (Cerna and Czaika, 2016; Eisele, 2013). However, though this visa is designed to allow 'highly skilled' non-EU nationals easier access to the EU, 'high-skill' is not merely defined as 'having completed a post-secondary education programme', but also as having the offer of a job for at least one year. In addition, many countries require a minimum level of income in order for the migrant to qualify as a 'knowledge migrant'. Until about two decades or so ago, this phenomenon was often referred to as 'brain drain' and was considered to be one of the ways in which rich countries were benefiting from the enormous efforts made by poorer countries to increase the human capital of their population. However, in the last ten years or so it has been recast as also (potentially) beneficial for the sending country by international institutions that are generally in favour of the various forms of free-market globalisation (OECD Development Centre, 2007). These same institutions have more generally framed migration as a development project, as a win–win–win scenario that will allow emigration states, immigration states and the migrants themselves to benefit (World Bank and IMF, 2016), and have reframed 'brain drain' as 'brain gain'.[12] Irrespective of the merits of such a perspective (de Haas, 2010), the onslaught of the frame of economic development has made most policy makers more sensitive to how, even while politically promising to curtail immigration, to justify immigration in economic terms.

For instance, in cases of low-skilled labour, countries are revamping a newer version of the old 'guest-worker' programmes, now called 'circular migration' programmes (Hugo, 2013). Here you can see an attempt by immigration countries to have their cake and eat it: acquiring cheap, often low-skilled labour, with the assurance that the workers will return to their home country. The lack of such fears in relation to highly skilled migrants only reiterates the social differentiations at play here.

The role of employers here is twofold. On the one hand, employer organisations may be involved in the development of the visa regime, by means of

lobbying or when consulted by the government. On the other hand, many immigration states involve the employer in the individual application process by requiring sponsorship of immigrant employees. In other words, a visa application needs to actively involve the employer, and the employer remains afterwards engaged in the residence permit. This employer-centred approach is indicative of an overall enhancement of the idea that the market can play an important role in the process of selecting migrants. Although the market approach is central to the 'open borders' argument, many immigration states nowadays invoke it judiciously, to argue for more high-skilled immigration, or for specific service professions, such as nursing and the care of the elderly. Some states, such as Canada, have developed a points-based system, which can be adjusted on an annual basis, and which allows for a selection based on the (perceived) needs of the labour market for specific skills and levels of education (Papademetriou and Sumption, 2011). However, when it comes to lower-skilled labour, Canada, like other immigration states, has different programmes that allow for less rights and less options to actually settle permanently.[13] In addition to this, more countries market themselves as opening their doors to 'start-up entrepreneurs' and other investors, in similar ways as described above on nationality (Sumption, 2012). The Netherlands, for instance, offers tax cuts for knowledge migrants, as well as an exemption from the obligation to pass basic language tests, thereby not only making a formal distinction between migrants, but even privileging high-earning migrants over national citizens.

Conclusion: migration control in its ideological constellations

It is essential to, at least briefly, situate the political and ideological contexts in which migration control policies come about. Beyond the particularities of the various countries, there are a number of tensions related to migration. Anti-immigration sentiment often focuses on a mix of nativist – such as ethnic, religious or linguistic – considerations about the political community or socio-political cohesion being endangered. In this view, immigrants endanger society, contribute to criminality, and otherwise create social and political tensions. Alternately, and often additionally, anti-immigration sentiment focuses on the economic disadvantages for the national population and/or even the economy as a whole. In this perspective, immigrants endanger the economy, by taking away jobs, by becoming reliant on the welfare system, or by, in the case of undocu-mented migrants, not contributing to national taxes. Both of these sentiments are often rigorously challenged by factual analysis, but they can really determine the political mood and in this way put a big stamp on the development of migration policies. Interestingly, and significantly, the 'dangerous immigrant' in both narra-tives is, generally speaking, the poor immigrant and not the wealthy one. And so, many states have policies that make it more difficult for low-wage earners to enter and easier for high-wage immigrants. This often reproduces distinctions between 'immigrants' and 'expats', and reinforces the idea that, economically speaking,

it is beneficial to attract high-earning migrants and deter low-skilled ones. Some have argued that, in this way, low-earning work pulls in undocumented migration, which creates a situation for host states in which they can attract even cheaper, and exploitable, labour during good years, and syphon it off, by means of deportation and other repressive regimes, during bad years (de Genova, 2010). From this perspective, even a policy meant to protect the national economy from poor immigrants ends up benefiting the national economy by means of the enhancement of social differentiation and the production of a specific class of persons with very few rights, and who are more or less tolerated while useful. In other words, the confluence of nativist and economic narratives contributes to enhancing the gap between the lower and higher echelons of migrants.

This enhanced social differentiation can, at times, cut right through national citizenship itself. In their eagerness to attract highly skilled migrants, states often offer perks and privileges that benefit these desirable migrants even over national citizens. This happens at a time when neo-liberal policies are dismantling welfare and other policies that protect economically weaker actors. Saskia Sassen has spoken of

> an epochal shift that is producing structural approximations in the position of, on one hand, minority immigrants, both legal and irregular, and on the other, a growing share of citizens, not only the minoritized but also the sons and daughters of once robust middle classes who are rapidly losing economic ground. (Sassen, 2012: 121)

And Aihwa Ong has described this unhinging of the citizen from the national stage and a reassembling onto global markets, a development that can only encourage more migration:

> In zones of hyper-capitalism, neoliberal values articulate ideals of belonging by making talents and self-enterprise ideals of citizenship. Those who are assessed to be underperforming and therefore a security risk are treated as second-class citizens. (Ong, 2005: 699)

And so, we can observe that mobility control operates in a complex set of ideological and political landscapes. On the one hand, it relates to formal citizenship itself, to the lien between a person and a political community. This lien, first, carries with it a whole range of rights and duties, and, second, links the person to particular geographies. Historically, these geographies have always been dynamic, with a lot of mobility that could properly be called 'migration'. Mobility control, moreover, has always related to class or standing, or status – to the varying relations between different persons and the sovereign. In other words, mobility was a function of class. The advent of the territorially centralised post-feudal state, with its constitutive idea of formal equality, seemed to have overcome this relation between mobility and standing, in that standing did not feature in the formal sense. However, as critical observers since Marx have argued, class had not

disappeared but was instead very much present in societies based on formal equality, in the shape of relations of labour and capital. Globalisation ensued, first in the form of colonial and imperial expansion that in many ways reproduced a formally differentiated system, now explicitly racialised, and then, recently and contemporaneously, in a formally non-differentiated system of trade and the free flow of goods, capital and services. Champions of the free market and some liberal progressives see the free mobility of persons as the next logical step in this progress narrative. However, there is much resistance, and it seems to come from a coalition of working- and middle-class constituents who fear the inflow of cheap labour and the further demolition of social welfare systems, on the one hand, and 'culturalist' (or racist) nativists who see the organic social cohesion endangered, on the other. Moreover, as Wendy Brown (1995) and others have argued, mobility control is one last vestige of national sovereign power, and so the prospect of open borders acquires at times both national and generally politically existentialist connotations – something clearly illustrated by the recent Brexit referendum results in the UK. All this contributes to the idea that mobility is heavily constrained, and that we are living in an age of closed borders. The reality is, however, that these borders are in fact quite open, and that they serve a function of selection. In this way, migration control hovers between various geographies of political economy, formal citizenship and social differentiation.

This chapter has sought to illustrate this fact, and to offer a preliminary mapping of the various dimensions of social differentiation that result from migration control. In this way, what comes to light is the complexity of contemporary mobility control, even in its relatively contained set of variables, and thus the complexity of the ongoing political economy of citizenship. Geopolitical variables, degrees of racialisation, particular ideas about economic worth, blatant exploitation, amidst a cloud of narratives about security, crisis and humanitarianism – all of these are key protagonists in this rather chaotic political economy of global citizenship in the making. Recently, and in order to attract the hypermobile rich, international mobility has begun to be quantified and ranked, and with this a proto-metric has been developed, one that could further be expanded on, into further sophistication. Much has been written, in migration studies contexts and in economic circles, about how migration can be an investment in human capital. The migrant is an entrepreneur: their migration, the effort or even risk, the dislocation and marginalisation, the separation from loved ones, etc. – all these are investments and if all goes well there will be a return, evidenced by an increase in human capital. However, what is generally left out is that the capacity to migrate is itself constitutive of human capital.

In this sense, it is important both to reiterate the importance of nationality, in view of the enormous differences in terms of international mobility currency that each nationality represents, and to emphasise the increasing importance of other factors, such as skills and education, expendability or exploitability, regional proximity, gender, stereotypes, etc.: in other words, all the other factors which, fairly or not, play out in the labour market. These two dimensions – the continued relevance of nationality and the increasing relevance of other factors – are

in complex relation to each other in ways that would need to be ascertained and evaluated in concrete circumstances. It is also important to understand the political economy presented here as dynamic, ever-changing, responsive to sudden humanitarian, economic, political or security crises, and very diverse and varied, both geographically and with regard to the vicissitudes of the labour market. That being said, as long as international mobility is so blatantly inaccessible to some, and so easily accessible to others, this difference will be constitutive of a globally differentiated citizenship.

Notes

1 I shall not elaborate too much on what one could call 'mobility-derivative rights', some of which may be of a first order, such as safety and liberty (for refugees), employment, education, healthcare, etc., while others may seem more trivial, such as tourism, visiting family, etc. For an elaborate theoretical and legal analysis of the implications of having membership in one place or the other, see Shachar, 2009.

2 Thus speaks Choulette, the fictional character in Anatole France's novel *The Red Lily*, who then goes on to say: 'That is one of the good effects of the Revolution. As this Revolution was made by fools and idiots for the benefit of those who acquired national lands, and resulted in nothing but making the fortune of crafty peasants and financiering bourgeois, the Revolution only made stronger, under the pretence of making all men equal, the empire of wealth. It has betrayed France into the hands of the men of wealth. They are masters and lords. The apparent government, composed of poor devils, is in the pay of the financiers' (France, 2007: 82–83).

3 This is not a novel observation: after Marx and France, feminist scholars have made similar critiques; see Pateman, 1988; Young, 1990.

4 The 2008 economic crisis and aftermath, as well as the prominence of scholars such as Thomas Piketty, has, however, put socio-economic inequality squarely back on the political (and academic) map.

5 In the same way, one can say that 'the national' is an international phenomenon, the global language that established itself in the nineteenth century to denominate the international legal requirement for legitimate political organisation, and that assisted in the disarticulation of colonial empires during the twentieth century, as more and more groups successfully laid claim to the status of nations. It was, however, only with the establishment of the United Nations in 1945 that the modern formal state, which was rooted in both nation and empire, but which was also a formal category, and thereby not necessarily a manifestation of the nation, became a protected category, its sovereignty at last defined as equal to that of other states. As international legal theorists have argued, national sovereignty is the product of international law more than, or at least as much as, the other way around. This is no mere flipping, but a fundamental shift in descriptive perspective.

6 The recent conflict between Russia and Ukraine and the subsequent annexation of Crimea by Russia come to mind. This latter has created enormously complicated situations for citizens of Crimea with respect to their nationality; see Hartog, 2015.

7 See www.passportindex.org.

8 A similar approach, but more as lobby, or 'stakeholder representation', as well as with an academic bent, is taken by the Investment Migration Council, investmentmigration. org.

9 There is strong evidence that visa policies, together with other mechanisms such as carrier sanctions, have a significant impact on the number of international migrants and travelers: see Neumayer, 2006; Bertoli and Moraga, 2012.

10 In a telling statement that illustrates how these various intersections can operate, made in 2014 regarding the visa policy of Belize, the minister of immigration justifies the waiving of visa restrictions for Colombian citizens. After he has explained that the purpose of this and other visa waivers is to increase the influx of tourists, the interviewer presses him on the threat of drug-trafficking from Colombia, a key security concern. His response: 'But immigration doesn't look after narco trafficking, that's for security service and for interpol. The European Union doesn't require any visa for Colombia. None of the South American countries and most of Central America and Caribbean don't require visa for Colombia. Our visa requirement for Colombia and security check was a United States dictated issue. The fact of the matter as a sovereign country we decide who we are going to waive visa for or not. We cannot and will not air mark [*sic*] or determine that everybody coming from Colombia is a trafficker. Let's be real, the world has fought and the US has put billion of dollars in trying to fight the drug chain, not succeeded at all. We don't want to victimise people who would be flying here for tourism purposes because they are coming from Colombia, Belize should look after its own interests'; see www.7newsbelize.com/sstory.php?nid=31024.

11 The connections between family migration rules and economic policies have been elaborately explored in van Walsum, 2008.

12 In the words of Philip Schellekens, lead economist with the World Bank Group: 'It is not clear if there is going to be a depletion of human capital, because there is something called the brain gain. Once you provide the possibility for migration, it provides an incentive for people to educate themselves better, so that they can make the transition to another country, so that's a benefit' (Gotev, 2015; see World Bank and IMF, 2016).

13 www.cic.gc.ca/ offers a fascinating view on the clear bias towards higher skills and specific services for the better earners. For instance, 'live-in nannies' enjoy the option of permanent residence, unlike other low-skilled workers.

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7 National origins of Frontex risk analysis

The French border police's fight against *filières*

Sara Casella Colombeau

Introduction

At the start of the 'migrant crisis' of spring 2015, the European Council gave the green light to the EUNAVFOR MED (European Naval Force – Mediterranean)[1] military operation targeting 'human smuggling and trafficking networks'.[2] This marked the first time that an operation of such scope was dedicated exclusively to those indefensible enemies, smugglers of irregular immigrants. Its implementation has institutionalised an increasingly identifiable type and continues to validate the association of immigration with international criminal activity.

How has this target emerged in European-level border control? This chapter examines the way in which the categories of 'smugglers' and 'rings' (*filières* in French), first employed by police agents, have gradually come to dominate the representations and objectives of immigration policy over the past 20 years.[3] Here, I explore the way in which a particular police force, the Border Police department, has gradually helped to (re)define the targets of border controls. Studying information collected during the service's activities, I examine the relationships between categories used by street-level bureaucrats and reform of migratory policy in France and Europe. I examine migratory policies through two lenses: first, through the analysis of professional transformations in the police department since it took over border checks in 1953; second, through an aspect of the department's activity, the processing of information collected by the agents during border checks.

The association of immigration and criminal activity has been studied by numerous authors. Two fields of study seem especially relevant. First, literature on securitisation has described changes in European migratory policies. In the framework of the creation of the Schengen Area, national officials in charge of cooperation and criminal questions have intervened in negotiations over migration issues (Bigo 1996; 1994). Migration has become increasingly conceptualised as a security problem, a situation described by the term 'securitisation' (Waever, 1995). In continuity with these studies, I aim to elucidate the circulation of knowledge and representations amongst agents of control between national and European levels. I also seek to create an up-to-date picture of the significant professional aspects of transformations in border control. The move

of the Police aux Frontières (PAF – border police) toward criminalisation in the mid-1990s is not unrelated to the more widespread change of migratory policies and the tendency toward 'crimmigration', meaning 'the process whereby criminal law and immigration law become interlinked' (Stumpf, 2006: 378). This second field of literature will be invoked here. This school of thought has flourished in the United States, mainly focusing on studies of legislative developments. With the support of these works, like that of van der Woude, van der Leun and Nijland (2014) and Franko Aas (2011), this chapter will concentrate on the manner in which 'issues relating to crime and immigration are perceived and framed in the social and political context' (van der Woude, van der Leun and Nijland, 2014: 562). Like these authors, my work will incorporate a wider perspective that considers not only legislative processes but also the implementation and the way in which field officers practice 'the intertwinement of crime control and migration control' (Franko Aas, 2011: 332). This literature also reveals a link between border control and the redefinition of citizenship (Bosworth and Guild, 2008). Building on this very rich body of literature, I intend to continue investigating the origins of crimmigration in Europe, emphasising agents' practices and representations rather than discourse.

How, then, has the smuggler – this outsider figure – come to dominate border control officials' shared representations, first on a national, then on a European level? My aim is to outline how European citizenship has been conceptualised through the creation of its own negative image, by designating an agreed-upon, legitimate target: the smuggler. The definition of the trafficker implies a continuity between migration and criminality, and invokes the migrant as, by turns, a victim of human trafficking and a calculating, rational individual.

The first part of the chapter establishes a link between the professional changes of the French Border Police and the resources it uses to produce accounts of its activities at the border. Because of the lifting of internal borders within the Schengen Area in the 1990s, the PAF adopted a new method, flow analysis, for measuring its clientele, ultimately aimed at *filières* or smuggling rings. The second part of the article concerns the preparation of risk analysis by Frontex, first in an institutional setting, then in practice. In this section the continuities between the French flow analysis and Frontex's risk analysis will be examined.

The border police and information collection at the border

A brief history of the PAF

Until the mid-1970s, the Renseignements Généraux (RG – General Intelligence Service) controlled and monitored French national borders. The RG offices were spread over the territory, with one part of the force dedicated to identity checks at ports of entry. The local departments at the national borders did not make up a specific RG division; in fact, no special authority exclusively in charge of these tasks existed. For example, the air police, which carried out checks on air

borders, was attached to the Direction de la surveillance du territoire (Directorate of Territorial Surveillance) during the Second World War, before being won by the RG in 1947 after a post-war competition between the two bodies on its behalf. The formal combination of all forces assigned to border posts into one department only occurred several years later, in 1953, with the creation of the Air, Border and Railway Police[4] attached to the RG services. During this period a PAF agent dispatched to a border post at the national frontier could not be officially distinguished from a RG agent. PAF agents were tasked with 'general surveillance' of the frontiers, parallel to their RG colleagues' responsibility for monitoring the whole territory. The purpose of the new department's new localisation at national boundaries was mainly to conduct systematic identity checks to stop known and wanted individuals. The agents' duties therefore consisted of using information already recorded in files and sending operational data to the central level for updating.

In 1969, the PAF's personnel was reinforced, with 820 border guards and ranked officials,[5] as well as 20 officers, joining the PAF's forces. More than merely a swelling of the ranks, this marked a true change in professional identity. In effect, the PAF acquired the means to patrol between ports of entry. A short time later, in 1974, the PAF gained its independence from the RG and became an integral central directorate of the national police. Thus, the PAF's increase in resources, its autonomy from the intelligence services and its restructuring around the border transpired just as immigration was being defined as a public issue and the national borders were officially closed to work immigration (Noiriel, 2008; Viet, 1998; Weil, 2005). Whereas, up to this moment, the administrative regulation of foreigners in France had taken place within the territory (Spire, 2005), the monitoring of mobility of people was transferred to the edges of national territory and the PAF obtained the means to control it. Border control no longer concerned only official points of entry to the territory; the PAF had become an essential link in the chain of immigration control at national boundaries.

The 1990s marked the second turning point in the PAF's development. This period, with the application of the Schengen Agreement, witnessed the lifting of internal border checks.[6] In France, most land borders are internal to the Schengen Area. The end of internal border control thus had important consequences for the PAF's organisation. Ports of entry closed even before the Agreement took effect, and PAF agents were transferred to other departments (particularly the urban police). In reaction to this forced transformation, police hierarchy had to redefine the PAF's duties. In October 1994, the PAF became the Direction Central du Contrôle de l'Immigration et de la Lutte contre l'Emploi de Clandestin (DICCILEC – Central Directorate of Immigration Control and the Fight Against Employment of Illegal Aliens). This corresponded to a significant reorganisation; the name change itself signified a new role in immigration regulation, no longer defining the PAF[7] by a location at the border. The disappearance of the word 'border' shows the police hierarchy's intention of orienting the department away from national frontiers and toward the interior, from an administrative toward a criminal police force. While reductions in staff and in border posts were

planned for internal borders, new units were created at local and national levels to supplement the traditional border posts departments with the mission of combating criminal activity associated with immigration. Smugglers, document forgers and employers of irregular foreigners were targeted by investigations similar to those carried out by the PAF's colleagues in the criminal police. Immigration was thus deemed a new sector for organised crime activity. The designated target of these new teams was the *filière*.[8] Although not new to the PAF, the *filière* became for the first time the focus of a specific department that was tasked with acting within the territory.

Developments in data collection at the border by the PAF

The type of data collected and transmitted by the PAF in the course of its daily duties reflects the organisation's professional changes. Until the beginning of the 1970s, data were mainly operational and concerned already identified individuals, such as repeat offenders or those who were the subject of police investigations or political monitoring. From the 1970s, the PAF acquired a central role in immigration regulation at the borders. Statistical data from its activities were thenceforth sent to other administrations to help determine the nature of border-crossings. These statistics established distinctions amongst foreigners, those entering the territory legally and those classified as 'non-admitted' or identified as 'illegal immigrants refused entry'.[9] Until then, the PAF's activity reports had been mainly concerned with tallies of files consulted or generated over the period.

   After the 1970s, these border statistics continued to be produced. In the 1990s, the French delegation to the Schengen negotiations, which included PAF agents, used them in Schengen Negotiation Groups to mount pressure on Southern European states to strengthen immigration control at their external borders. The French delegation was able to point to unauthorised entries at its borders with Spain and Italy.[10] These statistical data were neither published nor invoked in publicised political speeches, but were used in diplomatic inter-administrative relations at the European level.

   During this time, the PAF began to generate a new type of information derived from its border control activities: *flow analysis*. Flow analysis is produced from the collection of local operational information and its systematisation at the central level. It provides a qualitative measure of the flow of individuals crossing national borders. In this analysis, irregular border crossing is viewed as a result of criminal activity, namely use of smugglers and forged or counterfeit documents. The central figure in this picture is the *filière*. In PAF documents over a long period, the word *filière* is generally used without a precise definition. Until the early 1990s, it appeared to designate trajectories of migrants entering the territory illegally. Flow analysis is not directly used by police officers in the field as this information contains no personal data.

   In a document for the working group on 'external borders', the PAF defined *filières* in two sets of terms: 'itineraries taken by illegal immigrants and their

modus operandi for avoiding checks'.[11] In spite of this framing of the word, the reality described by *filière* is actually very variable. Some *filières* are:

> highly structured; these networks, of which some are under mafia control, organise the emigrants' journeys in a number of transit countries (Central and Eastern Europe for the Chinese) where a stay is arranged for several days to several months. Once arrived in Europe, these clandestine immigrants are forced to work illegally for the organisation which brought them and turn over to it large amounts of revenue in a racketeering scheme.[12]

However, a high degree of structure and a link with organised crime do not constitute *sine qua non* conditions for the designation of a network of individuals as a *filière*. The latter may also merely involve several individuals of the same nationality who use the same *modus operandi* to cross the borders. Thus, the document mentions a *filière* from 'Senegal and Angola' that traverses Portugal by plane before arriving in France, or the 'Tunisian' *filière* that reaches France by plane via Switzerland. Sometimes, border-crossers' professional activity forms the basis of characterisation. This is the case for the '*filière* of international sleeper train employees' that 'enables Chinese immigrants to reach France through Italy'.[13] These *filières* may thus describe a route, a migrant itinerary, a profession linked to border-crossing, or an unauthorised immigration network. Moreover, these *filières* are not based on precise, quantitative and visible data. No information is provided on the number of migrants concerned in each case. Although the author of the document is cautious when describing the size of each *filière*,[14] the term 'flow', often associated with a single nationality, is used without giving any idea of the magnitude of the observed phenomenon. Even when the number of migrants is reputed to be substantial, the exact figure is not given. For example, the author describes 'a not insignificant number of Romanians'. No matter the size of the *filière*, they all are described as if they had the same importance. This accumulation gives the sensation that the main aim is to insist on the diversity and ingenuity of the immigrants in reaching French territory. Thus, 'unauthorized migration is understood to be a rational, opportunistic choice' (Bosworth and Guild, 2008: 711).

The preparation and application of this analysis tool have not been without consequence. Despite the definition of two criteria – the route and the *modus operandi* of the crossing – the methods of applying these two factors cover a very broad range of situations, representing a large portion of unauthorised immigration toward France. This type of analysis presents migration and criminal activity on the same continuum. The concept of individuals' movement as criminal in itself is used to justify the criminal turn taken by the department, as well as the change in its jurisdiction. The fight against *filières* entails investigatory work, yet the department's duties have mainly and traditionally been administrative. Therefore, within the framework of its professional activity and parallel to an enlargement of its responsibilities, the PAF has created a new category linking migration and crime. What we have witnessed since is a

'growing trend of executive branches holding powers in both legal systems' (van der Woude, van der Leun and Nijland, 2014: 572).

Flow analysis is reinforced by European cooperation

Flow analysis and the identification of *filières* rely on shared information between European security services. Flow analysis itself represents migratory phenomena not as a simple move from the country of origin to a country of settlement, but a series of numerous stages and transit situations encountered by migrants. The depiction thus emphasises the importance of European 'rebound countries' or 'transit countries'. Implicitly, European cooperation emerges as an essential element of the fight against *filières*. The above-quoted document asserts the necessity of extensive cooperation between police departments, especially concerning forged documents. This analysis tool, identifying a transnational target, appeared in a European context in which national officials in the Ministries of the Interior and of Justice shared a discourse on the future 'security deficit' (Bigo, 1996), which was expected to result from the end of internal border checks. A new threat was said to be imminent, linked no longer to the Cold War but to the emergence of organised transnational criminal activity. The spread of this discourse in the working group on 'external borders' and the 'asylum-immigration' negotiation group ensured the PAF's participation in the process of Europeanisation of migration. Its European activities distinguish it from other departments, involving it, moreover, in training for the national police's entire workforce[15] on European issues.

At the European level, the exchange of information on immigration and asylum is structured around the creation of the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI). Created in 1994,[16] it is an arm of the authority of the Council's Steering Group I on immigration and asylum. During the implementation of the Maastricht Treaty, CIREFI was intended as a resource for all of the Council's working groups focused on asylum and immigration questions.[17]

The 'statistical information' transmitted to CIREFI regards 'legal immigration; illegal immigration and unlawful residence; facilitating of illegal immigration; use of false or falsified travel documents; [and] measures taken by competent authorities'.[18] In 1999, 'an Early Warning System for the transmission of information on illegal immigration and facilitator networks'[19] was set up, related to flow analysis in that it involves detecting and rapidly signalling to partner delegations the 'first indications of illegal immigration and facilitator networks'. Since the 1990s, there has evidently existed the will to transfer national border polices' knowledge to the European level. However, starting in the early 2000s, criticisms were levelled at the operation of this structure. Soon, a new structure emerged to assume CIREFI's role in processing information on border-crossings: the European agency Frontex.

The linking of illegal immigration with fraud via the vague notion of the *filière* legitimised the PAF's transformation from an administrative police regulating

immigration at the frontier to a criminal police acting within the territory. Its production of flow analysis thus marked a turning point in the development of the PAF's autonomous production of knowledge, and in its vision of the police's management of migration as a criminal matter. The PAF's turn toward Europe was concomitant with the conception and spread of the *filière* as a new element in immigration. The *filière* was employed as a justification for Europe-wide cooperation in migrant control. Above all, it offered legitimacy to an idea of control over migration as a criminal police matter. The crimmigration process emerged from the practices of those in charge of checks; it was not, therefore, uniquely a result of discourses by political actors in the media, but also by police agents whose motivations were chiefly professional.

Frontex risk analysis

The creation of Frontex and the risk analysis centre

The PAF's Europeanisation intensified in the 2000s, particularly regarding the creation of the Frontex agency in 2004, an extension of the cooperative activities of the 1990s around the Schengen Agreement's entry into force. With this agency, the collection of information from border checks was institutionalised. Risk analysis thus became the dominant method for measuring 'migration threat' at the EU borders: at once an operational tool, a way to legitimise decisions and a means of communication.

During the creation phase of Frontex a new collection and systematisation structure emerged for information compiled by the border control and monitoring department. PAF police agents were involved at the European level in a diversified way at the end of the 1990s. In particular, working groups sponsored by the Commission (through the Oisin,[20] Odysseus[21] and Argo[22] programmes) were intended to form a community of European-level border control experts. In 2002, the Council adopted the Plan for the Management of the External Borders of the member states of the European Union,[23] which stipulated the establishment of an 'external borders practitioners' common unit'. It was composed of department heads of national border guards meeting in a specific formation, the SCIFA+,[24] supervising a series of specialised centres.[25] The merging of these specialised centres would constitute the Frontex agency in 2004 (Jorry, 2007; Leonard, 2009; Neal, 2009; Wolff and Schout, 2013; Ekelund, 2013, Jeandesboz, 2008). The Risk Analysis Centre, inaugurated on 28 January 2003 at the Finnish delegation's initiative, would gradually come to rival CIREFI and gain prominence.

During the negotiations for the establishment of Frontex, risk analysis (RA) acquired a central role. For non-police actors involved in negotiations, it appeared to be 'the key to the system' (interview with C., French Permanent Representation, April 2007). The purpose of this instrument was to produce predictive analysis of migrants' routes and itineraries so as to organise preventive operations. RA was presented as a basis for consensual decision processes within the agency. The organisation of control operations at the EU's external borders entailed an

unequal distribution of Frontex's budget, its expenses always favouring the same member states. Risk analysis was hence chosen as the only means to allocate the budget 'fairly', identifying the flaws in border control by national border services. The data produced by the PAF would influence the terms of operational coordination on border issues. Risk analysis, thus wielded to legitimise the agency's decisions, has a strong political dimension that has been exploited even outside of Frontex. Satoko Horii has shown that risk analysis has also been used to support Commission decisions on allocation and distribution of European funds for external borders: 'Frontex's risk analysis influences the 'categorisation' of the EU member states (the risk level of member states' borders)' (Horii, 2016: 14).

The influence of risk analysis extends beyond European institutions because it is additionally used by the agency as an important communication tool (ibid.: 7). The agency regularly (yearly and half-yearly, depending on the geographic zone) and minutely updates its risk analysis.

The representation of immigration as a preventable threat spread in this way beyond the agency's range of action. Risk analysis identified a threat to all European border police. The definition of a common outsider, associated with the coalescing European political centre (Rokkan, 1999; Bartolini, 2005), arose from the meeting and negotiations of several national political centres inside the agency.

The content of risk analysis

Of what does this risk analysis consist, and how has it changed over time? In the early 2000s, during the creation of the *ad hoc* centre, the Finnish delegation laid out a 'common risk analysis model' which 'associate(d) aspects of intelligence in criminal matters (threat evaluation) and aspects of risk evaluation, the latter oriented on weaknesses in border management systems at the external borders of the European Union'.[26] A priori, the information collected did not concern only the migratory aspect of border issues. The shift in the definition of risk can be related to the character of the border under the responsibility of Finnish border guards, which is the largest European frontier with Russia and therefore has an important security dimension. However, very quickly, 'migratory risk' began to be taken into account. Moreover, the use of risk terminology to describe changes in migration to European borders followed a general shift in security issues toward 'risk-based' rather than 'threat-based' (Aradau, Lobo-Guerrero and van Munster, 2008: 148). This marked a fundamental change in stance, no longer of 'response but rather of anticipation and management' (Neal, 2009: 349).

However, interviews conducted with PAF agents illuminate one step in the process of risk analysis and put its aspect of border-crossing predictions in context. This predictive dimension, as in the case of flow analysis, also involves a criminalisation of immigration. Our precise analysis based on a field survey in 2010 of the conditions under which risk analysis is performed enables us to report on this process of criminalisation of migratory phenomena by those in charge of border control. One part of risk analysis treats data gathered

by national border police departments. In each member state, one body is responsible for collecting information and transmitting it to the Risk Analysis Centre (RAC). In France, this body is called OCRIEST,[27] a central office under PAF supervision. This office is the contact point for two European agencies: Europol and Frontex. OCRIEST's Analysis Unit gathers and synthesises all information on national border-crossings and on the fight against illegal immigration rings, before passing these data on to Frontex. OCRIEST, created in 1996, was designated as the central collection point for information arriving from different national security departments.

Thus, Frontex 'obliged member states to gather statistics in the same manner' (interview with D., Analysis Unit, OCRIEST, August 2010). OCRIEST therefore had to adapt its methods: 'A couple of years ago, it was all very French, today the perspective is much more European. The goal is more to examine changes in flows rather than to have a vision of France' (ibid.). The information gathered by local border police departments is processed by OCRIEST agents. For D., this entails a good deal of work: 'Sure, if you go only to the local level, the guys have no idea what OCRIEST or flows are. When they send me data, I have to redo everything to get anything out of it' (ibid.). 'Flows' seems to be the key word here. The task consists of taking statistical data collected at a specific geographical and temporal point (at the French national borders) and aggregating them to construct a 'flow'. The manner in which flows are presented is helpful for understanding the work carried out by OCRIEST before it sends information to Frontex. Nationality and region of origin are the main criteria for grouping data on individuals, and these factors are associated with the *modus operandi* of breaching the border.[28] For a single nationality or single region of origin, the sources used are the number of refused entries ('non-admission'), the number of people presenting forged documents and the point of crossing on the European border. For example, the route from the Middle East/Maghreb region is described thus:

> [There] is a big dominant terrestrial [route] with Turkey as a point of convergence. Their objective is England from the beginning because of the language, the ease of clandestine work and of the absence of identity card. But also the Scandinavian countries to seek asylum especially in Sweden. (interview with D., Analysis Unit, OCRIEST, August 2010)

D. insists that he is careful not to make 'untoward generalisations': sub-Saharan African migrants for example represent 'very disparate realities with a very wide range . . . very difficult to synthesise' (ibid.). Yet the categorisation of data based on national origin remains the technique of choice to identify migratory routes. During the interview, D. supported his words with a PowerPoint presentation showing analysis results on which he was working. Each slide covered a geographical zone of migrants' origin: North Africa, sub-Saharan Africa, Horn of Africa, Asia, the Middle East, the Indian subcontinent, Eastern Europe and South America. Each of these zones was associated with a 'migratory route', also referred to as a route, flow or *filière*. An arrow on each side pointed from

the region of origin toward Europe, and was accompanied by a diagram tallying 'non-admitted' migrants, bearers of forged documents, and persons entering at air, sea or land borders.

Classification by nationality merges a large number of different situations in the same category, associating with traffickers in international networks not only migrants crossing the border on their own, but also numerous types and degrees of criminal activity. Here, once again, continuity with flow analysis from the 1990s is evident. Mobility is associated with organised criminal activity. Risk analysis depicts migration processes as intrinsically linked to organised crime and to transnational networks. D. offers his analysis on this subject: 'Europe is a vast game board. We hunt *filières* all over the territory' (ibid.).

The data produced and exchanged at the European level are thus the product of professional changes. The analysis of the police's generation of data, which takes place at the interface between national police departments and a European agency, enables a deconstruction of the concept of 'risk' applied at the European level. A portion of the data on which Frontex relies to formulate its risk analysis corresponds to the data aggregation on French Border Police departments' activities. This information therefore resembles much more a snapshot of police actions at the border than a probabilistic calculation. Furthermore, this 'risk analysis' is inseparable from the professional changes of the police department that produces it.

The study of data accumulated, transformed and sent on by the PAF to Frontex reveals the former's conception of risk. Migrants are, as in flow analysis, grouped in terms of their migratory 'route', which is, to a great extent, related to the *filière* identified at the national level. The visual aspect of risk analysis produced by Frontex for the public is equally important. The representation of migratory routes in the form of arrows on maps charts the data aggregation accomplished for risk analysis. From information gathered at one point on the border, agents extrapolate an entire trajectory (Marin, 2011).

Recent evolutions in risk analysis

The current definition of risk analysis clearly resonates with this conception of security. Indeed, in a 2012 document, Frontex's description of the components of risk analysis is divided into three elements: threat, vulnerability and impact (Frontex, 2012: 6, cited in Horii, 2016). Threat is measured by the '"magnitude and likelihood" of migration-related factors: irregular migrants' modus operandi; characteristics of individual irregular migrants; trends and predictions; push factors, and routes' (Frontex, 2012: 19, cited in Horii, 2016). Common elements are found within this definition: modus operandi of border-crossing, routes and personal traits. 'Vulnerability' refers to the ability of the national corps of border guards to react to migrants' arrival. 'Impact' is intended to measure the consequences of a threat on the border region and in European territory more generally.

Frontex has had ten years to adjust its definition of risk analysis. Nevertheless, in the current definition, traces remain of flow analysis as formulated by the

French Border Police on the national level. The spectres of the smuggler and the criminal network linked to migration, remain central.

In the face of criticisms levelled at Frontex since its creation, the agency reinforced its section on respect of fundamental liberties in new regulations,[29] in the training of agents and in the structure of its activities. This shift raised a number of questions on the paradox between controlling migrants and protecting them. In the past few years, several authors have noted the rising number of references, made by the agents of border control themselves, to the question of respecting fundamental rights. Frontex, in the eyes of these authors, represents a locus of a paradox. Border control, especially for the maritime border, is characterised by the self-contradictory objectives of preventing outsiders' entry and ensuring their security through rescue operations (Weber and Pickering, 2011). This contradiction is particularly clear in risk analysis, which 'is clearly framed in the language of state security, and consequently even when addressing migrants' vulnerability, tends to frame it in the language of state security and organized crime' (Franko Aas and Gundhus, 2015: 11). The spectres of the 'bad guy' (Pallister-Wilkins, 2015: 64), of organised crime and of smugglers have gained a central place in the discourse of agents taking part in Frontex operations, particularly those in charge of producing risk analysis. Thus, for these 'screener' agents, migrants appear 'first and foremost as a source of information to reveal smugglers and other crime-related activities rather than subjects deserving of protection' (Franko Aas and Gundhus, 2015: 9). This focus on criminal activity associated with border-crossing is, according to the above-quoted authors, linked to an increasingly important dimension of border management: 'humanitarian borderlands' (ibid.: 14) or the 'humanitarian border' (Pallister-Wilkins, 2015: 67). Border control integrates a humanitarian aspect, 'moral sentiments of compassion, empathy and assistance' (Franko Aas and Gundhus, 2015: 13), beyond posturing or legitimising discourse. Migrants' bodies should be managed through modes of governmentality studied elsewhere (Fassin, 2010). The targeting of smugglers and other criminal networks supposedly represents a way of reconciling border policing duties with humanitarian management. Finally, the evolution of the tasks and representations of border guards over time reveals the professional aspect of this rhetoric which sets smugglers as the main target. As D., from the analysis unit of OCRIEST, indicates, 'to have a full idea of immigration, you need to have one foot in the criminal and one foot in administration' (interview with D., Analysis Unit, OCRIEST, August 2010). The articulation between specific expertise in the context of the border and the use of police apparatus typical of criminal investigations explains the police's use of *filières* in the representation of migrant phenomena. This articulation also corresponds to changes in the PAF that have unfolded since 1990.

Conclusion

The construction of European borders leads us to question how the European Union can define citizenship on the scale of this new territory. As we have seen on the national level, boundaries have not always been the locus where immigration

is regulated. In France, it was only in the mid-1970s that these borders concretely took on this role. The construction of external borders is accompanied by a set of measures, rules, agency interventions and street-level bureaucrats' activities and production of knowledge that together lead to the commonly conceived figure of the outsider. The mere drawing of frontiers for a shared economic and political space would not, in itself, imply the conceptualisation of the outsider as the negative image of European citizenship: this figure only emerges through the political, technical and professional context.

By charting the changes in flow analysis, then in local- and European-level risk analysis, this chapter has highlighted several aspects of this designated outsider. First, the formulation of risk analysis results from the collaboration of national actors, themselves rooted in national rationales. Risk analysis is used to legitimise decisions made by the Management Board of Frontex. The definition of the outsider has not emanated from a single political centre's decision, but has been synthesised from the interaction of the various national political centres that are the member states.

Second, risk analysis is created by the interaction of national and European levels, via border control agents' movements and transfers of information gathered by national departments. Thus, the outsider figure arises not merely in the context of European cooperation on immigration and border control, but from much more enduring dynamics. This idea is also shaped by the career paths of those in charge of border control. The designation of smugglers and criminal immigration networks (*filières*) is clearly linked to the PAF's metamorphosis into a criminal immigration police force that has the legitimacy to act within the territory.

Finally, the link between crimmigration and securitisation hinges on the figures of the smuggler and the *filière*. Resources for the fight against criminal activity are indeed used to regulate immigration; beyond this, however, the presence of an external menace is linked to the exercise of police power within the territory. The logic operating at the external borders of European territories does not disappear within this territory. For the time being, the same actors at the borders also work within the borders, seeking this outsider whose existence and definition are a matter of consensus.

Notes

1 EUNAVFOR is a military operation intended to fight against 'human trafficking in the Mediterranean'. Two phases were planned: the observation and intelligence operation launched on 22 June was replaced by an 'operational' phase from 7 October 2015.
2 COUNCIL DECISION (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ L 122 of 19 May 2015: 31.
3 This work has benefited from a state grant administered by the Agence Nationale de la Recherche for the project Investissements d'Avenir A*MIDEX, which holds the reference no. ANR-11-IDEX-0001-02.
4 In 1972, this department assumed the name Air and Border Police; in 1994, it was redubbed the Central Directorate of Immigration Control and the Fight Against Employment of Illegal Aliens (Decree 94-885 of 14 October 1994), and in 1999 with

the adoption of Decree 99-58 it became the Border Police. The different steps of this transformation will be further discussed.

5 CAC 19980002 – Article 6, Conference outline by André Dierickx, Head of the Central Air and Border Police Department, at the 31st promotion of police commissioners, 10 October 1979, ENSP.

6 Signed in 1985, the Schengen Agreement enabled citizens of member states to travel within the signatory states' territory without being subject to internal border checks. The Schengen Agreement extends this right to citizens of third-party states with valid stay visas.

7 The name 'PAF' will be retained for ease of reading.

8 The French word *filière* will be used in this chapter because it contains an ambiguity that cannot be found in the English word 'ring'.

9 CAC 1998 0002 – 6 – Document d'information sur le Service Central de la PAF, October 1975.

10 CAC 1994 0368 – Article 11 – Note of the Central Department of the Air and Border Police to the General Director of the National Police on the Committee of Evaluation of the Effectiveness of Border Checks at External Borders, 8 December 1994.

11 CAC 1994 0368 – Article 13 – Note entitled: Statistical Information and Reasons for the Growth of Clandestine Immigration Recorded at French Internal Borders, October 1993. (Notes on 1994 0368 – Article 13 – Schengen file October 1993 – PAF report).

12 CAC 1994 0368 – Article 13 – Note entitled: Statistical Information and Reasons for the Growth of Clandestine Immigration Recorded at French Internal Borders, October 1993.

13 CAC 1994 0368 – Article 13 – Note entitled: Statistical Information and Reasons for the Growth of Clandestine Immigration Recorded at French Internal Borders, October 1993.

14 He recommends for example 'having a more nuanced idea of the Algerian flow from Germany'.

15 CAC 1998 0002 – Article 3 – Note by Marchand, Central Department of the Air and Border Police, to the Prefect, Central Director of the Territorial Police Service, on the programme for the training of French police on European questions (application of the Schengen Agreement).

16 Council Conclusions of 30 November 1994, on the organisation and development of the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI).

17 Who in turn become sources of information for CIREFI.

18 Council Conclusions of 30 November 1994, on the organisation and development of the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI).

19 Resolution of 27 May 1999, on the creation of an early warning system for the transmission of information on illegal immigration and facilitator networks.

20 Joint Action of 16 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union establishing a common programme for the exchange and training of, and cooperation between law-enforcement authorities (OISIN) OJ L 007 of 10 January 1997: 0005 – 0008.

21 Joint action 98/244/JHA of 19 March 1998, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, introducing a programme of training, exchanges and cooperation in the field of asylum, immigration and crossing of external borders (Odysseus-programme) – (1998–2002) OJ L 99, of 31 March 1998.

22 2002/463/EC: Council Decision of 13 June 2002 adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme), Official Journal L 161, 19 June 2002 P. 0011–0015.

23 The Plan for the management of the external borders of the member states of the European Union, approved by the JHA Council on 13 June 2002, 9834/1/02 FRONT 55 COMIX 392 REV 1.

24 The Strategic Committee on Immigration, Frontiers and Asylum (SCIFA). This is a sub-group of Coreper, which was established in 1999.
25 A centre for Germany's land borders, a 'risk analysis' centre in Finland, a centre for training of border guards in Austria, two on the maritime borders in Greece and Spain, and a centre for aerial border checks in Italy.
26 Note from the Finnish delegation to SCIFA on the Plan for a Common Integrated Risk Analysis Model, 23 January 2003, 5622/03, LIMITE, FRONT 5, COMIX 43.
27 In 1996, a new structure was formed within the PAF: OCRIEST, the Central Office for Combating Illegal Immigration and Employment of Undocumented Foreigners. This would be one of the central offices of the national police. These offices are considered elite units, specifically in charge of cooperation with their international and European colleagues. OCRIEST is the only central office attached to the PAF.
28 Interestingly, the criteria for characterising a migratory route are nearly the same as those enabling police in charge of border checks to target those fitting the profile of a possible offender. See Casella Colombeau (2015) on 'plausible stories' (Heyman, 2009; 2001; 2004) formulated by police agents for border control.
29 Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the member states of the European Union.

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8 Is there a European refugee citizenship in the making?

The still-weak institutional basis of a common European asylum system

Ludger Pries and Natalia Bekassow

Introduction

In 2015, more than one million refugees knocked at the EU's doors looking for shelter. More than 3,500 refugees drowned in the Mediterranean while trying to reach the shores of EU member states. Both developments put a number of pressing questions at the top of the European political agenda and discourse in the EU alike. How can the EU guarantee the minimum rights of refugees and asylum seekers codified in human rights law as well as international and European refugee law? How can the EU deal with the massive increase of people claiming protection and asylum, in terms of accommodation, asylum petition procedures and sharing responsibilities between EU member states and neighbouring countries such as Turkey or Macedonia? In 2015, refugees entered the European scenery not only as victims begging for charity but also as citizens claiming their rights – and demanding that the EU be consistent with its own declarations.

The political, civilian and humanitarian case of the refugee drama, as well as the failure of the EU asylum regime, is illustrative for many aspects of the scientific debates on citizenship for two reasons. First, it reveals the *multi-level dimensions of citizenship*. At the *global level*, after the Second World War the international community of nation-states agreed upon international standards for defining and treating refugees; the refugee issue was included in UN activities related to global human rights and international law.[1] At the *European level*, the EU agreed upon a joint policy for dealing with asylum seekers and refugees. This process started in 1999 and, after many steps, in 2013, it ended up in the declaration of the Common European Asylum System (CEAS).[2] The CEAS was published as a collection of three important revised directives – on asylum procedures, reception conditions and qualification criteria – and two revised regulations, i.e. the Dublin regulation and the EURODAC regulation. At the time when the EU strengthened its regulative basis for asylum – and before the CEAS system could mature, grow and stabilise – there was dramatically increasing demand to put the CEAS into practice, mainly due to the violent conflicts in the near East and Africa. Despite the definition of the CEAS and its approval by the European Parliament and the Council of the EU, at the *national level* all EU member states are still committed to international and humanitarian law and treaties, to European directives and regulations, and to their respective national refugee and asylum regimes. Finally,

at the *regional level* of EU member states there are quite different jurisdictions at either regional or federal level (e.g. in Spain or in Germany) to regulate and/ or manage different aspects of the processes of e.g. how to distribute and accommodate refugees and asylum seekers. *De jure* as well as *de facto* citizenship rights are at play at all of these four institutional levels.

Second, the EU asylum regime highlights the differences between *de jure* and *de facto* citizenship. On the one hand, many EU member states *de facto* deny most if not all aspects of citizenship rights that international refugees *de jure* can claim. Obviously, for those refugees from Africa or Asia who do not come to Europe by aeroplane, it is almost impossible to apply for asylum in EU member states without risking their lives in the Mediterranean. They have to enter an EU member state *de facto* irregularly in order to be able to exercise their global, European and national rights as refugees *de jure*. On the other hand, there are also many *de facto* citizenship rights even for those who do not have any *de jure* refugee or residence permit status in the EU. Hundreds of thousands of refugees entering Mediterranean EU member states such as Italy or Spain as either regular or irregular refugees move forward to other EU countries such as Sweden or Germany regularly or irregularly.

This chapter mainly argues that we have to explain the gap between *talk* and *action* concerning the European asylum regime by the *low level of European institutionalisation of refugee-related citizenship*. Citizenship is the status of a person concerning his or her rights and duties in relation to a sovereign authority like a nation-state, within its regulative, normative and cognitive frames. The degree of institutionalisation of citizenship depends on the legitimacy of these frames in the societal field where potential individual, collective and corporative actors orient themselves. Until now, it has been only OECD states and Western EU member states that have recognised and enacted citizenship rights for refugees and asylum seekers. In many countries that became EU member states after the 2004 and 2007 extension rounds (such as Bulgaria, Hungary, Lithuania or Romania), the institutionalisation of this kind of citizenship has only begun.

Accordingly, despite the nice programmes and talk of the CEAS there are not only a huge variety of national asylum regimes but also of related action. Given that at the level of declarations and talk there already exists a common European strategy (CEAS), the future of an EU-wide asylum regime could either homogenise talk while maintaining actually different national regimes (*convergent divergence*) or start from different current national regimes and homogenise them towards a European regime consistent in talk and action (*divergent convergence*). In the face of this situation, the chapter takes four steps. First, it offers an overview of concepts of the nation-state, citizenship in general and *refugee citizenship* in particular. It then examines the under-theorised concept of refugee citizenship from the perspective of neo-institutionalism, which allows us to address the gap between talk and action in EU refugee policy and to consider a broad field of governmental and non-governmental organisations dealing with refugee- and asylum-related issues. Third, it points to the still-tremendous divergence of national

asylum regimes and the corresponding absence of an institutionalised European refugee citizenship, but also refers to some tendencies of European 'upward convergence' towards a CEAS. Finally, it draws some conclusions regarding the future of institutionalising European refugee citizenship.

Discussing nation-state and citizenship

In his seminal essay 'Social Classes and Citizenship', the British sociologist Thomas H. Marshall not only argued that the modern concept of citizenship developed simultaneously with the emergence of nation-states but also proposed an analytical and moral-political framework that allowed us to come to terms with the relationships among the market, institutions of the welfare state and democratic societies. Writing in 1950, Marshall's well-known three-dimensional concept of civil, political and social rights based on the institutions of the nation-state was a pioneering one. Interestingly, Marshall did not restrict citizenship to a narrow conception of economic rights of participation in the market and political rights of participation in public affairs, but also included ideas of social citizenship characterised by recognition and acknowledged the value of citizens as human beings in general (Marshall, 1950: 40).

However, as reality changed due to globalisation and ever-rising migration flows, it became obvious that citizenship necessarily stretches far beyond the concept of nation-state and the national status of rights and membership. Not only is there a global regime of human rights that applies to every human, whatever his or her national membership may be, but at the level of the EU there are similar economic, political and social rights for all people living within its territory, regardless of their national citizenship. Although there are some privileges for EU citizens, many basic rights also apply to third-country nationals, which develop in correspondence with the amount of time they have lived in an EU member state. Thus, neither the nation-state not *methodological nationalism* are sufficient to discuss and analyse rights and belongings any longer.

Wimmer and Glick Schiller developed a critique of methodological nationalism, 'understood as the assumption that the nation/state/society is the natural social and political form of the modern world' (Wimmer and Glick Schiller, 2002: 301; Pries, 2005). Instead, they argued that '[the] social sciences have become obsessed with describing processes within nation-state boundaries as contrasted with those outside, and have correspondingly lost sight of the connections between such nationally defined territories' (ibid.: 307). During the last two decades or so, the classic concept of citizenship has been contested. In its place, a large number of competing concepts have been proposed, such as e.g. world citizenship, global citizenship, universal citizenship, cosmopolitan citizenship, multiple citizenship, postnational citizenship, transnational citizenship, dual citizenship, nested citizenship, multilayered citizenship, cultural citizenship, multicultural citizenship, cyber-citizenship, environmental citizenship, gendered citizenship, flexible citizenship, intimate citizenship or protective citizenship (see Kivisto and Faist, 2007: 2).

Battegay and his co-authors criticise a 'mechanical dualism' in the basic understanding of citizenship (you either gain citizenship by simply fulfilling the conditions, or you 'earn' it with your action). They suggest a concept of *profane citizenship*, which is 'neither a new citizenship nor a citizenship of those excluded from expert models of citizenship', but 'a strong program aiming at renewing the epistemological or even ontological foundations of citizenship' (Battegay *et al.*, 2012: 21–22). They propose the French word 'profane' in its several meanings: first, ignorant; second, sacred or 'returning the sacred to a primal state, that of the community' (ibid.: 18); and, third, in the public dimension, where profane 'appears in the tension between a policy of public declaration and the serving of what is kept secret' (ibid.: 20). The authors regard citizenship as profane 'in dual essence: it is of profane or lay quality with regard to the legal expertise, which lays down the criteria of citizenship, and it is profane with a view to the socialization of citizenship, which makes it a civil religion' (ibid.: 22).

Balibar suggests that the concept of *common European citizenship*, based exclusively on citizenship in one of the member states and excluding anyone else, no matter if he/she is settled or economically or culturally integrated, resembles something like 'European apartheid', which is 'a reverse side of the emerging European community of citizens' (Balibar, 2010: 319). Such a principle of differentiation simply on the basis of nationality creates 'a permanent discrimination', i.e. while European foreigners are perceived as 'less than foreigners' or 'not exactly strangers', non-European foreigners, such as immigrant workers or refugees, are 'more than foreigners' or even 'the absolute aliens'. Consequently, the latter category becomes subject to institutional and cultural racism (ibid.).

Due to this communal logic, some European member states (mostly in the south) are forced to lead 'permanent border war against migrants', reducing the notion of a 'stranger' to that of a 'virtual enemy'. Balibar describes this as 'one of the clearest signs of the crisis of nation-state'. As for foreigners inside such nation-states, they most likely become 'internal enemies', treated by the majority of the population and the authorities with caution or as 'additional citizens' (ibid.: 320).

Despite the great quantity of scholarship on citizenship in general, the concept of citizenship has hardly been related to refugees and asylum seekers, who frequently are addressed indirectly as non-citizens when considering their rights and belonging in the country of arrival. Bosniak suggests four interrelated dimensions of citizenship, i.e. as 'rights', as 'legal status', as 'political activity' and as a 'form of collective identity and sentiment'. She differentiates between universal, nationally bounded and alien citizenship, arguing that the second one is still the most applicable in the modern understanding of citizenship and immigration (Bosniak, 2006: 24–36). Bosniak holds that the formal line between citizenship and non-citizenship is potentially porous. On the one hand, non-citizens such as refugees and asylum seekers may participate in community life and organisations, despite the absence of the right to vote. On the other hand, there are citizens who are neither marginalised nor barred from participation, but do not actively practice their citizenship (ibid.: 34–35). Consequently, Bosniak concludes that 'aliens can thus be described as both outsiders to and subjects of citizenship simultaneously' (ibid.: 34).

Following Bosniak's argument, Shinozaki conceptualises citizenship of irregular migrants as both status and practice, calling it 'migrant citizenship from below', meaning that it highlights 'the transnational dimension of migrant citizenship' and 'their simultaneous embeddedness structurally as agents, in both society of origin and residence' (Shinozaki, 2015: 9). In another approach, Goldring and Landolt analyse non-citizenship in the Canadian legal and social context and propose to leave the nation-bound perspective on citizenship behind and turn to a transnational lens for its analysis instead. The authors suggest that, on the one hand, citizenship status does not automatically mean citizenship practice and, on the other hand, it cannot protect from inequalities or discrimination either. Yet non-citizenship is both characterised by limits in membership and rights within a political community and combined with social exclusion and vulnerability by definition (Goldring and Landolt, 2013: 3).

Understanding refugee citizenship from a neo-institutional perspective

Despite these advances in decoupling citizenship from the classic nation-state container, the concept remains under-theorised when concerning refugees and asylum seekers. The simple juxtaposition of citizenship and non-citizenship remains as weak as the dichotomy of *de jure* and *de facto* citizenship. Neo-institutional theory could help to develop and strengthen the concept of refugee citizenship. It deals explicitly with the tensions between *talk* and *action* of collective and corporative actors, focusing on the relations between formal structures and actual activities of organisations and explaining organisational behaviour in the context of their legitimation strategies. Institutionalism holds that individual, collective and corporate actors[3] orient their behaviour not only, and sometimes not predominantly, by rationally calculated and reflected aims and goals, but by the perceived expectations of their environment. A company, as a for-profit organisation, could perceive making profit as a taken-for-granted or institutionalised expectation in its organisational field (of competitors, state control bodies, consumers etc.). It also could notice that its organisational environment expects statements of Corporate Social Responsibility as part of its legitimation strategy.

Whereas classic institutionalism focuses on individual actors and their societal framework of actions and behaviour, neo-institutionalism looks at organisations as collective or corporate actors. It holds that organisations follow the legitimacy expectations of their organisational field *without* necessarily checking the rationality of their corresponding actions in light of their own internal organisational goals. Organisations develop a *talk* in order to legitimate themselves towards and follow the institutionalised myths of rationality of their organisational field. This environment of organisations, or 'organisational field', is primarily constituted by those other organisations that see and watch each other. In this way, an 'organisational field' is the shared space of awareness, where expectations of legitimacy are perceived and strategies of legitimacy are oriented to. The actual behaviour and *action* of organisations could differ from their *talk* when internal and external expectations of legitimate behaviour are perceived as opposing.[4]

Social institutions as complex patterns and programmes of formal rules, social norms and cognitive frames of significance emerge from mechanisms of making explicit the ruling action norms, stabilising expectations and formalising procedures. According to Scott (1995, see Table 8.1), institutions are based on legitimacy of three different kinds. The first pillar of institutions is regulative and refers to explicit rules, laws and corresponding sanctions that could hold and are valid for a specific field of social relations. The mechanism of guaranteeing that individual and collective actors comply with this regulative basis is mainly coercion, and actors comply with the regulative side of institutions in an instrumental way: that is, they need not be fully convinced of the rules and laws, but they follow these regulations due to their fear of corresponding sanctions.

The second pillar of institutions is their normative basis. This means that individual and collective actors are driven by norms they are convinced of and that they have internalised. It is social and moral obligations, as well as actors' being convinced of their appropriateness, that make them follow the normative foundation of an institution. The third pillar of institutions is the cognitive framing of situations and worldviews. Institutions always require a certain interpretation of the social world in general that those who know the social institution and are obliged to it take for granted. In this case, an actor simply follows what the institutional cognitive framing prescribes to him or her: that is, actors do not reflect explicitly about the appropriateness or instrumental value of the expected behaviour.

If we apply this basic idea of social institutions to the concept of citizenship, we may conceive of it as one of the most important social institutions of societies. The neo-institutional focus on both citizenship and refugee citizenship allows us to do three things. First, we can address the gap between talk and action in the EU refugee regime; second, we can integrate an action-oriented approach into citizenship debates; finally, we may refer systematically to the broad field of governmental and non-governmental organisations that are dealing with both refugee- and asylum-related issues. Citizenship in a general sense relates to all human beings, respectively to all individuals defined by specific social, cultural, ethnic and national criteria or by territorial space. In a more specific way, one could define refugee citizenship as *the complex framework of*

Table 8.1 Three pillars of institutions

	Regulative	*Normative*	*Cognitive*
Basis of compliance	Expedience	Social obligation	Taken for granted
Mechanisms	Coercive	Normative	Mimetic
Logic	Instrumentality	Appropriateness	Orthodoxy
Indicators	Rules, laws, sanctions	Certification, accreditation	Prevalence, isomorphism
Basis of legitimacy	Legally sanctioned	Morally governed	Culturally supported, conceptually correct

Source: Scott, 1995: 35.

regulative, normative and cognitive elements that define and dominate the rights and aspirations of the specific group of persons who are fleeing their country due to political, racial, religious or other reasons of persecution.

At the *regulative* level, such a definition of refugee citizenship includes the rights

> not to be expelled, except under certain, strictly defined conditions [Article 32]; not to be punished for illegal entry into the territory of a contracting state [Article 31]; to work [Articles 17 to 19]; to housing [Article 21]; to education [Article 22]; to public relief and assistance [Article 23]; to freedom of religion [Article 4]; to access the courts [Article 16]; to freedom of movement within the territory [Article 26]; to be issued identity and travel documents [Articles 27 and 28]. (UNHCR, 2011: 4)

After the Second World War and in the face of having had to deal with tens of millions of refugees in Europe, at the international level the Geneva Refugee Convention was extended and made more explicit by the UN protocol of 1967. By April 2015, almost all nation-states of the world that were registered under the UN had signed and accepted either the Geneva Convention or the UN protocol, or both.[5] This shows that, considering its general regulative pillar, refugee citizenship is solidly based on international and humanitarian laws and treaties, as well as on European directives and regulations and on corresponding national laws.

However, when it comes to the *normative* and *cognitive* pillars of refugee citizenship, the basis of this social institution remains quite weak at the EU level. This is hardly surprising given the long and varying history, social structure and political regimes of EU member states. On the level of nation-states – and no less on the level of micro-regions within them (e.g. the Spanish Autonomies) – the normative framework and the taken-for-granted cognitive framing of refugee citizenship vary substantially. This became obvious in the refugee crisis of autumn 2015 when EU member states developed and discussed completely opposing talk and action. The public discourse and its cognitive framing, as well as the actual policy and politics, differed substantially, e.g. between Hungary, Czech Republic and Poland on the one hand, and Austria, Sweden and Germany on the other hand. However, the great variation of the normative and cognitive pillars of refugee citizenship also becomes visible with regard to the number of refugees received and accepted by these countries; the conditions of residence, medical care and social provisions for refugees; or the proportion of refugees recognised and granted asylum. The distribution and accommodation, as well as decision-making processes with regard to refugees and asylum seekers, vary to such an extent that one can hardly detect any joint normative and cognitive criteria of refugee citizenship at EU level. The Common European Asylum System of 2013 was a crucial step to stabilise a regulative pillar of European refugee citizenship as a social institution at the EU level. Nevertheless, heterogeneity still dominates the normative and cognitive aspects of refugee citizenship, as becomes obvious with regard to differing recognition rates of asylum applicants

in EU member states – even if one compares the rates of refugees coming from the same country (see EASO, 2014).

When looking only at the talk and action of governments and politicians at EU and national level, there are significant bifurcations between the highly developed regulative framing of EU refugee citizenship and the corresponding talk of EU authorities on one side, and the action of EU authorities and many member states on the other side. Focusing exclusively on the regulative pillar and governments, the EU and European refugee citizenship show up as nice talk, but with little institutionalised social reality.

Beyond that, a neo-institutional perspective allows the broadening of the scope of analysis towards other actor groups, mainly organisations, in order to detect European refugee citizenship 'in the making' as an emerging transnational social institution. Hatton underlines the significance of organisations, namely NGOs, for the European refugee regimes; he states the need to integrate NGOs and other collective actors in order to explain the dynamics of the European asylum regime:

> Policy development within the EU is also influenced by a variety of well-organised interest groups and NGOs such as the UNHCR and the European Council for Refugees and Exiles, which are often represented in the European Commission's Expert Groups. While the EU is often criticised as suffering from a democratic deficit, in the refugee arena this typically works in favour of . . . humanitarianism and against the xenophobic pressures that face many national governments. (Hatton, 2012: 24)

In a *multi-level (neo-)institutional collective-actors approach* one can make the following assumptions. Collective actors at European, national and local level have divergent aims and strategies; further, there is also different talk and action, with tensions between them, at all these levels. Organisations act according to their own aims and the expectations of their organisational field alike. Consequently, in a multi-level perspective we have to take the aims and strategies of different collective actors at European, national and local level into account. Not only are all these actors involved in a variety of talk and action in the organisational field but, no less, there is high legitimation pressure to integrate talk and action in the long run.

Applied to the European asylum question, the multi-dimensional and multi-level collective-actors approach assumes that there are different histories, economic cycles, political forces, interests, organisations, migration regimes, asylum and refugee politics, and policies, as well as varying power relations between collective actors (state agencies, NGOs, international organisations etc.), at the transnational, European, national and local levels. According to the (increasing) strength of legitimation pressures in their corresponding organisational fields, the behaviour of collective actors will converge and homogenise in the sense of adapting talk and action. The EU is a supranational framework of unbalanced power relations, competing interests and contested terrains. Until now, at the European level the CEAS is a nice programme as talk, but is hardly harmonised at national

and local level. As asylum and refugee issues are contested issues everywhere, usually NIMBY ('Not In My Back Yard') politics are the first reaction at national and local level.

Based on the multi-level (neo-)institutional collective-actors approach one could suppose that collective and corporate actors at local, national, European and global level are increasingly intertwined, that they watch each other, and that they are embedded in multi-level organisational fields. Empirical fieldwork in five Mediterranean EU member states (Cyprus, Greece, Italy, Malta, Spain) has revealed the high degree of development of organisational networks dedicated to dealing with refugee and asylum issues (Pries and Gansbergen, 2016).[6] These organisational networks articulate between civil society and political system. With regard to refugee citizenship as a European institution, in many cases these networks are effectively filling the gap between CEAS talk and (lack of) state action at European, national and regional level. Figure 8.1 visualises the actor types of organisational networks of eight refugee- and asylum-related organisations in Cyprus. The figure does not represent the total network of all related organisations in Cyprus, but only the ego-centred networks of organisations that were interviewed and indicated the outlined organisations as their most important cooperation partners. The actual organisational networks of all organisations are more extended and differentiated.

The organisations interviewed and their most important cooperation partners represent a wide range of organisations, from classic NGOs through research institutions to local, national or international governmental organisations. The rather heterogeneous composition of the ego-centred networks includes national

Figure 8.1 Ego-centred networks of eight refugee- and asylum-related organisations in Cyprus
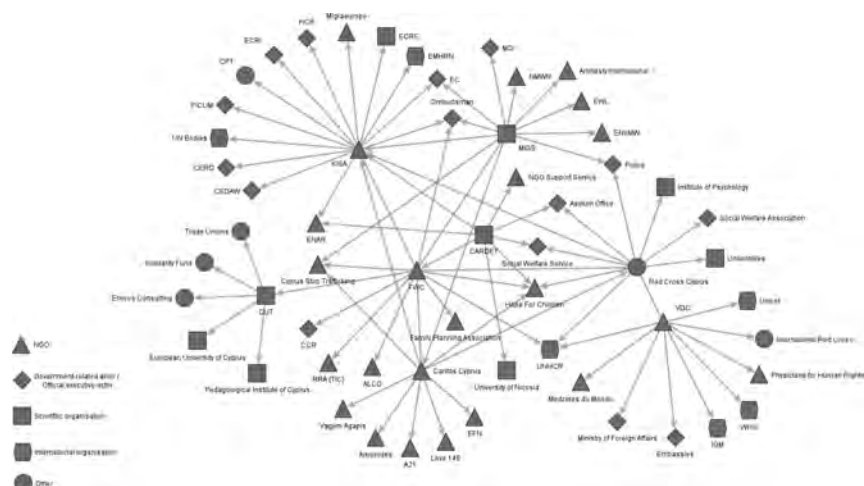
Source: Expert interviews and homepage analysis (for abbreviations see chapter annex).

governmental corporate organisations such as the Ministry of Interior (MOI) and the National Machinery for Women's Rights (NMWR), but also European or international organisations such as the Mediterranean Institute of Gender Studies (MIGS) or the World Health Organization (WHO) and International Organization for Migration (IOM). Indicated ego-centred organisational networks in Cyprus include on average five NGOs, three official-executive actors, one scientific institution, one international organisation and one other actor of another type. All organisations that were analysed in the five Mediterranean countries showed a wide scope of types of organisation that they are cooperating with, an enormous variety of norms and values that guide each of the organisations, and differences with regard to the main level of legitimation (national, European or global) of their activities (Pries and Gansbergen, 2016).

Although a lot of empirical research is still necessary, first-hand evidence reveals that there do exist extended and stable organisational networks that are not only concerned with refugee and asylum issues but in direct contact with refugees and asylum-seeking persons and groups. The significance of these organisational networks should not be underestimated. They are working as intermediaries between civil society and state agencies. They interrelate collective and corporative actors of different types and levels of activity and operate as the basis for emerging asylum- and refugee-related 'organisational fields'. They represent the ground over which institutionalised expectations of a legitimate way of dealing with refuge and asylum are defined. European refugee citizenship as an important social institution will hardly emerge and stabilise without the public discourse and pressure of legitimation that these organisational networks could produce. Collective-actor groups at local, national, supranational and transnational level are increasingly entangled in organisational networks, and therefore they raise the expectations of legitimacy in the European Union on a common societal base. Whenever the nice talk of the CEAS has a chance to translate into corresponding action, this probably will not be the outcome of isolated political decision-making at European level, but of the interplay between Europeanisation 'from above' (e.g. by the CEAS) and Europeanisation 'from below' (e.g. by increasingly intertwining organisational networks).

Strengthening European refugee citizenship as a social institution

Despite substantial national differences with regard to migration-related citizenship, the last decade has seen considerable efforts to establish and institutionalise a European refugee and asylum regime. This regime

> is underpinned by three pillars: harmonisation of standards of protection, by further aligning the Member States' asylum legislation; effective and well-supported practical cooperation; as well as increased solidarity and a sense of responsibility, not only among EU Member States but also between the EU and non-EU countries. (Triantaphyllides, 2012: 15)

Although Triantaphyllides' pillars (harmonisation of norms, practical Europe-wide cooperation, sharing of responsibility) are not exactly coherent with the three pillars of institutionalisation that we referred to above, there is considerable overlap between them. Thus, we now turn to the tendencies of change that have developed with regard to the regulative, normative and cognitive pillars of European refugee citizenship.

The regulative pillar: the CEAS as the new regulative frame of EU refugee citizenship

In 2012, the EU established the CEAS, which consists of several

> key, positive substantive and procedural rules, most notably, the recognition of the 'right to asylum' in the EU, which goes beyond protection from refoulement, but also the recognition of non-state agents of persecution, gender-based persecution and the codification of subsidiary protection and temporary protection . . . and, finally, the recognition of basic standards of reception (e.g. detention) for asylum seekers. (Lambert, 2013: 11)

Summarising the outcome of the harmonisation of legal norms, there is little doubt that the CEAS was successful and is quite far-reaching in defining humanitarian principles and procedures. The CEAS can be seen as progress in the EU-wide harmonisation of refugee-related standards, but full homogeneity in laws and legal concepts is not achieved yet (Bendel, 2014: 2).

Bendel refers to the beginning of a European asylum system, when already in 1999 the EU had defined which member state was responsible for the asylum procedure, and how this procedure and the reception of asylum seekers should be organised. In the middle of 2013, a second stage was adopted with the CEAS in order to achieve stronger harmonisation. The aim was to increase the standards for an efficient and fair procedure for asylum seekers in Europe and to strengthen the solidarity of member states for the reception of people of concern (ibid.). However, Lambert argues that the CEAS is still characterised by significant gaps and shortcomings, such as

> a tendency towards more exceptions and derogations to established standards (e.g. . . . limitation of the application of the Refugee Convention definition to third-country nationals, the internal flight alternative concept, the safe third country, first country of asylum and safe country of origin principles, manifestly unfounded applications), restrictive access to international protection through delocalized migration control . . . the Dublin rule . . . increased securitization . . . and a tendency, in some countries, to resort to granting subsidiary protection rather than refugee status. (Lambert, 2013: 12)

Concerning the regulative pillar and legal norms, one can state a general tendency of growing significance:

> Rather than leading to policy harmonisation at the 'lowest common denominator', EU asylum laws have frequently led to an upgrading of domestic asylum laws in several Member States, strengthening protection standards for several groups of forced migrants, even in the case of EU laws that have been widely criticised for their restrictive character. (Thielemann and El-Enany, 2009: 24)

In a similar way, Kaunert and Léonard argue:

> that the move to the EU venue [of a common EU asylum policy] has not led to an increase in the restrictiveness of asylum policies for two main reasons: (1) institutional changes that have empowered more 'refugee-friendly' EU institutions and that have recently been consolidated by the Lisbon Treaty and (2) the increasing 'judicialisation' of asylum in the EU. (Kaunert and Léonard, 2011: 11)

During five years of negotiation on the CEAS, the European Parliament became more powerful and finally, together with the EU council, it took on the role of the co-legislator, the consequence being that the gap between different positions of EU member states became much more obvious, e.g. when some member states opposed a new system of distribution of asylum seekers that had been proposed by NGOs and researchers as an alternative to the Dublin Regulation (ibid.: 1). Further, it is difficult to harmonise standards due to decentralising tendencies in some member states such as Italy and Spain, where regions or autonomies were enabled to pass their own laws and regulations (Thränhardt, 2013: 10, 12; Finotelli, 2013: 51). This means that the asylum system is developing not only at the European level, but also at national and regional levels (Finotelli, 2013: 55). In Italy, local governments have much more power than the national state to change the situation with regard to migration and integration issues. The creation of a network consisting of municipal projects for asylum seekers' and refugees' reception that led to the institutionalisation of the national system for protection of these groups of concern is just one example in this context (ibid.: 62).

In this regard, the European Asylum Support Office (EASO) and its team took on the role of experts who try to mediate between the member states. Concerning the legal norms of how to share responsibility and resources for asylum seekers (reception, application procedure, distribution during and after the process, resettlement programmes etc.) there is only the Dublin principle of the country of first entry, but no consensus on how to distribute burden and opportunities. Member states with a high influx of asylum seekers and refugees and with the weakest asylum systems should be supported through the Asylum and Migration Fund during the period between 2014 and 2020 (EASO, 2014: 55). Nevertheless, the specific regulative norms of responsibility-sharing, one important pillar of a common refugee citizenship, are not defined.

The normative pillar: heterogeneity of refugee citizenship in selected EU member states

The normative pillar of institutionalising a European refugee citizenship includes a Europe wide *professionalisation* of all collective and individual actors who are engaged in refugee and asylum issues. One can never transfer formal regulative norms from talk to action without professional knowledge and ethics. Persons and organisations involved in putting legal norms into practice also have to follow social norms and moral obligations. In 2010, as an outcome of corresponding activities, the EASO was created, with its headquarters in Malta:

> Over the last decade considerable progress has been made in establishing the CEAS. However, most of the focus has been on harmonisation of standards and procedures, something that EASO aims to further advance through its training programme. Nevertheless the application of these directives remains very uneven across the EU. (Hatton, 2012: 10)

There is much empirical evidence making it obvious that the CEAS until now (still) reflects more the talk than the action, especially at the Mediterranean borders of the EU and Schengen areas (see Luft, 2014; Düvell, 2013).

For the first time ever, and completely innovative compared to all other countries and regions of the world, joint training activities and interchange of personnel

Figure 8.2 Variation in recognition rates in the EU 28 by citizenship of applicants, 2013
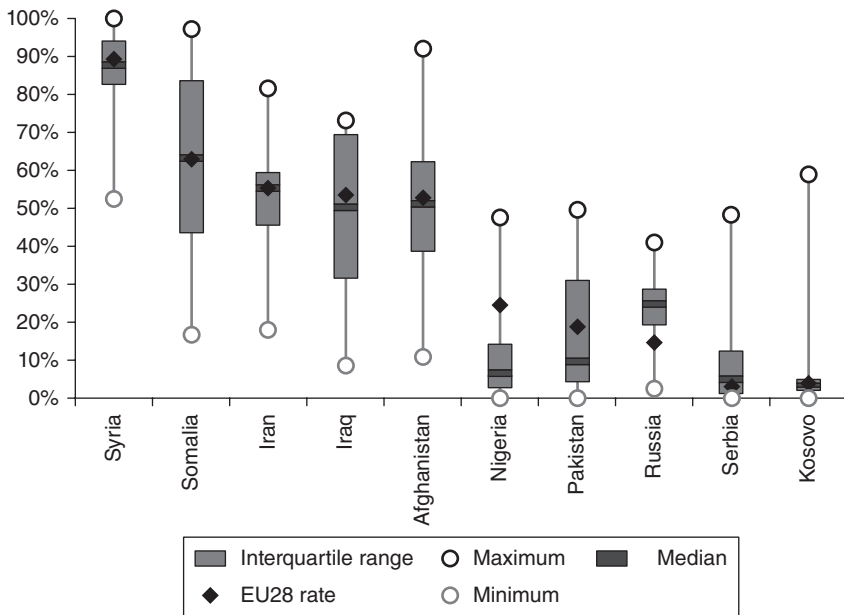
Source: EASO, 2014: 25.

between EU countries developed in order to learn from each other in practical decision-making. As a result, harmonisation should trickle down from the legal-normative frame to the professional social praxis of individual and collective actors.[7] However, indicators such as housing and hosting conditions, the average time taken to deal with an asylum application, the labour market, other rights of asylum applicants and, finally yet importantly, the outcome of recognition rates of asylum procedures show the dramatic variety of national practices and outcomes. The UNHCR 'found significant variation in the outcomes of asylum applications from situations of violence lodged in six European Union countries' (UNHCR, 2012: 10).

Figure 8.2 indicates the variation in recognition rates in the EU 28 by citizenship of asylum applicants for the ten most important countries of origin. There can exist varying recognition rates between EU member states, e.g. when one EU state receives many applications from Serbian citizens and another one from Syrian citizens. Due to different national situations of war and persecution, all over the world the recognition rates of asylum applicants do vary according to their countries of citizenship. Yet, if for the same country of origin, e.g. Afghanistan, applicants' recognition rate spans from 10 per cent to more than 90 per cent within the 28 EU countries, it is difficult to speak of a common normative framing of asylum citizenship in the EU. This becomes obvious during the massive influx of refugees into the EU in 2015.

The cognitive pillar: contrasting national frames of reference

While the normative pillar of a European refugee citizenship is more than weak, the cognitive pillar hardly even exists. Given, that the basis of legitimacy is the cognitive framing of the asylum and refugee topic that is taken for granted and culturally shared, a minimum of solidarity and responsibility between member states and their national citizens should be the foundation of a common European refugee citizenship. In 2012, a report on the issue stated: 'Even less progress has been made in developing effective burden-sharing policies' (Hatton, 2012: 10). In a similar way, Triantaphyllides argued that 'it is now important to tackle head on the third pillar of the CEAS by giving substance to the notion of solidarity and responsibility-sharing, enshrined in Article 80 TFEU, which constitutes an essential horizontal component of the CEAS' (Triantaphyllides, 2012: 15). Since then, neither the number of refugees drowned in the Mediterranean nor the shipwrecks at Lampedusa in October 2013 and on the Libyan shores in 2014 and 2015 have substantially changed the attitudes of national representatives in terms of responsibility-sharing. In summer 2015, the United Kingdom and almost all Eastern EU accession states opposed agreement on EU mechanisms of distributing refugees, resources and accountability. This situation had not changed by 2016, while public opinion polls and discourses of politicians underline the broad variety of and lack of common ground for a European refugee citizenship.

This state of affairs becomes obvious e.g. in what could be called 'responsibility trading' between EU member states when it comes to deciding which state is responsible for dealing with an asylum application. Following Dublin Regulations 343/2003 and EURODAC regulations (RC) No. 2725/2000, the member states send 'requests' to each other for the acceptance of responsibility of an asylum application. Accordingly, EUROSTAT provides annual statistics to incoming requests (country A reports requests received from other countries) and outgoing requests (country B reports requests sent to all other countries).[8] Thus, in 2014 there were almost 130,000 requests between EU member states to take over responsibility of an asylum seeker.[9] Only Germany asked other member states in more than 35,000 cases to take over an asylum application, which is the largest number of requests performed. In turn, there were 5,535 cases in which another member state asked Germany to accept the responsibility of an asylum application.[10]

These numbers reflect the lack of a common cognitive framing of refugee citizenship in the EU and a major failure of the CEAS in practice. UNHCR, as an observer of EU asylum policies, constantly states that there are accentuated different trajectories of asylum regimes between the member states:

> Some Member States currently argue strongly in favour of merits of the system as it stands, while others would seek greater efficiency in the form of more and more rapid transfers. There is also a third group of States and other stakeholders, including UNHCR, that perceive pressing needs for the current system to be reinforced with more safeguards for the rights of applicants. As a close observer of the system over many years, UNHCR believes that the need to fill protection gaps is urgent. UNHCR also considers that the efficiency of the system can be improved without sacrificing procedural and substantive rights. (UNHCR, 2009: 25; see also Thielemann, 2006: 4–5)

Conclusion

While citizenship developed simultaneously with the emergence of the nation-state, it has changed during the last decades, two of the main reasons being globalisation and rising migration flows. However, the citizenship approach goes far beyond both the concept of the nation-state and the national status of rights and membership. We argued that neither the concept of the nation-state (and the corresponding methodological nationalism) nor Marshall's three-dimensional concept of citizenship are any longer sufficient to adequately grasp the character of rights and belongings, one reason being that although there is a wide debate on citizenship there is hardly any link to the situation of refugees or asylum seekers.

In order to be effective in social practice (i.e. in talk and action, *de jure* and *de facto*) we argued in favour of institutionalising refugee citizenship in a broader societal environment. Initially designed to establish a common European asylum regime, the CEAS has been widely criticised for failing in practice – especially since the refugee crisis escalated in 2015.

The chapter made a plea for applying a neo-institutional perspective in order to develop a systemic view on the concept of refugee citizenship, as this theoretical approach emphasises the critical role of diverging collective actors in European asylum who are effectively filling the gap between CEAS talk and the lack of state action at European, national and regional levels.

Further, we showed that the challenges and problems of the emerging European refugee citizenship are most worrying at the normative and the cognitive level. Although with regard to the CEAS there are clear homogenising trends at the level of EU member states to meet European legal norms on a regulative level, so far neither are legal concepts completely homogeneous with regard to legal concepts nor are there any specific regulative norms of responsibility-sharing. At the normative pillar, the EASO training programme, with its interchange of staff among asylum-related organisations between EU countries, indicates initial steps towards a common normative framing and an emerging professionalism. Nevertheless, in the face of enormous variation with regard to rates of recognition of asylum applications between member states one can hardly talk of a common European asylum regime. However, even less realised is the cognitive pillar, as 'responsibility trading' between EU member states shows. A consequence of Dublin regulations, this not only shows an almost complete lack of a common cognitive framing of asylum and refugee issues in the EU but no less a major failure of both the CEAS and a European refugee citizenship. Given that European public opinion is 'greatly in favor of more stringent asylum rules combined with an increase of forced deportations of rejected asylum seekers' (Hansen and Hager, 2012: 12) for refugees, the EU is far from being an 'area of freedom, security and justice'.

A multi-level (neo-)institutional collective-actors approach such as we proposed in this chapter would suggest that a European refugee citizenship may emerge and increase in strength only if there is a common field and pressure of European legitimacy. Such expectations of legitimacy at the regulative, normative and cognitive levels could in turn stabilise only in a complex framework of intertwined local, national and European collective and corporate actors. In a multi-level perspective, we have to take aims and strategies of different collective actors at European, national and local level into account; these collective actors are involved in a variety of talk and action within the organisational field; one might assume that in this field talk could lead to action in the long run. The almost complete failure of the European asylum system during the dramatic refugee crisis during 2015 and 2016 revealed the still-existing wide gap between talk and action.

Despite this pessimistic – respectively: realistic – summary, we must stress that the recent refugee crisis produced for the very first time an intensive discourse on a genuine European issue across the EU. According to the German sociologist Georg Simmel, each conflict has a powerful socially integrating force: it socialises, integrates disparate persons into groups and reduces tensions between them; at the same time, the conflict acknowledges other groups – even if as enemies – as social actors (Simmel, 1903: 490). Thus, Simmel argues that

conflicts promote socialising processes. If this is true, a deepening of the EU and an increasing institutionalisation of a European refugee citizenship will not emerge by social discourse and conflict alone. Rather, its emergence will depend on political decisions, but probably much more on the networks of collective actors and civil society. The pressure of legitimacy will promote either a strengthened European (refugee) citizenship or a renaissance of exclusive nationalisms.

Notes

1 See www.un.org/en/sections/what-we-do/protect-human-rights/index.html, www.un.org/en/sections/what-we-do/uphold-international-law/index.html and www.unhcr.org/cgi-bin/texis/vtx/home, accessed 4 May 2015.
2 See http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm.
3 The main resources that organisations can mobilise and rely on mark the difference between collective and corporate actors. Organisations as collective actors are mainly based on the internal resources of members and their corresponding interests, for example trade unions live predominantly on member fees; non-governmental organisations (NGOs) normally also depend mainly on members' activities and inputs. Organisations as corporate actors sustain themselves by mobilising external resources, which makes them more independent from their members. Companies as for-profit organisations and public authorities such as police or immigration agencies can be considered as corporate actors.
4 Meyer and Rowan (1977) hold that organisations could decouple their legitimation strategies in their organisational field (talk) from their actual organisational behaviour (action). Other neo-institutionalists (DiMaggio and Powell, 1983) argue that in the longer run organisations adapt to the expectations of their organisational field that in this way will homogenise.
5 For the complete list of the States Parties see www.unhcr.org/3b73b0d63.html.
6 Data presented here were collected in a research-teaching project called MAREM ('MApping Refugees' arrivals at Mediterranean borders') funded by the Federal Ministry of Education and Research and organised at Ruhr-University Bochum (Chair for Sociology/Organisation, Migration, Participation) from September 2013 until August 2016; see www.ruhr-uni-bochum.de/marem/en/about.shtml.
7 For more information about EASO Operational Support see https://easo.europa.eu/about-us/tasks-of-easo/operational-support/.
8 See http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin_statistics_on_countries_responsible_for_asylum_application#Database.
9 See http://ec.europa.eu/eurostat/publications/recently-published?p_auth=wCwHj5oo&p_p_id=estatsearchportlet_WAR_estatsearchportlet&p_p_lifecycle=1&p_p_state=maximized&p_p_mode=view&_estatsearchportlet_WAR_estatsearchportlet_dimension=request&_estatsearchportlet_WAR_estatsearchportlet_sort=lastUpdateDate&_estatsearchportlet_WAR_estatsearchportlet_action=search&_estatsearchportlet_WAR_estatsearchportlet_collection=dataset&_estatsearchportlet_WAR_estatsearchportlet_publicationDate=2015.
10 See http://appsso.eurostat.ec.europa.eu/nui/show.do. Concerning actual inter-country transfers of asylum applicants, 6,956 (incoming) and 10,355 (outgoing) Dublin transfers were reported in the Dublin area. The majority (65 per cent of all outgoing transfers registered in 2014) of Dublin transfers took place after a 'take back' request, and Germany performed the largest number of outgoing transfers to other EU+ countries; see EASO, 2014: 32 and http://appsso.eurostat.ec.europa.eu/nui/show.do.

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9 Antinomies of European citizenship

On the conflictual passage of a transnational membership regime

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Introduction

Modern citizenship has long been conceived from a nation-state perspective: generally, it has been understood as a set of equal rights that individuals grant each other based on their membership of the same legally constituted political community. In this sense, citizenship has typically been equated with *democratic* citizenship – it implies an equal right to participate in the political process of decision-making.

However, conceptually, this view of citizenship is haunted by two antinomies. The first consists in an internal *social* selectivity inherent within the concept: according to the promise of modern citizenship, social status must not determine political influence. But there is an ongoing tension between the political and social dimensions of citizenship under the conditions of capitalist societies. A second antinomy consists in an external *political* selectivity. The founding declarations of modern citizenship open up the idea that – at least potentially – all men can be citizens. But as a membership status, citizenship is oriented towards a horizon of social community and is directed towards a closing of political boundaries. Both antinomies – as will be outlined later – are inherently related to the core meaning of modern citizenship insofar as it entails its own dual promise, comprising a generalisation of rights and equal membership status within a political community (Mackert and Müller, 2007: 12–16).

With the two antinomies in mind, it appears that the idea of democratic citizenship covers up a persistent problem – a puzzle without full solution, which cannot be solved either by a retreat to the *national* or a shift to a *transnational* level of political order. In the current situation within which there are spreading diagnoses of a 'simultaneous crisis of the national and the post-national' the antinomies become particularly visible (Balibar, 2004: 65).[1]

In what follows I will discuss the problems that EU citizenship currently faces in the light of this simultaneous crisis. The introduction of EU citizenship in the Treaty of Maastricht 1992 constitutes a challenge for the well-established modern conception of citizenship. It introduces one of the institutionally effective dynamics of detaching citizenship from the national. On the one hand, EU citizenship is not supposed to be a *substitute* for national citizenship: it is still

based on national citizenship in a member state of the EU. On the other hand, due to its transformative character, EU citizenship encapsulates an expansive effect that changes the relation between European and national citizenship in a not yet foreseeable direction. EU citizenship is actually on a conflictual passage from a primarily market-oriented form of citizenship to social and political citizenship, and at the same time is confronted with several aspects of its cosmopolitan promise (currently refugee and migration politics). This conflictual passage again accentuates the tensions in the concept and reveals the challenge of resolving them under changing political conditions.

The first part of this chapter elaborates on the assumption of two basic antinomies in the concept of modern citizenship: the tension between political equality and social status on the one hand coupled with the tension between human and citizen rights on the other. The second part focuses on the institution of EU citizenship and discusses its potential for addressing the antinomies vis-à-vis the current simultaneous crisis of the national and the post-national. Following that, the chapter finally draws conclusions about the prospects for European citizenship by stressing the transformative potential of a cosmopolitanisation process supported by EU citizenship *practice*. Currently the EU is in a difficult situation because it lacks the political authority and the legitimacy-creating institutions for a new configuration of citizenship beyond traditional institutions – a precondition for rebalancing the antinomies.

Antinomies of modern citizenship

Political equality and social status

Citizenship is a concept with a long tradition in the history of political ideas and different trajectories. It can be described as an unfinished dialogue between Aristotelian and Roman understandings (Pocock, 1992): while the Aristotelian understanding focuses on the citizen as a political being – thus putting political *praxis*, embedded in a comprehensive context of meaning, at the centre – an understanding of citizenship as a legal entitlement in the Roman tradition focuses on the appropriation and possession of things.[2] Having its origins in Roman law, this meaning has broadened in modernity towards the inclusion of personal rights to self-determination. Citizenship as a legal status defines spheres of action without prescribing how individuals make use of them; citizenship as praxis indicates activity related to a political form of life, the flourishing of which one deliberately strives to foster.

The modern *political* understanding of citizenship is closely related to the genesis of modern legal constitutions, with their protection of individual rights, but this relationship is inherently ambivalent.

The modern understanding is historically and systematically connected to a concept of republicanism, with its constitutive principles of *freedom* and *equality*.[3] In this understanding, political autonomy means freedom under laws which one has given to oneself as an equal among equals. Thus, envisaging oneself

as author of the laws to which one is subjected is the determining element of democratic citizenship. Citizenship itself is legally constituted and culminates in an act of legal authorisation (political rights). In order to *realise* these rights on an equal basis – which is what democratic citizenship demands – social life has to be shaped by practices expressing the egalitarian principles of republicanism. But the political citizen and the citizen as a 'possessor of things' (ibid.: 42) are historically and conceptually related, which gives the idea of citizenship an exclusionary potential.

The notion of the citizen is constantly floating (especially in the German language, *Bürger*) between the *citoyen* and the *bourgeois*. As a political notion, citizenship refers to a legally constituted membership of a state and the entitlement to (direct or indirect) participation in a process of self-legislation. In contrast to the political understanding, the *sociological* understanding refers to the member of a particular social class, qualified by possession and economic independence. The bourgeois is a market citizen acting self-interestedly, thereby – according to early liberal theory – also fostering the common good. In contrast, from a Marxist perspective the bourgeois conceals, at best, his class interest behind a common interest.

Since equal rights for citizens have been proclaimed, at least formally, social status is no longer allowed to determine political influence. But it is not difficult to show that under conditions of capitalist production (the socialising conditions of the bourgeois) political and social notions of citizenship overlap insofar as political influence and social esteem were never completely detached from each other.[4] Nevertheless, it has been a promise of (social) democracy in the twentieth century that it will contribute to making the two dimensions less dependent on each other.[5] But, as public claims and struggles for inclusion, justice and equal participation indicate, overcoming those conditions that are hindrances to the realisation of equal citizenship continues to be included on the agenda – and increasingly so.

Let us trace in the classical reference texts the exclusionary potential, which is the origin of the first antinomy inherent in the modern concept of citizenship. Kant, for example, defines the citizen by stating three principles: liberty, equality and (economic) independence (Kant, [1793] 1996a). At first it seems that Kant only loosely connects his understanding of freedom with a political notion of the citizen. Legally, freedom refers primarily to negative freedom. Nevertheless, the political dimension is invoked insofar as a citizen is not supposed to obey any law to which he has not given his consent. Kant is thus referring to a political understanding of freedom, qualifying the citizen by the right to vote in the legislation (ibid.: 295). The second principle, equality, is again primarily related to formal legal equality. Instead of feudal privileges, it again stresses equal subjection to general laws, but also a basic idea of equality of opportunity with regard to social status (ibid.: 292).

Kant's reflections on the third criterion, the principle of (economic) independence, explicitly start from the political concept of the citizen as co-legislator. And it is here that his argument reveals itself as an argument for exclusion. In order to be a citizen in this sense, one has to be one's own master (in the literal

meaning, since there are certain natural criteria for exclusion: not being a child or a woman). The citizen has to have some kind of possession to support himself, which he is able to sell and trade on the market. Those who have nothing to offer but their sole labour power are not supposed to have the internal (mental) independence and capacity for judgement on which external (legal) independence relies. Kant's criterion of economic independence thus reveals itself as a criterion for exclusion of the dependent. This obviously raises a substantial tension for a republican theory. The political meaning of the citizen stands against the class-related meaning. Citizenship – politically understood – claims to be a general ideal, but insofar as its social foundations are misinterpreted, its effects are exclusive. The political citizen turns out to be an economic citizen, and historically this meant a male property-owner.

The tension between the *citoyen* and the bourgeois has its counterpart in the systemic tension between a social culture of capitalism – with its values of competitiveness, merit and individual achievements – and a political culture of democracy – with its values of equal worth, respect and cooperation. In this sense, the *in*clusive practices of 'civicness' stand against the *ex*clusive practices of distinctiveness in a bourgeois society. While the social culture of capitalism produces differences in status and wealth, i.e. social inequalities, the political culture of democracy requires one not to 'bow and scrape' but to 'stand eye to eye with fellow citizens' (Pettit, 1997: 87, 51). A republican political project thus requires a constant critique of those conditions of power, as well as the social preconditions of merit and individual achievements, that undermine the possibility of being 'one's own master', so that political participation will not appear as a class or status privilege (Kant, [1793] 1996a: 295).[6]

The origin of political citizenship in economic citizenship still casts its shadow in current welfare state regimes that were originally introduced to even out differences between political equality and social status. A contemporary equivalent to the property qualifications Kant envisaged and national citizenship regimes enforced until the beginning of the twentieth century can be found in the forms of a differentiated citizenship pushed forward by neo-liberal welfare state regulations, with their activationist calls: regulations that increasingly relate welfare benefits to the willingness to work and draw pictures of the 'good citizen' as economically self-supporting (O'Brian, 2013; Lessenich, 2008). Neo-liberal transformations of the welfare state since the 1990s have caused a shift in the welfare discourse from a language of benefits and needs to a language of 'earned entitlements' (Morris, 2003; 2009). As Bridget Anderson argues, citizenship as a privilege for the propertied classes is enjoying a resurgence, particularly when it comes to criteria of naturalisation (Anderson, 2015: 184–185): immigration laws that state the requirements on wealth and economic independence for those who want to enter a country and naturalise.[7] This resurgence can certainly be traced within the context of the EU. As will be demonstrated later, in the EU an economic model of the citizen is particularly strong and constitutes an ideological frame for models of citizenship in the member states.

Citizen rights and human rights

The founding declarations of modern citizenship[8] open up the idea that – at least potentially – all men can be citizens. They declare general human rights, claiming validity for all men and not only for citizens of the constituted political order or members of some pre-political collectivity. But as a membership status, citizenship is oriented towards a horizon of social community and directed towards a closing of political boundaries.

With this ambivalent founding, modern citizenship turns out not to be a fixed category but rather something in a process of constant transformation. The modern history of citizenship is a history of struggles for recognition of equal rights and status for those who have been excluded from the commonwealth. In this respect, Balibar (2014) describes the dynamics of modern citizenship as inherently driven by a tension between the particular and the universal. Whereas on the one hand citizenship always claims to realise equal individual freedom – the universalist promise – the practical realisation of these rights, on the other hand, is a collective achievement of a social group/movement and presupposes the institutions to be of a bounded legal order – the particularistic restraint. Thus, the universalistic tendency inherent in the values of equal individual freedom contradicts the particularistic conditions of its own realisation: that is, a bounded political community. This tension between the particular and the universal is the source of the second antinomy of modern citizenship.

Under conditions of transnationalisation this tension becomes more and more pressing, and it is widely debated in current discourses on democratic citizenship beyond the state (Benhabib, 2006). As mentioned above, the idea of modern citizenship – historically and conceptually – is closely related to the nation-state context. But claims for inclusion and equal participation are now not only articulated from *within* but also pushed forward from *without* the national community. The national community is confronted with the critique of unjustified exclusion, based on the fact that under conditions of transnationalisation national citizenship has increased its exclusionary potential. These conflicts appear on the public stage as immigration and refugee politics, but underlying are the fundamental dynamics of economic and cultural globalisation. These dynamics challenge the 'principle of autonomy' for democracy, which means that those affected by political decisions are supposed to be those who are included in decision-making procedures (Held, 2006: 264). In the context of deliberative democracy, therefore, a diverging of 'deliberating' and 'decision-making demos' is stated, a discrepancy between the publicity and authorising functions of the political people (Cheneval, 2011: 58; Lafont, 2010). This puts the conditions of legitimacy for existing political orders under pressure.

In dealing with the second antinomy – which can be called the cosmopolitan challenge to national citizenship – two complementary positions can be distinguished. Both assume that the principle of equal individual freedom also implies equal political participation and, consequently, that modern citizenship ought to be a form of democratic citizenship. However, they differ in

their assumptions about the nature of social membership, or more precisely the cultural and institutional preconditions that are necessary to establish a democratic community of citizens.

The first position states that citizenship is to be constructed as a *bounded concept*. That means citizenship always refers to a membership status: membership in a social group. What is indispensable then is a 'we-perspective' (Habermas, 1996) for social and political integration. Citizenship as based on *peoplehood* makes it necessary to distinguish one group of people from another. Procedures for inclusion and exclusion become unavoidable. There are differences about whether the 'we-perspective' of a social group is supposed to be a precondition for or rather a result of political participation (Smith, 1986; Miller, 2007). But it is generally agreed that, at least historically, the concept of the nation and nationality played a key role in successfully generating such a 'we-perspective'.

The second position focuses on the universal aspect of citizenship. Cosmopolitan critics of the bounded concept argue for a concept of citizenship based on *personhood*. In principle, so they claim, citizenship ought to be conceived as an *unbounded* concept. It is always in a state of transition, an ever unfinished process of overcoming exclusions, including yet more categories of persons and even non-persons.[9] From this perspective the concept of modern democracy is linked to the idea that the individual as such, rather than as a member of a pre-existing group, can claim rights. The nation-state used to monopolise the protection of these rights, but this is no longer the case. Although those in this 'camp' agree that political rights are the core of citizenship rights, they point out that the institutionalisation of these rights has created and always creates anew unjustified boundaries.[10] According to this view, citizenship is not dependant on affiliation to a particular (national) political community. Rather, human beings 'deserve equal political treatment based upon the equal care and consideration of their agency, irrespective of the community in which they were born or brought up' (Held, 2009: 537).

This perspective brings forward an interpretation of democracy that revolves around the idea of individual rights and no longer needs to presuppose a strong community or even, some argue, the idea of a demos. As Cathérine Colliot-Thélène argues, it is only the claim for an equality of rights that breaks up the communitarian logic inherent in every appeal to sovereign 'people' as a collectivity (Colliot-Thélène, 2011: 196). The ultimate claim that moves the dynamic towards inclusion is the 'right to have rights' (Arendt, 1951: 177). Rights comprise the medium necessary for individuals to shake off subjection and be protected against arbitrary power.

The position that conceives citizenship as being based on personhood is of particular interest in the context of the EU. From this angle, EU citizenship – to which we will now turn – seems to be the ultimate realisation of the normative core within modern democracy. It is built on rights and otherwise does not have much more to offer. But there also seems no need to offer more. The 'power of law', celebrated on the occasion of the sixtieth anniversary of the European Convention on Human Rights – is a potential achievement for humanity as a whole.[11]

Citizenship and the European Union

Market or polis?

As James Tully observes, many of the central and most enduring struggles in the history of politics have taken place in the 'language of citizenship' together with the activities and institutions into which it is woven (Tully, 2014: 3). Following up on this observation, one might ask: which particular struggles were being encountered when the EU decided to take up the 'language of citizenship'?

When the project of European integration was increasingly deemed to be suffering from a democratic deficit in the late 1980s, the Maastricht Treaty and in particular the establishment of EU citizenship in 1992 carried hopes for strengthening the EU's legitimacy. Yet, from the beginning, EU citizenship was a disputed concept. For some this introduction was 'little more than a cynical exercise in public relations' (Weiler, 1998: 10). In this sceptical view, the language of citizenship contains a promise that the EU is far from being able to fulfil. For one thing, EU citizenship was introduced as a complementary 'extra', leaving national citizenship itself untouched. For another thing, Union citizenship rights seemed mostly to reiterate already existing rights of free movement: the four freedoms of goods, services, capital and labour that constitute the Common Market. Thus it appears as nothing more than 'old wine in new bottles'.

No doubt, the establishment of EU citizenship in the Maastricht Treaty of 1992 added a formal dimension to changes in transnational social relations that had been going on long before and are still going on to this day. The genesis – market integration – influenced and is still influencing the conceptual core of EU citizenship: *mobility rights* based on diminishing the importance of national borders. On the one hand, this mirrors the strong systemic impulse of European integration – creating a realm of peace and prosperity by opening up national economies, making them more and more interdependent. Yet, the fact that at this time rights of free movement were being brought together in a coherent legal status points to a certain political ambition that had accompanied the European project from the beginning.[12] Together with the rights to mobility, Maastricht introduced the political rights of active and passive suffrage at a local level as well as on the level of elections to the European Parliament. Thus it reaches out to the normative core of democratic citizenship: political rights. With the principle of non-discrimination, it also provides a pathway for adding social rights to the status of EU citizenship (although relative to the level of social protection in the respective member state).[13]

Although in substantial terms appearing initially to be nothing more than a mirror image of pre-Maastricht 'market citizenship' (Everson, 1995; D'Oliveira, 1995), EU citizenship has planted expectations regarding the kind of political entity the EU is or aspires to become. Ulrich K. Preuss puts it in a nutshell:

> [The] mere association of the idea of citizenship with the European Community seems to promise its transformation into a polity whose constituent elements are no longer only the member states . . . the exciting and challenging quality

of European citizenship is the underlying claim that political participation –
the activist element of the concept of citizenship – is not necessarily confined
to the nation-state, but is also a constitutive element of a transnational polity.
(Preuss, 1998: 15)

According to this interpretation, the sceptical view on EU citizenship neglects the
constructive power of legal concepts (Kostakopoulou, 2008), which do more than
just reflect existing social practices. They also shape expectations and thereby
have a slow but steady transformative impact on citizens' views as well as under-
standings of the political world in which they live. This is why EU citizenship,
contrary to sceptical interpretations, has always had more than a mere symbolic
and decorative function.

Nevertheless, this sceptical position brings into question the optimistic
assumption driving the European idea that an increasing interdependence between
national economies and the introduction of a Common Market leads unavoidably
to a spill-over into cultural and political integration within an 'ever closer Union'.
Given the fact that so far the introduction of European citizenship has been driven
by a top-down approach to political integration, there are good reasons for doubt-
ing the optimistic idea of a spill-over: national leaders, consenting to the Treaty
of Maastricht, called a 'European citizenship' into being while a prior authori-
sation on the part of the European population which could be interpreted as a
statement of their common will to join together and form a polity was obviously
lacking. *Historically* this is rather extraordinary, because struggles for citizenship
can usually be associated with the struggles of movements for social and political
inclusion. *Normatively* it is problematic: there seems to be hardly any grass-roots
movement for European citizenship, and although there are proponents for a *polit-
ical* concept of EU citizenship transcending its economic roots, these proponents
have been scholarly rather than societal in nature (Shaw, 2007: 38).

Another aspect of the sceptical position is important to note: what lurks behind
scepticism is the systematically relevant question of how far a market citizenship
that gives primary importance to economic activity is compatible with political
citizenship that demands engagement for a common concern. Since the financial
crisis, doubts about the general compatibility of economic and political rights in
the EU have spread. Wolfgang Streeck (2014), for example, calls this the 'great
illusion'. From his neo-Marxist point of view, the celebrated European Union was
never more (and in the current shape can never be more) than an economic and
currency union. The effort to stabilise this currency union undertaken in the crisis
has created a level of friction among the member states which is unprecedented in
the post-war era. Rather than a vision of European democracy, we are threatened
by a technocratic-authoritarian imposition of a capitalist mono-culture. According
to this position, EU citizenship – celebrated by the Commission as 'the corner
stone of political integration' – itself constitutes a barrier to the further develop-
ment of *democratic* citizenship in the EU. It is indeed a paradoxical situation.

However, it is problematic that this position grants no weight at all to the
'constructive power' and the 'embedded normativity'[14] inherent in the political

institutions of the EU, including the institution of EU citizenship. Rather than an either/or, market or polis alternative, we seem to be in a 'Jekyll and Hyde' situation, with Jekyll being the 'Kantian' and Hyde being the 'managerial' mindset – two forces in perpetual struggle on the European scene (Brunkhorst, 2014: 31–59).

Despite its origins in market integration, the concept of Union citizenship has been continually expanded since its introduction. To a large extent this resulted from judicial activism by the European Court of Justice (ECJ), which, with backing from its case law, pushed from a basically market-related citizenship towards an understanding of rights that are not directly linked to the market and economic activity (Besson and Utzinger, 2008: 191–192). With reference to the non-discrimination principle, the rights relating to EU citizenship have gradually been extended to non-economically-active people. This has led to social additions, a transformative framing of economic rights and freedoms. It is obvious not only that this dynamic has changed the quality of EU citizenship, but also that it has the potential to put long-established suppositions of modern citizenship into question. It indicates very clearly that in the light of social processes, which transcend state boundaries, the modern state as nation-state is no longer the only appropriate framing for the recognition of rights and reflections on citizenship. But the more the status of EU citizenship is given an expansive drive which eventually leads to a transformation of national citizenship, the more the problem of the European Union's incomplete political integration comes to the fore. The Court was limited in its attempt to re-embed the European market: judicial activism cannot substitute for active political participation, and social rights cannot substitute for political rights.[15]

The two antinomies in the EU context

It has been suggested above that the EU is currently on a conflictual passage from a primarily market-oriented form of citizenship into social and political citizenship, whilst at the same time being confronted with its cosmopolitan promise. This conflictual passage resets the two antinomies in a sharp light on centre-stage. How will they perform at the European level?

As outlined above, so far the institution of EU citizenship still has a strong bias towards an economic model of citizenship. The most prominent rights are still those regarding mobility: to move freely among the territories of the Union, to settle and engage in economic activity. How far does this have consequences for the social selectivity of this status? What EU citizenship has to offer is of particular importance for certain categories of people: those who are mobile, who travel to other member states in order to study, take a job, trade – for 'movers' rather than 'stay at homers' (van Parijs, 2013). No doubt, movers come not only from the elite; they are also often low-educated seasonal workers from poor (sending) countries in the EU. But these are movers who are most unlikely to claim their EU citizen rights (often they do not even know about them) and most likely to be deprived of their rights. And this is not only an administrative or educational,

'conscience-raising' problem. There are also systemic reasons. Under the current institutional conditions it is not the EU itself that supplies its citizens with goods and services. The rights of EU citizenship are 'thin' rights – the expansive jurisdiction of the ECJ notwithstanding. In the absence of EU-wide solidarity arrangements, the substantial underpinning of rights – in particular social rights that are costly – lies entirely on the shoulders of the nation-states. Economic gains of migration notwithstanding, public debates on social security payments in the receiving countries of the EU are highly contentious and very likely to be exploited by right-wing populists insinuating social security abuse by EU migrants. The crucial achievement of European integration, freedom of movement, has reached a critical juncture in the 2010s. Mobilisation against free movement rights was one of the winning formulas for the European Parliament victory of populist parties in France, the UK and Denmark. But it is not only populist parties that are pushing in this direction: in 2013 the governments of Austria, Germany, the Netherlands and the UK also called upon the European Council to act against EU citizens who allegedly 'abuse' their freedom-of-movement rights. Since member states are granted the right to protect their national security systems against abuse, it has become obvious that mobility rights – the backbone of the common market – have a relatively thin value. As these rights are to do with not only *entering* a country but also *residing* in that country, they are restricted to those who are economically self-supporting and thus unlikely to become 'a burden on the host EU country's social assistance systems'.[16]

The use of not only mobility rights but also political rights in Europe reveals the first antinomy's effects. As argued above, democratic citizenship promises that social status will not determine access to rights and political influence. From this perspective the normative core of democratic citizenship comprises equal political rights. The principle of political equality refers not only to the formal existence of rights but also to the conditions of being able to actually make use of them. One way of evaluating the level of political equality in a political community is the use of voting rights, i.e. voter turn-out in the parliamentary elections. This does not give us a complete picture of political equality, but at least we are provided with a snapshot.[17]

If we take a look at the use of voting rights during elections to the European Parliament, the conclusions about political equality in the EU are alarming. A voting analysis shows very clearly that turn-out is not proportionally spread across the population. On the contrary: non-voters disproportionally come from less well-off and less educated strata of society. Although similar results can be found at the national level, the results for the elections to the European Parliament are particularly problematic. Political interest, especially in the European elections, plays an important role in the decision to cast a vote (the more disaffected people feel, the more they are likely not to vote) and it clearly correlates with social class (Seubert and Gaus, 2016). Additionally, the analysis reveals a correlation between left/right political orientation and lower/higher social class. It thus suggests in itself that a socially unequal use of voting rights results in serious problems for the political equality of representation.[18] The under-representation

of leftist positions probably in favour of redistribution and European-wide social policies strengthens the already dominant market orientation in EU citizenship.

With regard to the second antinomy of modern citizenship, it has been suggested that the EU can be understood as a laboratory experimenting in how to react to the cosmopolitan challenge (e.g. Bohman, 2007). Will the EU integration process transform cosmopolitan citizenship into a reality? The main question, accordingly, is whether or not in the EU the configuration of the democratic constitutional nation-state can be disaggregated so as to reassemble its elements – democracy, constitution and the state – in a way that meets the challenges of an extended sense of democratic obligations reaching beyond the borders of the EU member states.

Regarding the prospects for responding to this challenge, the EU is considered to exemplify how the scope of legitimate political claim-making has already extended beyond the borders of national communities. Externally, EU institutions impose the obligation of mutually justifying national politics with regard to negative externalities affecting neighbouring countries. Internally, the principle of non-discrimination increasingly undermines the normative basis for special rights and obligations towards fellow national citizens only. In both regards, the national community is challenged as the exclusive political space that draws the boundaries between legitimate and illegitimate claims. From this standpoint, European integration has the effect of gradually transforming national citizenship and opening up perspectives for a new transnational membership regime (Besson and Utzinger, 2008). While remaining strongly anchored at the national level, it pushes national citizenship to develop towards a 'stakeholder citizenship' (Bauböck, 2007) that is based on affectedness and residence rather than national affiliation.

Following this path, restricting legal and political claims becomes increasingly problematic not only for national fellow citizens but also for citizens across all EU member states. Affectedness due to residence is a principle that is valid for third-country nationals as well. Indeed, the European Council has stressed the need to ensure fair treatment for third-country nationals. Concerning the status of third-country nationals who are long-term residents (and thus, due to social and economic involvement in the host country's society, can be seen as being *affected* by policy decisions), it was decided that those people should enjoy a series of rights common to those enjoyed by citizens of the European Union.[19] This merging of status tends to blur the differences between citizens and long-term residents. The EU Charter of Fundamental Rights of the European Union (2000) contributes to that dynamic insofar as those common rights have to be borne in mind when enforcing EU law. This expresses the political commitment of the European Union to human rights and integration of the migrant population.

As is frequently pointed out, the European project has had a universalistic vocation from the outset: it was built on the expectation that peace as a 'categorical imperative of practical reason' (Kant) can be achieved by supplanting power by law and enhanced economic cooperation.[20] If, following Kant, one takes as a minimum definition of cosmopolitanism the idea that the ultimate units of concern

are individual persons, human rights appear to form a status attached equally to every human being, that ought to have global force. According to official documents, cosmopolitanism understood in this way is part of the EU's self-identity: the documents express a commitment to putting the individual at the core of a normative order that tries to connect democracy (as popular sovereignty) and human rights (as based on global legal status).[21] This opens up a tension: insofar as democracy refers to a particular community of legal consociates, it needs to be mediated by human rights as principles that transcend this context. This tension cannot simply be solved by reference to 'world citizenship'.[22]

Eriksen characterises the EU as a 'regional cosmopolitan entity' rather than an emerging federal state. According to him, the EU is a 'rights-based quasi-federation' (Eriksen, 2014: 86). It claims to have legitimate authority based on entrenched principles of law and a set of representative political institutions for collective will-formation. Yet, it rests on a communal vocation broader and more universal than that of a multinational federation. As a regional cosmopolitan order, the EU can promote a cosmopolitan standpoint insofar as it has established supra-state authorities that monitor the conduct of lower levels with regard to violations of rights. EU citizenship endows individuals with rights that – by appealing to the European Courts – can be used against national administrations. Conversely, the EU has an unfinished agenda with regard to democratic reforms. How can Europeans see each other as co-legislators when not only a central power (executive) but also, and of prime consideration, a properly elected assembly symbolising 'the people' are missing?

In a multinational quasi-federation, democratic legitimacy is certainly a complex matter, a problem which cannot be given full attention here.[23] Nevertheless, the EU is seen as spearheading a new type of transnational membership regime without a bounded demos, sometimes described as a 'post-national democracy with a cosmopolitan imprint' (Eriksen and Fossum, 2012) or even a 'global stakeholder democracy' (Macdonald, 2008). Despite the open questions concerning the institutional architecture of the European Union and despite the political crisis following on from the financial crisis of the Union, the EU is still considered to be a promising experiment.

Conclusion: prospects of European citizenship

The status of EU citizenship remains normatively indeterminate as long as the standards by which the political configuration called 'European Union' is to be evaluated are so deeply contested. The EU is still torn between market and polis, leaving the situation negligently undecided as to whether it should be developed into an instrument of catching up with economic globalisation or as an accelerator of it. The normative promise of modern citizenship, individual and political self-determination, is dependent on successfully rebalancing the two antinomies: the tension between political equality and social status on the one hand and citizen rights versus human rights on the other. A rebalancing in the context of the EU has *institutional* and *cultural* implications. The institutional implications refer to

the political architecture of the EU: with regard to the effective regulation of an unfettered capitalism and its detrimental effects on democracy, the EU would have to integrate even further into a polity with a common economic, labour and social policy. Democratic citizenship in the EU would presuppose full political rights at the European level. This would not necessarily imply new mechanisms of political participation but rather an upgrading of the right to vote by turning the European Parliament into a full legislative chamber on equal terms with the European Council.

The cultural implications refer to practices of 'citizenization' (Tully). The shift away from judicial activism once again makes it clear that social rights cannot be a substitute for political rights. Democracy can neither be paternalistically granted by an enlightened judiciary nor is it a simple spill-over from economic integration. Jurisdiction makes normative claims in a conflictual political space within which agreement and compliance cannot be presupposed. As legal claims, they have to be translated into everyday social practices, the creation of social bonds and a sense of fairness, as well as always being justified anew in political discourse.

The increasing incongruence of territorial and social boundaries puts existing orders of membership into question and makes unavoidable the normative search for alternatives to traditional bounded versions of citizenship. Bearing in mind the transformative potential of EU citizenship, it remains the most promising way to foster an experimental process that builds on civic practices and addresses 'the people' – with or without formal status. Political integration has its own inner logic, which – rather than being an effect – is in tension with the economic dynamic of a globally expanding capitalist economy.

Notes

1 'The old can no longer benefit from the self-evidence and legitimacy it had acquired in the framework of a particular hegemony, but the new remains impossible, or appears as a regression' (Balibar, 2004: 65.). In the constitution of EU citizenship Balibar sees 'archaism and modernity . . . inextricably mixed'. Identitarian self-conceptions of the national continue to produce practices of exclusion and discrimination whereas emancipatory dynamics effect movements towards a generalisation of rights and inclusion in civic practices.

2 In this context Pocock notes: '[It] is in jurisprudence, long before the rise and supremacy of the market, that we should locate the origins of possessive individualism' (Pocock, 1992: 42).

3 I am referring here to the concept of republicanism that Rousseau and Kant developed in their political writings and that is resumed in Habermas' understanding of political autonomy: being the authors and addressees of law, see Habermas, 1996.

4 One should bear in mind here that social status is not meant to refer only to material economic status but also to cultural practices expressing social esteem. Thus the critique can be extended to include ethnic and gender discrimination; see Young, 2002.

5 This developmental dynamic is captured by the Marshallian approach to citizenship: an expansion of rights from civil and political to social rights, leading to an understanding of citizenship as a full and unitary status for all members of a political community; see Marshall, 1950.

6 The culture of bourgeois society as based on esteem for economic and civil independence includes a social ideal of how to lead one's life: virtues of self-reliance,

economical-ness, interest for education, achievement-orientation. The claim is to derive one's social status not from inherited privileges but from individual merit. What one represents, socially, one owes to one's own diligence and energy. No doubt, the project of democratic self-determination would not make sense without presupposing any internal/mental independence and matureness. Self-consciousness and self-reliance, which were historically associated with the possessive bourgeois, are indeed dependent on external material and cultural resources. But both conditions – personal capabilities and external conditions of individual performance – ought to be understood as corresponding, thus transforming the criterion of *ex*clusion in a claim to *in*clusion.

 7 The privilege of property in accessing citizenship rights is also addressed with reference to the concept of 'investor citizenship'; see Borna and Stearns, 2002.
 8 See, for the universal promise, the American Declaration of Independence and the 'Déclaration du Droit de l'homme et du Citoyen' of the French Revolution. The tension between the universal promise and the exclusionary realisation is already expressed in Olympe de Gouges' 'Déclaration des droits de la femme et la citoyènne'.
 9 As suggested by claims for citizenship rights of non-human animals; see Nussbaum, 2006.
10 For a reflection on the inherent necessity of creating an external 'other' to the community of citizens, see Honig, 2003.
11 'Europas Rechtskraft', *Süddeutsche Zeitung*, 3 September 2013.
12 See the preamble of the Treaty of Rome (1957), which expresses the determination to 'lay the foundations of an ever closer union' – an aim that has frequently been put into question, as e.g. during the Brexit campaign in 2016.
13 The non-discrimination principle laid down in the Treaty of Maastricht demands that no EU citizen in any member state of the EU shall be put in a position more disadvantaged than that of a national citizen or a third-country national. This takes into account that social rights – although they complement (according to the Marshallian trias) a unitary status of citizenship – are socially relative in character (Nullmeier, 2000). For a reflection on the specificity of social rights, see Lessenich and Mau, 2005.
14 With the idea of 'embedded normativity', Erik Eriksen makes the claim that there are 'normative codes' embedded in the political institutions of the European Union that unfold their 'force of reasons' (Eriksen, 2014): democracy *Rechtsstaat*, human rights, responsible government etc. are the discursive codes of political institutions that stem from the common constitutional traditions of the EU member states. Despite their indeterminacy, these discursive codes – to which one could add those of democratic citizenship – have their normative weight and obtain quasi-empirical status; they become 'social facts'.
15 Niam Nic Shuibhne (2015) diagnoses a distinctive shift in the jurisdiction of the ECJ that can be interpreted as a partial roll-back from previous judicial activism: a hegemonic attribution of supremacy to secondary law vis-à-vis the Union legal order. This strengthens again the discretion of national law, in particular with regard to social rights.
16 EC, Memo/1/1041, http://europa.eu/rapid/press-release_MEMO-13-1041_de.htm. From a critical perspective, the principle of non-discrimination accelerates a process of disaggregating a unitary status, thereby, as e.g. Charlotte O'Brian argues, potentially destroying the former idea of rights and personhood (O'Brian, 2013). From this, O'Brian draws the conclusion that EU citizenship entails and at the same time disguises a controversial ideological framework, i.e. market citizenship.
17 It is common knowledge that the European Parliament does not yet have the status of a full parliament – although it has continuously expanded its competencies. This contributes to the characterisation of EU elections as 'second order elections', which is certainly one of the reasons for low voter turn-out. For a discussion of the problems of the status of the EU Parliament in the architecture of European institutions, see Seubert and Gaus, 2016.

18 This, again, is not EU-specific, but also a result of national electoral studies. But the effects of the social selectivity of voting are increased due to the 'second order character' of EU elections. For the diagnosis of an increasing political inequality due to low voter turn-out,see Rossteutscher *et al.*, 2014; Schäfer, 2012.

19 Paragraph 21, Tampere Conclusion 1999, Directive 2003/109 EC, 25 November 2003. For a discussion see also de Pietri and Rodríguez-Magdaleno, 2015

20 Both motives can already be found in Kant's 'Toward Perpetual Peace' ([1795] 1996b): the peace-promoting potentials of principles of law and a spirit of trade (*Handelsgeist*). One could add that the experiences of the nineteenth and twentieth centuries reveal the necessity for establishing a multi-level system of law even more urgently as a means of 'making the nation-state safe for democracy' (Eriksen, 2014: 45).

21 The European Convention on Human Rights (1953) and the Charter of Fundamental Rights of the European Union (2000) strengthen the weight of fundamental rights in the architecture of the EU.

22 It rather provokes the follow-up question of why Kant took up the 'language of citizenship' when talking about cosmopolitan rights. If 'world citizenship' is meant to have more than metaphorical meaning, the question must be addressed of how these rights are enacted and what co-legislation on a global scale would mean; see Kleingeld, 2013: 81–91.

23 Habermas (2012) has suggested combining features of a European 'demos-cracy' with a European 'demoicracy'. In this sense, EU decision-making would consist of two counterbalancing legislative institutions, one representing the community of European citizens (the EU Parliament), the other representing the community of national communities (the EU Council).

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10 European citizenship and identity politics in Europe

Is the citizenship narrative a good plot for constructing the collective identity of the people living in Europe?

Klaus Eder

Linking citizenship, identity and narrative

The subtitle of this chapter asking whether the citizenship narrative is a 'good' plot for talking a European identity into being does not make a normative moral claim. It says that the citizenship narrative is functional for constructing collective identities. The French Revolution did exactly this: it made the citizenship narrative the reference plot for a national identity. In its implementation, the French were 'made', and local differences – often with force – destroyed, an important step in the 'making of the peasant into Frenchmen' (Weber, 1976). Regional differences since then often reappeared – yet the citizenship narrative turned out to be so stable that it has survived 200 years so far. Identity politics in the name of citizenship has led to three clear outcomes: the making of a national group beyond old group boundaries, legitimacy in spite of the violence involved in the national implementation of the citizenship narrative, and new exclusive group boundaries in spite of the claims of universality in the citizenship narrative. The citizenship narrative therefore is a paradoxical construction – very similar to the problem of theodicy built into universalistic religions.

Can this national model work also in the post-national situation? Citizenship is, as some claim, a well-functioning narrative not only in the context of national unification but also in the context of European unification. This invites some observers to argue that Europe will repeat the model case of national identities. Some even believe that Europe can repeat the national model without reproducing the dark sides of the national model. Then the issue is how to avoid the dark sides of linking the citizenship narrative with constructing a collective identity.

Finally, there is a normative connotation in the debate over citizenship in Europe: the citizenship narrative not only tells a politically contested story, it is a politically contested concept, which raises the question of whether it is at all good (again a normative statement!) for analytic purposes. It tells a story that is universalistic. At the same time, the concept constitutes groups that are distinct from other groups, which points to the particularistic nature of the citizenship narrative. The usual theoretical solution is the teleological solution: particularism for the time being with the aim of realising its universalistic claims in the future.

To pinpoint the problem: we cannot escape the normative dimension of the citizenship narrative, which has a normative core as has any story that we tell. The guiding questions of the following analysis are as follows. When does the citizenship narrative turn up in the European integration process? Does this citizenship narrative create a European people, a collective identity of Europe? How to get around the dark side of identity constructions that are necessarily boundary constructions separating a 'we' from 'them'?

The 'citizenship narrative', it will be argued, is an interpretative scheme that is attributed to the practical life of people in a political community. How this attribution takes place varies: the diffusion of such narratives can be imposed by elites, talked into being by radical intellectuals, or simply imitated and taken over from other groups. Such narratives do exist not only in the air of ideas; they are embedded in the practical life of a political community.

In order for such attribution to work, people must have already developed a practical sense of their community. They must have the feeling that it is good for them to live in such a community. This practical sense is what 'banal nationalism' is about (Billig, 1995). 'Banal Europeanism' (Cram, 2009a; 2009b) assumes such a practical sense across Europe. Both theories argue that a 'thick' collective identity emerges where a taken-for-granted world exists that the people perceive as 'good' for their life, as 'good for me and us'.

This practical sense already transcends short-term interests of the people. It provides a collective sense of togetherness. Yet such practical sense is unstable as long as it is not grounded in some overarching normative idea of a 'we'. People also need a good theory of why this world is good for us. The French Revolution provided this normative frame: we the people, citizens of a nation (Sewell, 1996). Such normative theories are important: they transcend the short-term perspectives of people taking into account their immediate interests by providing long-term perspectives. Collective identity then turns out to be a central factor in organising a long-term perspective that reaches beyond the rational motivation of individuals. Narratives provide the format for such long-term perspectives, since they can go very far back into history and even prehistory. Such narratives are organised not only as a series of events but also as stories with an end that have some normative quality. As many fairy tales tell us at the end: and they lived happily ever after . . .

This question of the transformation of short-term individual perspectives into long-term collective images will be approached by comparing the making of the nation as a political community in Europe with the making of Europe as a political community beyond the nation. In both cases, we start with the observation of some people developing some kind of banal understanding of common interests that is more or less embedded in long-term narratives with a specific end: the living together of people as free and equal citizens in peace.

The comparative historical exercise confronts the citizenship narrative in the nation-state with the citizenship narrative in the EU, thus confronting the case of a national political community with the case of a post-national political community. I will proceed in four steps. First, I look into the past of the idea of Europe as a

political, social and cultural order that has come under attack by the formation of nation-states in Europe. Second, I turn to the emergence of the idea of a modern society as made up by a community of citizens, i.e., the emergence of the idea of the nation and its transformation in the course of European integration. Third, I approach the question of whether a modern society is feasible without and beyond a nation-state. Where does social integration come from when there is no nation-state claiming the monopoly of power against its citizens? Finally, I raise the issue of whether European citizenship can provide the foundations for a sufficiently robust collective identity without reproducing the dark side of national identity politics.

The argument is that the narrative of citizenship builds upon an old European idea of a society of citizens as a community of free and equal people as distinct from the state. This citizenship narrative allowed the transcending of the narrow frame of self-interests, transforming the inhabitants of a city into citizens, and later bourgeois into *citoyen*. Defining a town and later a nation as a community of citizens provided the robust basis for a collective identity (Tilly, 1995). The EU started to profit from that tradition when it introduced, in the 1990s, the idea of a 'European citizenship' (La Torre, 1998; Weiler, 1998; Closa, 1995; Eder and Giesen, 2001). Yet this appropriation of the citizenship narrative did not make much difference since the narrative remained closely linked to the nation-state. The EU therefore started to add other pieces to the citizenship narrative, such as values, arts or religious/moral images as 'typically European'. These signifiers were supposed to give to the citizenship narrative a meaning that nation-states were not able to claim for themselves. Yet this EU construction of a collective identity from above was doomed to failure from the beginning. It never succeeded in providing the cement for holding together a society made up of nations. This raises the question of where such a cement could come from, what it would consist of and how it could be produced. European political institutions have so far failed to create a transnational community with an identity from above beyond what has been offered by the nation-state. Therefore, the search for signifiers beyond the nation will start not from above, but from below, not by addressing the state, but by addressing the people (i.e. society).

The modernisation of European society

Europe has always been more than the sum of its parts. This holds for the feudal era as well as for the nation-state era. It has represented an order that transcended the diverse forms of political domination that emerged within it. This order has been more than just an idea. It has also been a social reality, shaping central aspects of the social relations among people. This is to argue that ideas are a necessary and social relations a sufficient basis for explaining the specificity of Europe.

This order above the multiplicity of states has always puzzled comparative historical research. Europe has been a world of competing feudal estates, principalities, monarchies and nation-states that lacked centralised rule. The puzzle is that despite the heterogeneity of its political centres Europe has developed a

homogeneous socio-cultural landscape. It has developed the *model of coordinated competition and conflict*. It has developed an institutional order capable of coordinating competing states and feuding parties.[1] The 'European puzzle' for historical analysis is that the centrifugal system of many competing states has not broken down, even in the times of the grandiose devastation of Europe.

The underlying forces in Europe for such successful coordination are still debated. Such capacity has been sought in a general intellectual feeling of commonness. However, intellectuals do not provide sufficient ground for creating an institutional system capable of coordinating centrifugal centres of authority. Comparative historical analysis has aired another answer: Europe has held together because there has been an organisational form based on an idea that transcended political particularism.[2] The capacity to coordinate competing political centres is explained as the capacity of the institutional regime established by the Catholic Church over Western Europe in the first millennium to adapt to changing environments throughout the following centuries until the present. This institutional form survived even the formation of nation-states in Europe.

To describe the exceptionality of this institutional form, we have to take into account the structures established by the Church in order to control the emerging European society. The Church provided an administrative and ideal centre; it shaped the system of property rights throughout Europe; it included people in a system in which everybody was an equal soul. The control over the soul was the control over the people, and this was enacted through abbeys and parishes. It was a highly rational system of rule, based on the canonical law. It provided a linguistic idiom that made elite communication possible: the Latin language. In addition, it provided legitimate interpreters to the extent that Latin was constrained to tiny elites and vernacular languages did not dominate communication. Even the need for interpreters was functional to such an institutional order. The control over interpreters made it possible to control the process of communication in and between the states and landlords.

This system provoked orthodoxies and heterodoxies, which it survived. It provided structural forms in which new and modernising carriers could act. These include: (1) a European aristocracy that was capable of ending the religious wars; (2) a class of rulers that served as experts in a complicated system of intergroup (especially interethnic) conflict in Europe; (3) a class of intellectuals that controlled transnational literary discourse; (4) a system of universities that controlled transnational academic knowledge; and (5) a system of property rights that provided the social structure for trade and production that finally led to rational forms of economic action which we call capitalist.

The process of secularisation finally reshaped the social space of Europe. The institutions of this social space adapted to the new ideological worldviews that emerged from the enlightenment, above all to the force of democratic ideas. New groups shaped the emerging institutional regime of Europe: a capitalist bourgeoisie forming a capitalist market that crossed the boundaries of politics, as well as an intelligentsia and enlightened cosmopolitans who opened channels of communication across political boundaries in Europe.

This social space, however, had to give in to the strong organisational power of the nation-state. Thus, the idea of Europe had become an idea without a political, social and cultural basis, a free-floating symbolic device that could be used and misused by anybody. Europe turned into an empty signifier.

Filling an empty signifier: the 'new Europe'

Two World Wars have shattered the hegemony of the nation-state. With the project of European integration that started after the Second World War, Europe returned not only as a geographic entity in which nation-states in Europe managed to live in peace with each other, but also as a symbolic reference for a community transcending the nation-state. Europe returned as the 'new Europe'.

The debate on the 'new Europe' has so far concentrated on the problem of its 'new political institutions', which were seen as forms analogous to those of the nation-state, i.e. as political centres controlling a society. This is misleading when taking seriously the specificity of European history: the difference between state and society and the capacity of European society to find self-organising institutions above the state. Instead of seeing European institution-building as a continuation of state-building we propose to see it as a continuation of the self-organisation of European society as it evolved in the first millennium through the organisational power of the Church and in the second millennium through the ascending power of citizenship. Such self-organisation by citizens, which we have observed in city states, in empires, in enlightened absolutism and finally in the nation-state, creates a type of citizenry that substitutes the community of equal persons to be protected regardless of their origins and – if necessary – even against their ethnic origins for the community of souls to be saved for heaven. The Community of citizens replaces the Holy Empire of souls. This is the beginning of the 'citizenship narrative'.[3]

Citizenship is an idea that binds people together as equal and free persons, disregarding their ethnic and/or religious differences. The goal of such an order is no longer salvation of a community of souls. The goal is the association of free and equal beings living together in peace, a community of citizens. This community of citizens evolved side by side with the evolution of political institutions: the formation of cities, of states, of empires. There is no necessary relationship with the nation-state. The political boundaries of communities of citizens could range from small city-states to large empires. The nation-state is just one (and for some time the most successful) of a series of political forms for communities of citizens.

The idea of European citizenship is thus another experiment in finding an institutional form for the coordination of free and equal citizens: a political institution different from the city, the nation-state or the empire. This shows the potential symbolic surplus of the notion of European citizenship: a political form in which citizenship is bound to a society in which national membership is secondary to being a citizen. Europe is in fact a complex society which experiences movements in and out of national societies in terms of people, goods, knowledge and beliefs; and a heterogeneous society because it is full of national societies and national

minorities that do not assimilate and nevertheless stay. Does citizenship make sense as an integrative device for a post-national society? Can citizenship really provide an integrative narrative for European society?

The postmodern escape is ready at hand in this situation: the plea for particularism (Kymlicka and Norman, 2000), the plea for tribes (Maffesoli, 1995) and the plea for subpolitics (Holzer and Sorensen, 2003). The social order – the argument goes – emerges by itself from a recognition of diversity. Yet these ideas give a hint regarding the rewriting of the citizenship narrative that is on the way: the nation-state is no longer the exclusive form of the association of free and equal people. We are witnessing experiments in resolving the paradox of the nation-state: to build the state on the rule of law while conceiving the association of free and equal citizens as a particularistic people. Europe is equally an experiment in the extension of the rule of law among states as a widening of the boundaries of a civil society beyond a nationally (or locally or religiously) defined people. Europe is an experiment in finding a story that makes sense of people living together as an association of free and equal people.

A recent idea has been the rise of cosmopolitanism as a 'philosophy' good for post-national political communities such as the European Union (Beck and Grande, 2007; Delanty, 2009; Schlesinger, 2007). Cosmopolitanism is a candidate for providing elements for a narrative foundation of Europe's political community. Yet cosmopolitanism is not a story – it still needs to be turned into a 'good story', telling about a people that is no longer satisfied with living in a nation, telling about a people which can live its often violent past in a different way. A story about living in a post-national world is still to tell.

Citizenship is therefore more than a functional element in a viable strategy for governing societies where people permanently cross the borders of the national container. Citizenship is also a mechanism for creating a sense of belonging that transcends banal Europeanism. To show this we will have to engage in a counter-factual exercise: what kind of post-national collective identity would emerge if we were to continue the citizenship narrative in the European Union?

Belonging to Europe: a non-functional argument for European citizenship

The modern nation-state solved the problem of a sense of 'belonging' by identifying the state with the association of citizens. The citizen has a 'fatherland' or a 'motherland'. The citizen no longer had a choice between the fathers or mothers available: the citizen simply had a collective identity, which generated an exclusive sense of belonging through 'national' citizenship.

At first glance, European citizenship does not deviate from the model of national citizenship. The European citizen is formally and legally still the citizen of a nation-state. The legal status as a national citizen is logically and normatively prior to being a European citizen. The claim to a European citizenship, however, adds to this status an additional qualification: it refers to a political order in which rights and duties derive their validity also from a source above the

nation-state. European citizenship necessarily has to claim some transnational quality of citizenship, something transcending what constitutes national citizenship. This additional element undermines the exclusiveness of one 'father' or one 'mother' to be identified with. Having two (or more) fathers (or two or more mothers), several national ones and maybe even a post-national one, might have small effects in terms of rights and obligations. However, it makes a big symbolic difference: it makes visible the impossibility of having more than one 'natural' father (or mother).[4]

In a historical perspective, the idea of a social order above the different states has a strong tradition in Europe (see above). Being a member of a political community in traditional Europe and early modern Europe was bound to being the subject of kings, being the property of feudal landlords or being an inhabitant of a city. Citizenship in the modern sense evolved mainly from the third mode of membership. At the same time, these subjects/citizens were subjects of another order, the order of Christendom. They were also subjects of the Church, 'citizens' of the heavenly order on earth (which was equal to Latin Europe). Citizenship thus was bound to a status in a political community and simultaneously to being a member of a more encompassing order, to the universal moral order of Christendom.

Following the revolt of the third and the fourth estate, the idea of Christendom was replaced by a new idea, the idea of a people as a people 'for itself'. These people then were deemed to realise what was to become the modern model of being a people in Europe: the model of a *bürgerliche Gesellschaft*/*société civile* that claimed validity as being prior to the state. This idea transcended the many states in Europe and provided a common European experience. It involved a missionary attitude of European civilisation, which led to its often violent export around the world, 'civilising' the others. To be European meant to be part of a modern chosen people that served as a carrier of civilisation.

This sense of Europeanness, being the carrier of a civil society, dissolved because of the increasing competition among the emerging states fighting for power in Europe and in the colonised world. The emerging nation-state claimed the symbolic order of civilisation for itself, for a people bounded by some (often invented) nationhood. The difference between the order of the new nation-state and the order of a *bürgerliche Gesellschaft* in Europe developed toward the fusion of the *bürgerliche Gesellschaft* with the state.[5] The division of power between the holy and the non-holy world, constitutive for Europe, gave in to the identity of state and society, glorified by Hegel and producing two horrible centuries to follow.

This fusion of the civil society with the nation-state destroyed the reference to some order above the nation-state such as civil society. The citizens of the merging states were no longer citizens of a society above the state. The middle classes, but also the peasants, the plebeians and later the industrial workers, and finally the upper classes, became 'citizens' of the state – the German concept of the *Staatsbürger* rightly describes this fusion. To give to the *Staatsbürger* an identity, the modern state recurred to elements of togetherness that pre-existed citizenship by constructing a collective memory, objectified in a shared language and in shared narratives, i.e. by constructing a nation. The nation-state reduced the

industrial workers of the world to national workers, reduced the aristocracy to a national aristocracy, and the local peasants to national farmers. Above all, it made the middle classes the core of the national association of free and equal people. This is the culmination of the paradox of the nation as the association of free and equal people.

Europe, in fact, disappeared in this evolution of modern society. The idea of a civil society, of a *bürgerliche Gesellschaft* in Europe that would transform the trans-feudal and trans-ethnic social formation of the Church into an association of free and equal individuals was handed over to the state, which claimed to be the end in itself, based on the sovereignty of its people. The *bürgerliche Gesellschaft* in Europe could not take over the transnational role played by Christendom. A European civil society as a secularised form of Christendom and its idea of European civilisation survived as a marginal utopian idea. What remained of the old European society was a system of aristocratic networks that took over the role of fostering the civilisation of Christendom as the guarantor of peace in Europe.[6] This European aristocracy was delegitimised in the course of the democratic revolutions in Europe. No other class could take over the role of fostering Europe as an idea transcending the nation-state. A European *bürgerliche Gesellschaft* remained a project in the long period of national wars to follow and that ended in world wars and ethnic cleansing.

The project of European integration that emerged in the post-war period had an idea of a European order transcending the nation-states. This idea of a civilising mission in Europe had, in the beginning, strong roots in the idea of Christendom. Fostered by Christian political parties and politicians, this project added a reference to something transcending the nation-state. This 'transcendence' was staged in public rituals of peace-making among the nations in Europe and remained a subtext in the making of supranational institutions in Europe, especially in the making of a supranational legal system which guarantees the free flow of persons, ideas and capital within a territory defined by 'member-states'. The outcome is a legal competence of the EU that institutionalises a normative reference beyond national sovereignty while secularising the idea of Christendom as the symbolic referent for the unity of Europe. It addresses national citizens as citizens of Europe, i.e. as citizens of a secular order of Europe, transcending the particularity of the nation. This 'add-on' is permanently contested. Yet the legal momentum creates its own transnational dynamics. It makes visible a secular social order, a society beyond the nation-state. It creates a symbolic reference, a transcendence that would give normative meaning to living in Europe. The ideas are there, yet the problem is whether there is enough banal Europeanism to which to attribute such signifiers.

The citizenship narrative as a founding myth for a European collective identity

The citizenship narrative tells about a people living together in peace. The mechanism which accounts for the binding force of this story is the sentiment created

by the recognition of the other as a citizen (Alghasi, Eriksen and Ghorashi, 2009; Benhabib, 2002; Benhabib, Shapiro and Petranović, 2007). By recognising each other as equals a people develops a collective identity in which the commonalities among this people is described, staged and linked to past events. The narrative organisation of these elements results in national identities; the narrative telos is to unite people together that belong to each other. Traditional narratives organised these elements under the organising principle of a people being subject to a good ruler. Modern narratives replaced this ruler by a sovereign in the people, thus securing continuity in the narrative of citizenship. This narrative is on legal rules, rights and obligations of practicing citizenship without the need for an external authority guaranteeing the validity of such rules.[7]

As long as European citizenship derives its legal status as something borrowed from the nation-state, the legal system evolving in Europe has to accept a limit: the boundaries of a national people. Legal rulings addressing this limit, i.e. the extension of citizenship rights to people not belonging to the nation, regularly produces defensive reactions in the name of national sovereignty. This happens particularly in times of crises (such as the financial crisis or the refugee crisis). This has kept European citizenship as an empty signifier. The secularising dynamic built into the legal system therefore has remained blocked and has fostered alternative ways of filling the notion of European citizenship with meaning. Among these meaning-generating devices are policies targeting 'European social citizenship' and 'European multiculturalism' (not political citizenship!). Whereas the first policy discourse could play only a subsidiary role, the second policy discourse moved to the breaking point: imagining a society of equal, yet different people. In this way, the search for a specifically European identity entered the citizenship narrative, going beyond demands for 'more solidarity' in Europe.

Linking citizenship with a European identity requires a form of 'belonging' to a political community which transcends the idea of national belonging. The national answer relied on the idea that everybody is similar to the other in some cultural respect, made visible by speaking the same language; this allowed a quasi-natural recognition of the other as an equal other. The narrative of national belonging was contingent on the homogeneity of the people. Given such homogeneity, everybody, in a kind of naturalistic fallacy, recognised the other as someone who belonged to the same community.

Such quasi-natural homogeneity assumptions visible in shared 'values' and 'habits' has always been a fiction. Such homogeneity fictions work even less well in the European situation (Joppke, 2008). This makes the citizenship narrative issue the privileged site for retelling the story of the people who want to live together in peace (Bloemraad, Korteweg and Yurdakul, 2008). A European citizenship narrative has to address the differences among people as stories that citizens in Europe tell to each other, thus finding their commonness in telling and understanding these particular national stories.

Theories of multiculturalism provide an optimistic account of the feasibility of such 'open' citizenship narratives. The central point in these narratives is the problem of recognising the other not only as an equal other, but also as

a 'brother/sister'.[8] The debate on how to extend citizenship to people sharing different cultures moved the focus from the issue of equality to the issue of recognition.[9] A community emerges, the multiculturalist thesis holds, by recognising the identity of the others as an equally valid identity. There is then no longer a space for a collective identity. There is a pluralism of identities emerging in a world where nations and/or ethnoi become the basic units of political communities. The principle that makes these collective identities compatible is the reciprocal non-interference into the life-worlds into which people were born and raised, into indifference to the narratives other people share among themselves, but not with me or my group.

Citizenship narratives in which people do not share values and habits yet recognise each other as equal citizens are extremely vulnerable[10] because such narratives do not do what identities have to do: provide boundaries. They are at the mercy of plots that can foster either exclusive or inclusive narratives. Some foster highly exclusive narratives that want to preserve the common ground of the principle of reciprocal recognition. European populism is here the case in point (Berezin, 2004). Some foster highly inclusive narratives such as the idea of 'European cosmopolitanism' (Beck and Grande, 2007; Delanty, 2009), which applies a universal narrative to a particular people, the Europeans. Both narratives, the exclusionary and the inclusionary one, do not fare well in defining the boundaries of a modern political community, holding together people of different backgrounds, beliefs and ethnic identifications. They focus on either an idealised past (as populists do) or an idealised future (as cosmopolitans do). Incompatible narratives emerge, identity conflicts intensify and ideologies interrupt the flow of narrative constructions. The narrative move from the past to the future is no longer possible. Lacking the integrating force of narratives, people engage in the defence of ideological commitments. Nations had once provided such a narrative and in part succeeded in taming ideological clashes between different groups of people in a nation. Multicultural societies consisting of a plurality of nations (and/or ethnoi) often lose this capacity for taming sentiments. The issue of the particular boundaries of the space in which citizenship narratives can circulate among a people, i.e. Europe, remains the open flank of such citizenship narratives. This critique forces the considereration of alternative plots capable of filling the European space.

How then to extend the narrative of citizenship beyond the national boundaries while keeping it within the boundaries of a European space? There is a series of answers to that question in the European case. A first answer is that identities in Europe are 'politicised' (Checkel and Katzenstein, 2009). This is in fact a good description of the process going on: established identities are redefined with the goal of redefining the boundaries of the emerging new community. This is another way of saying that identities have to be constructed by a political will. Still the question is why boundaries beyond the many boundaries that pre-exist a political community such as the EU are emotionally attractive for a people.

A second answer is the argument of Smismans that the EEC/EU has gradually developed fundamental rights narratives, which constitute a 'political myth' and

provide a foundational claim to some European heritage (Smismans, 2010). The EU still has to defend this myth against competing myths. This argument goes further than the politicisation argument insofar as it makes the theoretical assumption that any justification for citizenship rights presupposes some belief shared by a collectivity (Eder, 2009a). There are many such myths or narratives that the EU has tried to foster in the last decade. There is the myth that Europe is distinct because of its particular quality of social citizenship, the myth of a social Europe, which is presented as a (cosmopolitan or social) future resulting from a particular past of social solidarity in Europe.[11] Another myth is the one of the 'normative power Europe' (Diez, 2005; Scheipers and Sicurelli, 2007) shaped in processes fostered by foreign policy debates.[12] It heavily relies upon elements of the human rights discourse, which turns into a narrative of the 'good side' of Europe.

A third answer is a closer link with 'European civil society' as the space for European citizenship (Smismans, 2009). This idea bases citizenship on the reciprocal recognition of those engaging in the provision of common goods in Europe. The idea of a European civil society in the making serves as a reference for telling a story of a politically active Europe where citizens participate in collective action for advancing the common good in Europe. It is the reciprocity of those engaging in a project like European integration as a goal in itself. This idea of a 'European civil society' in the 'new Europe' no longer has its social basis in an enlightened class of property owners or high-culture owners. It is a civil society of activists across classes and ethnic groups. In this emerging space of a European civil society, citizens discover transnational interest. This discovery provides the elements for a more inclusive story, and there is no reason to assume that the story will stop where the European Union ends. Yet we can expect that this story will provide some signposts for a political community of Europeans, that it will generate a myth of civil society as a subsidiary instance to European political institutions. Thus, the making of a civil society in Europe can be taken as providing a narrative that fosters identification within a specific social space beyond the nation.

The options and their ambivalence

These three answers to the issue of making universalistic claims within a particular space bring to the fore three options for creating narrative foundations (Eder, 2009b). In the following, I will discuss these options and air their possible perverse effects.

The first option is to base collective identities on universalistic human rights discourses. This would be the universalistic solution, constituting a community of well-doing people, defending an idea that should (and could) be applied to everybody. A second option is the primordialist one. It takes Europe as a community with a long tradition going back to the beginnings of history, grounding this long tradition in a blend of stories that mix up Jewish/Christian and Greek/Hellenistic elements. It fosters the idea of a cultural Fortress Europe, which is to be defended against those who are not able to share these roots. The third option would be a neo-traditionalist one: Europe as integrating through some selective account of

the many traditions of a conglomerate of people who no longer use their identity-generating stories for fighting against each other, but for telling to each other, thus producing unity out of diversity. This is the peaceful variant of the story of nation-states fighting violently against each other.

The first option of embedding the citizenship narrative in a collective identity, which is a strong form of ideological universalism, tends towards explosion. It turns Europe into the protagonist of human rights around the globe, thus following the United States, which took on such a role in the twentieth century. The problems of doing so are well known: the missionary zeal of creating a world in which being American meant defending the right and the good.

The second option of embedding the citizenship narrative in a collective identity, the idea of primordial universalism, easily turns into a self-destructive collective identity. It tends to become an exclusive device for defining a community of citizens, leading toward the implosion of society.

The third option of embedding the citizenship narrative in a collective identity leaves intact the idea of the nation as the basis for a space in which people can share narratives. This culturally learned naturalness of being a particular people, often defended on counterfactual grounds, returns: nationalist and ethnic revivals go hand in hand with European integration. The populist backlash in today's Europe provides cases for this neo-traditionalist solution (Albertazzi and McDonnell, 2007; Berezin, 2004).

Considering the ambivalences built into these options for a European citizenship narrative, it seems that there is no alternative to the first option. The creation of symbolic references of European citizenship ('la transcendence de la citoyenneté', as French intellectual discourse would put it; Dufour, 2007) is an experiment in transcending the nation-state as the incarnation of human rights and in globalising the human rights discourse. 'La transcendence' is no longer in the nation. It transcends such groupness and is in a people that recognises each other as good-willing people. The debate then turns to the issue of why this first option is the one best suited to rectifying narratives undermining the normative principles of the citizenship narrative.

This leads to a preliminary conclusion: a citizenship narrative giving meaning to banal Europeanism (to the extent that it exists at all) needs a modified narrative fundament for signifiers that are conducive to making universalistic claims. The narrative of enlightenment on which the universalism of citizenship has rested so far is no longer self-evident. The question of its social validity has to be reconsidered. The space where it was said to be realised, i.e. the nation, has turned out to be self-defeating. Nations are bad carriers for the enlightenment narrative. With the creation of transnational communities, new options for situating the citizenship narrative in the social space are given. The most radical option is a citizenship narrative that builds the issue of social validity into its plot as something to be constructed in the process of telling the citizenship narrative. This radical narrative takes seriously the famous sentence by Ernest Renan written in 1882: 'L'existence d'une nation est (pardonnez-moi cette métaphore) un plébiscite de tous les jours, comme l'existence de l'individu est une affirmation

perpétuelle de vie'. And he continues a paragraph later: 'Les nations ne sont pas quelque chose d'éternel. Elles ont commencé, elles finiront. La confédération européenne, probablement, les remplacera. Mais telle n'est pas la loi du siècle où nous vivons'. Times have changed, and the daily plebiscite needs to take into account the limit of the nation as the guarantor of liberty and equality and human dignity. The radical narrative option assimilates the doubts about the universalism linked to the European nation-state. It therefore starts to tell us the story about a people that permanently puts into question given spatial boundaries for applying universalistic norms such as citizenship rights and forces this people to enter into debates about the legitimacy of given spatial bordering. The script of a European civil society where borders are permanently contested seems to satisfy best the need for a citizenship narrative that binds people together in a political community beyond the nation-state.

European civil society defines a social space that extends the scope of reciprocity among people imagined in the national community to a wider community and extends the boundaries of a national people toward a transnational people (Ifversen, 2008). In the course of the scope of this extension, narratives can emerge that are not only compatible with universalistic moral standards, but also use universalistic claims to contest the boundaries that people permanently build around themselves. In this story-making process, options for a European identity, as discussed above, turn up, and we do not know yet which one will survive the processes of European integration ahead of us (Maas, 2008). If there is a European identity turning up in transnational stories, we can be sure that its durability will be shorter than that of the collective identities we have lived with so far. The permanent change of collective identities will be normal, and their durability will become exponentially shorter after the already short golden age of the nation-state.

Re-narrating the discontinuity of Europe

Taking a wider historical perspective, we could stretch the discontinuity with European society as it has been shaped in the first millennium in the following way. The space for souls to be saved in the Europe of Christendom was heaven. Those lost ended up in hell. In principle, everybody could be saved. However, not everybody was. This narrative continued in the 'old Europe': anybody identifying with a privileged community of co-nationals was 'saved' – he even had to sacrifice himself for this community. This narrative of redemption continued the narrative of Christendom; it took its strength from the model of salvation and redemption carried on in the idea of a nation. The real break with old Europe is the break with the narrative of salvation and redemption. The 'new Europe' provides a different experience: people trying to figure out common interests through permanent debate. There is a story linked to it too, which had remained marginal in old Europe: the story that people can recognise each other's interests when they talk with each other. It is the story of the unbound 'spirit' (already foreseen in the biblical story) in and between human beings. The space for the citizens

to live well in the new Europe is the public space in which they construct the community in which they want to live. In principle, everybody is able to take part in it since nobody is excluded from using his 'spirit'. Fighting for human rights offers a good story for such a community. In narrating such stories, a collective identity emerges that includes the citizens as citizens beyond religious and national boundaries. The emerging collective identity is no longer bound to an extra-social entity. It is bound to nothing but acting together as a citizenry. The case of the 'new Europe' can thus be seen as an experiment in narrating a community of post-national citizens.

Europe is experimenting with such narratives – yet experiments can fail. To add a new turn to the national citizenship narrative requires two conditions: social relations, which allow the circulation of such stories, and a plot that allows a retelling of the past and links it to an open future. Existing social relations do not foster such narratives: they rather tend to block them. Therefore, we are left with telling repeatedly the post-national story, hoping that one day this story might find its way into the flow of communication that is circulating through networks of social relations among people in Europe.

Notes

1 This notion follows the paradox of the emergence of such a system, which Hall (1988) has called the European miracle. For the notion of a European puzzle, see also the explanation of European dynamics given by Michael Mann, 1988; 1992.

2 John W. Meyer (1989) provided a short but succinct analysis of this phenomenon when he explained the role of Christendom in terms of the organisational theory that has become the starting point of sociological neo-institutionalism.

3 The idea of citizenship as a narrative stems from Margaret Somers (1993). For the theoretical basis of this explanation of the role of citizenship, see Somers, 1994a; 1994b.

4 These metaphors invite the thought of the combination of one father and one mother, while subsuming the nations as mother (nations are female) and the EU as father. The association of the nation with fatherhood seems to be a specialty of the German situation, where the nation has also been named the 'Fatherland', which is neither male nor female.

5 Hegel's philosophy of history provides a theory explaining why this fusion necessarily had to take place. He did not see the consequences of this assimilation of society and state.

6 It was not civil society but aristocratic networks that provided the social basis of the peace of Westphalia.

7 For a good overview of concepts of national citizenship, see Gosewinkel, 2001. Habermas (1995) has pointed out very clearly the normative limits implicit in national citizenship.

8 Obviously, reference is made here to the third element in the revolutionary notion of 'liberté, égalité, fraternité'.

9 In an article of 1994, Kymlicka and Norman already clearly saw this point. Yet the solution of 'multiculturalism' is still contested (Kymlicka and Norman, 1994; 2000; Taylor 1992).

10 Bellamy and many others have described the inherent self-destructive mechanisms (Bellamy and Castiglione 2008; Joppke 2008). For a debate on the general dilemma of citizenship, see Crouch, Eder and Tambini, 2001. See also Jenson (2007) on the practices that make European citizenship different.

11 The debate on a social Europe has obvious normative implications that are good for telling a story. This story refers to a particular past of social responsibility realised in the European welfare state and projects this past into a future that is identified with Europe, see Ferrera, Hemerijck and Rhodes, 2000; Stevenson, 2006.
12 There is a special literature on the issue of how a European identity emerges in the foreign policy field, see Kantner, Kutter and Renfordt, 2009; Risse and Grabowsky, 2008.

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11 European citizenship between cosmopolitan outlook and national solidarities

Richard Münch

Introduction

How is citizenship, how are civil, political and social rights, changing in the transnational space of European integration? This is the question to be answered in this chapter. We do so by localising European citizenship in the zone of tension between a cosmopolitan outlook and historically rooted national solidarities. This programme is carried out against the backdrop of European solidarity construction between global challenges and national traditions. We will start with the expansion of civil rights in the context of European market integration and proceed subsequently to the changing nature of political rights in the European multi-level system and to the change in social rights in the context of an emerging society of individuals, to arrive at a discussion of European cosmopolitanism in the zone of tension between a cosmopolitan outlook and national solidarities.

The debt crisis affecting the Southern countries of the Eurozone and Ireland has meant a substantial blow to one essential force driving European integration. This force is the previously unbroken belief that Europe's economic integration would guarantee peace and prosperity for all on equal terms. The European Single Market and, beyond it, the even more ambitious project of a monetary union, were considered a guarantee for this beneficial development. All parts were meant to profit from this development – rich and poor countries, rich and poor people within the countries. The economic doctrine of comparative cost advantages proves that this is not utopia, but rather a scientifically grounded forecast. Nevertheless, the economists also say that a monetary union will not work without an economic union, since precisely those distortions will appear then that have nowadays actually become a big problem.

Although everyone agrees on the fact that the less indebted, more affluent countries have to help the highly indebted countries to avoid the breaking up of the European Union (EU), there is extreme dissent on the how the former should help and the extent to which they should do so. The debtor countries feel increasingly robbed of their sovereignty and subjected to an unacceptable pressure to economise, imposed upon them by the richer countries under the leadership of Germany. The latter countries, in their turn – and above all Germany – fear that they will have to pay far into the future for the Southern European countries' and

Ireland's lack of budgetary discipline. Such a development would exceed by far the existing level of European solidarity.

There are far narrower limits to the redistribution of income between the European Union's member states than has been the case within the states so far. Furthermore, the readiness to accept such measures has clearly decreased. In Germany, for instance, it is shown by the increasing unwillingness of the richer lands/Länder) of the republic to support the poorer ones in the framework of financial compensation between them. While this was formerly considered a compensation for lower chances to participate in economic growth, it is nowadays regarded as the inappropriate support of undisciplined budgetary behaviour. Hence there is, on the one hand, (still) no sufficient solidarity in sight between the EU member states to compensate for the disadvantages of the poorer countries in economic competition. On the other hand, the solidarity between regions and/or individual states within the member states has obviously dropped. Can we assume that this is a temporary problem of adjusting solidarities to Europe's economic integration, or do we have to accept that this will turn out an unsolvable dilemma in the long run? The question arises as to whether transnational economic integration is necessarily accompanied by a decrease in national social integration while this loss is not automatically compensated for by European solidarity. In other words: does European integration bring with it paradoxical effects of de-solidarisation?

Expanding markets, expanding civil rights

The European Single Market is first of all a driving force of the expansion of civil rights beyond national boundaries. According to the economic theory of comparative cost advantages, labour division would have to occur on the European Single Market in such a way that, in the long run, products were produced wherever this was cheapest. This should involve an advantageous specialisation between the countries. For instance, Greece would exchange favourably priced wine and beautiful beaches for German machinery and cars. Even though Greece would not reach the same income as Germany in this process, the theory claims that the country would nevertheless fare better than without international labour division. In the European Single Market, Greece might turn to cheaper Italian cars and yet attract tourists from Germany to its beaches. Meanwhile, however, the common currency has made holidays in Greece more expensive and hence less attractive for German tourists. A lack of tax income has been compensated for by Euro credits at low interest rates, which caused a significant increase in state debts. In reality, however, disruptive elements appear that prevent the results predicted in the model from being attained.

Furthermore, the method of distributing the national income produced in international exchange is neglected. First of all, it was indeed a success story of European economic integration to have poorer countries raise their gross domestic products while their distance from the richer countries shrank due to their higher growth rates. This has not, however, applied to all countries to an equal extent.

After a lengthier period of catching up, the poorer Southern European countries, above all, have had to accept higher losses since the start of the financial crisis, causing their distance from the richer countries to grow again. Figure 11.1 shows this development for the purchasing power per capita of Greece, Portugal and Spain in comparison with Germany. It also demonstrates that there is still a wider gap between the East/Central European transformation countries and Germany, but no radical turn in their process of catching up as is the case with the Southern European countries.

We should bear in mind that in almost all countries – rich and poor ones alike – income inequality has risen. This is evidence of shrinking internal solidarity and, consequently, the state's decreased capacity to guarantee compensation for the income inequality that has been produced by market competition (Münch, 2008). A study by Jason Beckfield (2006) indeed proves that European economic integration explains almost half of the growth in income inequality between the countries. Hence, decreasing inequality between countries has been accompanied by increasing inequality within the countries. This is also underlined by another study by Beckfield (2009). An extreme form of the countries' internal de-solidarisation is the tax and capital flight of the richest citizens, who are unwilling to pay money to their own state because, in their view, it handles capital inefficiently. They prefer to invest abroad, where they expect higher benefits. In

Figure 11.1 Southern European and East/Central European transformation countries' purchasing power per capita in comparison with Germany
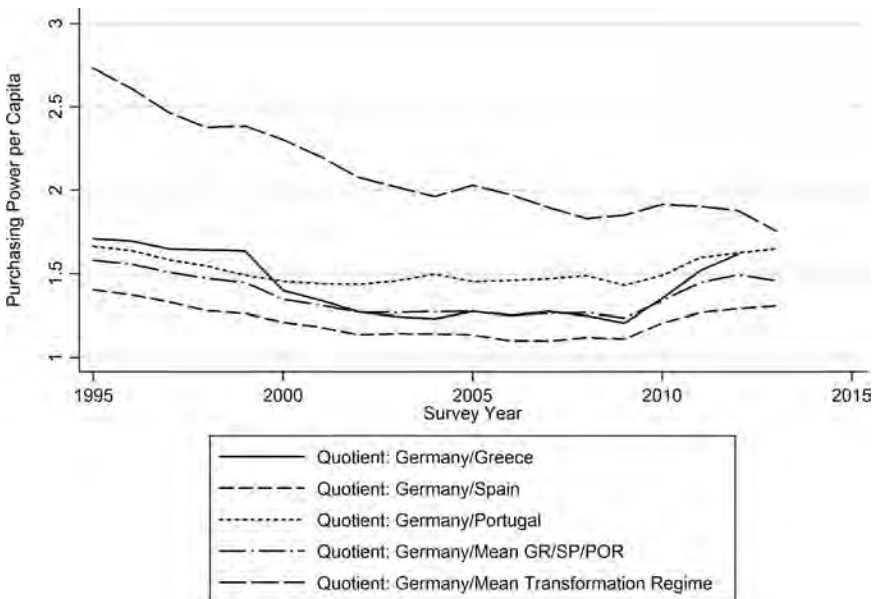
Source: European Commission, 2015; own calculations.

the richer countries, there is also a growing gap between the elites, profiting from European and global economic integration and no longer feeling obliged to their own nation exclusively, and the wide mass of citizens who feel washed to the margins or – in any case – fear being pushed there (Haller, 2008).

A closer look at the data shows, however, that the thesis of income inequality within countries going hand in hand with European economic integration has to be relativised. Income inequality has grown most strongly in the egalitarian social-democratic nations in Scandinavia starting from a level far below the average. It has risen slightly in the conservative countries, starting from a level below the average. It has remained more or less constant in the liberal countries, starting from a level above the average. In contrast, it has fallen slightly in the Southern European countries with a familiaristic orientation, starting from a level far above the average. Income inequality within these different regimes has converged, starting from a gap between a very low and a very high level. It has reached a narrower scope that stretches from a level below the average to a level above the average. This development is mainly due to the unfurling of inequality in Scandinavia and its reduction in Southern Europe. Figure 11.2 highlights this development for the period between 1997 and 2014 for the EU member states as of 2004. The special development of Southern Europe is most probably due to the fact that the integration into the EU's economic area and participation in its programmes of regional

Figure 11.2 GINI coefficients of EU member states in the course of time according to welfare regimes
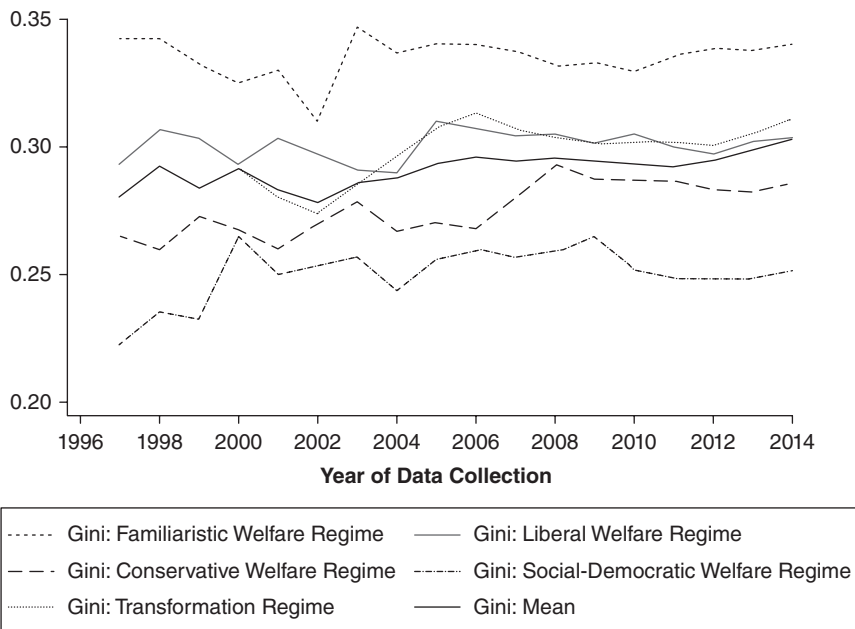
support, along with orientation to the Northern countries' social standards, has helped to raise the lower incomes. Nevertheless, the public and private debts that have piled up in the meantime put into question the sustainability of this way of dismantling inequality.

Europe's economic integration also involves a strengthened differentiation of centre and periphery alongside the effect of decreasing inequality between countries and increasing inequality within countries, with the exception of the special case of the familiaristic regimes. Previously coexisting economic systems and life-worlds come into a relationship of classification based on the centre's yardsticks. In this way, the Southern European way of life loses its own right and dignity within the common monetary area. The yardsticks are supplied by the Northern European culture of achievement, which is rooted in ascetic Protestantism. The different way of life in the South is now considered a worse way of life, since it does not generate the same level of economic success as the Northern way. Furthermore, it seems to endanger the North's success and demands a level of assistance from the North that necessarily raises the question as to what the South can do itself to further its own economic rise. The feuilletons' debate about the dignity of the South is, therefore, based on a material change of the relationship between the North and the South.

In the monetary union, the South no longer exists in its own right, side by side with the North, but has become part of a system dominated by the North. The monetary union has definitely replaced the segmentary differentiation into nation-states with a differentiation of centre and periphery. Certainly, some parts of the periphery will benefit from this development and will thus become the representatives of the centre in the periphery. The periphery's weaker regions, however, will fall behind even further. Such is the regional dimension of decreasing inequality between the countries and increasing inequality within the countries. Northern Italy, for instance, is a winner of European economic integration and makes Italy's overall distance from the richer countries in the North shrink, hence inequality drops between the country and others. Nevertheless, this decreasing inequality between the countries does not reach Southern Italy. This region then feels even more left behind, especially as European economic integration has weakened even more the generally weak internal solidarity between Northern and Southern Italy. The same can be established in Spain when we look at the relationship between the economically successful Catalonia and the poorer Spanish regions. Hence, increasing regional inequality within the countries is hidden behind decreasing inequality between the countries and, therefore, there is an increasing differentiation within the entire European economic area between strong, economically networked centres and weak, cut-off peripheries. This is shown both within and across the countries.

Obviously, deeply rooted distortions are hidden behind the European debt crisis. The poorer countries' catch-up movement was paid for with a level of indebtment that they can no longer reduce without help from outside and which is a tremendous burden on coming generations. At the same time, internal inequality has grown within almost all countries both in social-structural and regional

terms, and has involved effects of de-solidarisation and disintegration within the countries. Consequently, the foundations of inter-state and intra-state solidarity are lacking which are necessary for an extension of a workable economic or even political union (Bach, 2008). Hence, the governments in the Euro area are compelled to develop cooperative forms of crisis management that are less effective than a genuine economic union. Further crises will not stay away and their management will have to be negotiated over and over again. We cannot expect anything more in the foreseeable future.

The transnationalisation of political rights: the Europe of controls and counter-controls

Political rights generally seem to be in danger in the context of an expanding European bureaucracy without sufficient democratic control. I will argue in this section that we have to adapt our understanding of democracy to the structural features of a multi-level system in order to make democratic sense of them.

The European debt crisis has brought the urgency of a European economic union into the focus of attention more clearly than ever before. What was demanded by far-sighted economists as early as in the founding stages of the monetary union in the Euro area seems to have become inevitable today. A monetary union can only work when there is an effective coordination of fiscal policies. And, since all other tasks of politics depend on fiscal policy, the step towards a comprehensive political union is only logical and consequent. The political imbalance caused by a monetary union without an economic union and – beyond that – without a political union can now be recognised from the fact that the establishment of the European rescue umbrella to stabilise the Euro zone (European stability mechanism, ESM) and, in particular, to manage the debt crisis, provides governments with the power of decision-making for emergency situations where quick action is required without giving a sufficient right to national parliaments to have a say, even though extremely painful consequences for citizens may arise from these decisions.

Spill-over from economy to politics?

To enable the logically necessary steps from economic to legal and then political integration, the neo-functionalist integration theory introduced by Ernst B. Haas ([1958] 2004) pointed out a mechanism that helps in making one step after the other. This mechanism is the spill-over from economic to legal and then to political integration (Fligstein and Stone Sweet, 2002). Legal integration referring to economic transactions has progressed strongly ever since the introduction of the principle of mutual acknowledgement of product regulations. According to the neo-functionalist integration theory, growing cross-border trade generates a pressure of adjustment on the law (Figures 11.3 and 11.4). In the wake of legal integration by way of European directives, decisions and rules and jurisdiction by

the European Court of Justice (ECJ) – which is activated from below by economic actors and the courts – further pressure for political adjustment arises to form a political union. At this point, the project stagnates, however. So far, no spill-over has taken place into political integration. What is the reason for this stagnation? Is it merely due to the resistance of unwilling governments that feel robbed of their national sovereignty, or are there deeper structural reasons behind it? One problem that needs to be solved in the context of Europe's political integration is the democratic foundation of supranational politics. The deeply rooted obstacle to Europe's political integration can be found precisely at this point. Supranational policy can only insufficiently be forced into the corset of a representative democracy with a strong parliament as we are familiar with at the national level. At the same time, however, the transfer of further political competences to the European level involves the disempowering of national parliaments far beyond the level reached before. This is the dilemma of a European democracy, which became a burden for the European unification project at the latest with the signing of the Maastricht Treaty in 1992. The spill-over from the economic and legal to the political integration of Europe requires a transformation of democracy and is, therefore, not a simple continuation of the integration project along a given path. The spill-over is hindered by deeply rooted obstacles (Lepsius, 1991; Bach, 2008; Fligstein, 2008; Münch, 2008).

For roughly two decades, the European Union has been subjected to the criticism of not being close enough to its citizens, of untransparent political decision-making processes, bureaucracy and raging lobbyism that undermine the national institutions of democracy. It is claimed that the Union is good for capable citizens but subjects less capable citizens to a competitive pressure that they cannot live up to.

Obviously, the European Union lacks wide consent from the populations of its member states. It was, hence, little surprise that the ambitious project of a European constitutional contract did not meet with majority support in the referendums held in France and the Netherlands in 2005. In many other member states, such referendums would probably have failed as well. The Lisbon Treaty helped the European Union to save as much of its constitutional project as possible. However, this has changed nothing about the lack of identification of a substantial part of the national populations with the European Union.

Creating more transparency and dismantling bureaucracy has, therefore, been given top priority among the problems to be solved. Although the European Union has made efforts in this context for around 20 years, it has hardly been able to reach out to the average citizen. Identification with the Union and its integration project is differentiated still very strongly according to citizens' educational level, income and professional status. The higher the levels of education, income and professional status are, the higher the percentage who identify themselves with the Union and its integration. Indeed, knowledge of the Union and its policy and participation in European projects is distributed unequally according to education, income and professional status.

We might say that knowledge about politics and participation in its decision-making processes is distributed as unequally on the national level, so that the European Union suffers from a democracy deficit of a general nature, not of a specific European character. Nevertheless, on the national level, the institutions of representative democracy, such as the public formation of opinion in the media and consensus formation within and between the parties, ensure that the interests of citizens that are not immediately involved are given at least indirect attention. At the European level, this step is largely lacking. Citizens' unequal participation in political decision-making processes therefore causes a greater deficit of input legitimacy to arise than on the national level. And since the European Union has gained increasingly more decision-making competences in all questions related either directly or indirectly to the Single Market, a growing legitimacy deficit can consequently also be observed at the national level. Citizens' participation in the national formation of opinion and decision-making becomes increasingly vain when no decisions are taken at all at this level.

Hence, the EU suffers from a substantial lack of input legitimacy, since the chances for citizens to participate at the European level are distributed more unequally according to education, income and professional status than they are at the national level. Is this lack of input legitimacy compensated for by improved output legitimacy? Have all citizens benefited equally from European integration? All economic accounts referring to higher economic growth rates and citizens' extended scopes of action within the Union ignore the unequal distribution of the related opportunities in Europe and their impact on growing inequalities within the member states. Just as identification with Europe is distributed unequally depending on education, income and professional status, participation in increased economic growth and growing scopes of action is also unequal. Hence, an increasing legitimacy deficit can also be identified on the output side.

The European Union's legitimacy dilemma can be illustrated by the entanglement of trade, EU jurisdiction in preliminary rulings of the ECJ, citizens' self-perception as Europeans or as Europeans and national citizens, and trust in the European Commission. The entanglement of trade has grown both within the EU and beyond, though there is strong inequality with regard to the shares, as is illustrated clearly by a comparison between Germany and Greece. Added to this is a surplus of exports in Germany and a surplus of imports in Greece. Along with the entanglement of trade, the ECJ's jurisdiction has increased in preliminary rulings. Over the same period, however, self-perception as 'European' and/or as 'European and national citizen' has remained constant, at the low level of around 10 per cent. In contrast, trust in the European Commission dropped between 1990 and 2000 from a level of 40–60 per cent to a mere 30–40 per cent. In 2005, the previous level was reached again. In the wake of the financial crisis, however, this trust fell drastically to the low level of 20–40 per cent by 2012, and even more dramatically so in Greece, where it dropped from 60 per cent to 20 per cent (Figures 11.3 and 11.4).

Figure 11.3 Entanglement of trade and ECJ preliminary rulings
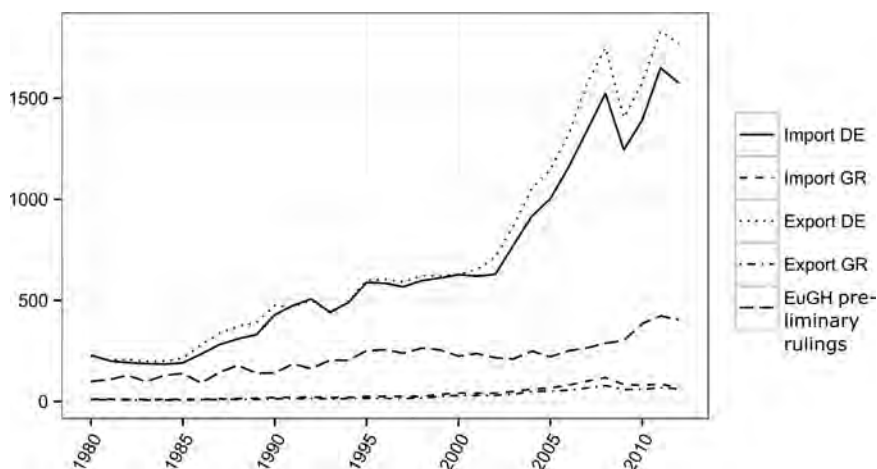
Sources: UNCTAD, 2013; ECJ, 2013:109–110.

Notes: The data was retrieved from the UNCTADstat's online data bank. EU exports and imports were measured in billion US dollars at the current exchange rate. ECJ preliminary rulings are calculated as number of claims to preliminary rulings. Own calculations.

Figure 11.4 European identity and trust in the European Commission
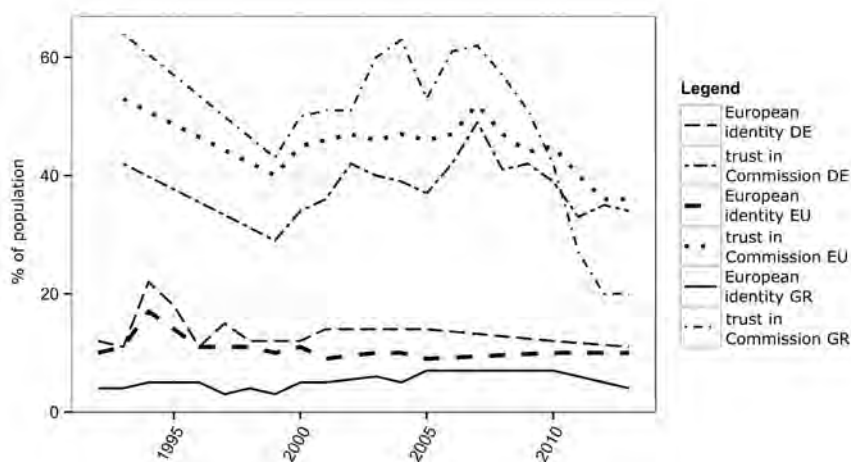
Source: European Commission, 2013a.

Notes: Values for European identity were calculated as share of interviewees stating 'European only' or 'European and national' as identity they expect for their future. The items 'European identity EU' and 'Trust in EU Commission' are average values for all EU member states.

Market and law as limits to politics

Ever since the signing of the Treaty of Rome in 1957, market opening and the removal of barriers to market access and of discrimination have been established as guidelines to the European integration project. The various extensions to the Treaty have merely defined these guidelines more precisely. The guidelines determine the contents of a liberalisation programme that can be understood as being hegemonial. The programme is hegemonial in that it has spread globally, defines the rules of the economy, affects all areas of life far beyond the economy, and determines the language in which the winners of competition justify their profits and the losers acknowledge their losses and launch their claims. The programme's hegemonial position can be recognised above all from the fact that the state is no longer considered a counter-structure to the economy, which reins in its effective power, but rather a structure to enable the functioning of the economy in the form of market and competition. In this sense, power widely shifts towards the economy and its self-regulation in the framework of market freedom and competition. Privatisation of state services, the deregulation of markets, and the replacement of hierarchies and professions with markets are part of this programme just as much as the breaking up of traditional forms of guaranteeing solidarity and social security by activating the individual who has become a life entrepreneur. In this context, the superposition of state sovereignty over a territory and of the state's disciplinary power over the individual with an economics of governance beyond territorial borders goes hand in hand with the liberation of the individual from nation-state traditions and constraints. In the framework of the European Union's Open Method of Coordination (OMC), we find a widely advanced stage of this governance across territorial borders. Benchmarking in institutional competition more or less automatically ensures the selection of 'best practices', completely without any 'political debate' and democratic formation of will. The impact of this new form of governance goes much further than is established by reference to the governments' remaining freedom of decision-making. It transforms expectations regarding societal practice and the yardsticks of its legitimation.

The helplessness with regard to the further political formation of the European integration project results from the way of thinking in nation-state categories of the sovereign practising of rule over a territory within a public formation of opinion and democratic formation of will. However, in our era of historical development the structural prerequisites for this kind of governance no longer exist. European governance cannot proceed as the practising of the people's sovereignty, as in nation-states. This fact will not be changed – not by the pan-European survey of the population, by strengthened political cooperation in a core Europe as a centre of gravity, by the direct election of a Union presidency, or by the election of a European executive by the European parliament. These are concepts borrowed from the nation-state, which either will fail at the European level as a result of the resistance shown from national governments or, rather, their realisation will not live up to what they originally promised: bringing European governance closer to the nation-state model of the democratic formation of will.

The decision for Europe is a step into a world that supports markets, exchange, competition and individual entrepreneurship more strongly than hierarchy, collective solidarity and social security – whether this is desired or not. Under these terms, democracy must be seen in a different way to the public production of consensus, democratic formation of will or 'paternalistic' representation of public will by political elites. Beyond the nation-state, there are basically two powers of control of political rule: the law and the market. Typically, the European single market project aims at a symbiosis of law and market, guaranteeing by law the free flow of goods, services, capital and people (Foucault, 2008). It includes the removal of any kind of discrimination as regards market access, an issue the EU has raised most effectively, for instance, to promote gender equality. On the one hand, citizens' civil rights and market laws are the forces that set the crucial legal and natural limits to European governance far more than has been the case in the world of nation-states. On the other hand, this means a dismantling of the nation-state form of democratic control over governments, not only at the European level, but also at the national level as a result of restricted state sovereignty and weakened national solidarity.

A European system of checks and balances?

The search for farther-reaching controls of European governance will only be successful when the changed structures are taken into account. The focus will then be geared to the opportunities to raise contradictions to political measures and their implementation, and to the barriers such measures have to overcome in order to achieve. It is then not the execution of the sovereign will of an imaginary European people nor the according of the will of 28 nations that is at stake, but rather a system of checks and balances in line with the US American model. One pillar of this system is the European Court of Justice – both de facto and de jure. Its job is ensuring and granting individual freedoms, but not discovering a common European welfare. The second pillar of the European system of checks and balances is the influence of a wide variety of bodies and forces trying to make the European decision-making process changeable in many places and even to have it fail. Council, Commission, Parliament, the committees of the European comitology, national governments and lobbyists make decision-making processes both unclear and prone to objections and resistance.

The demand for more transparency does not make this European system of checks and balances more visible, but nevertheless does make it more accessible to control. As we know, such a system is only open to interests capable of being articulated. Actors with influence are far from representing the entire scope of opinions and interests. It is, however, unrealistic to aim at this feature, since the wide variety of opinions and interests has long been unable to be represented in a visible way by parties and associations even at the nation-state level. If the European project is not to be thrown into question permanently by disappointments, the only possible way might be to say farewell, in Europe, to obsolete

ideas of democracy and instead focus on the formation of what is breaking ground anyway: a programme of liberalisation, which obviously matches far better with a system of checks and balances than with the nation-state model of democratic formation of will (Münch, 2008: 341–383). Hence, we necessarily have to say farewell to exaggerated expectations of a European formation of society. These can only end in disappointment. The search must focus on mechanisms to set limits on Europe's economic liberalisation. This task also demands a return to the social integration tasks of the different member states, especially since, in this context, little more than the existing policy of reducing regional inequalities can be expected from the European Union (Scharpf, 2010; Streeck, 2012).

The recent debate between Jürgen Habermas (2013) and Wolfgang Streeck (2013a; 2013b) reveals the entire dilemma of the European integration project. Habermas (2008) supports the regaining of political power to balance the growth dynamics of open markets with the needs of social integration and ecological sustainability. A new political unit is to emerge between global economy and the now powerless nation-states, which has enough political power of formation to transport the synthesis of economic dynamism and social integration into the future in a new guise. This new unit should be the European Union. In this context, we must neglect, however, that the goal of ecological sustainability creates new problems and is in conflict with the old programme of social integration that is based on economic growth. Social integration can no longer be produced simply by following a policy of growing shares. Added to this is the fact that – in contrast to the national welfare state's boom period – social integration must nowadays be achieved in a far more heterogeneous world. Today, it is not only the citizens of a homogeneous nation-state who are legitimately entitled to a good life, but citizens all across Europe and all over the world. At the same time, the nation-states' civil society itself has become more heterogeneous. Under these terms it may be legitimate to support the European factor in intellectual discourse, to bring new momentum to the European integration project. Neglecting the accompanying structural change of social integration is the privilege of an intellectual who wants to move things. And yet, a sociological analysis makes it necessary to highlight precisely these structural changes, even if they point to the fact that the path towards more Europe is much more difficult than an emphatic appeal to people to take up more Europe, and a more democratic one, too.

Compared to Habermas's optimism, Wolfgang Streeck's European scepticism appears backward-minded and completely unsuited to producing a wind of change. In contrast to what is expected from an intellectual in the political arena, it is not the job of a sociological analysis to create new enthusiasm for a political project. Streeck's contributions (2013a; 2013b; 2014) represent just such an analysis. They are definitely suited to sending a sobering message to the political public: stop, before the final remains of welfare state achievements must be sacrificed on the altar of European market liberalisation. Streeck arrives at this message because he regards the European Single Market project and the monetary union as a forced programme of liberalising the economy. Looking at the progress of economic integration in the wake of the dismantling of market restrictions by

the different stages of contract development, the passing of directives and the ECJ's jurisdiction, there cannot be any doubt about this diagnosis. The finding is, furthermore, confirmed by the failure of Jacques Delors' idea of a social union. Too big are the differences in economic strength and welfare systems between the member states, and too small is the impact of genuinely European associations and parties and a European public. The cultural differences are too big to allow a common line of market correction, redistribution and social compensation at a European level to be attainable. Rainer Lepsius (1991), Fritz Scharpf (1996) and Wolfgang Streeck (1998) pointed out these problems long ago and have therefore emphasised that the maintenance of democracy and welfare will, in the long run, depend on the sufficient right of member states, national governments and parliaments to have a say in all European matters, as well as on continued national competence in all matters of social policy.

When Streeck points out that increasing Europeanisation will, in the long run, result in further economic liberalisation and an even farther-reaching rule of markets over politics – different to what Habermas aims at – this statement has a solid sociological foundation. Beyond Streeck's analysis, there are good arguments for saying that the European integration project is feasible exclusively in the form of a programme that removes the homogeneous national welfare state in a heterogeneous multi-level system, which is closer to the USA's federal pluralism than to any other historical model of the European nation-state.

If my analysis presented so far is correct, the decision for Europe will inevitably involve the abandoning of a level of social balance in the conservative or social-democratic national welfare state, which has only been achieved by external delimitation and internal homogenisation. The European multi-level system must seek the internal social integration of the European Union under terms of increased heterogeneity and in utmost agreement with the world population's claims to having a share in global affluence, but also with the increased demands of ecological sustainability. These more complex terms set narrower limits to the internal social integration than there have been for the national welfare state. Consequently, it is not a question of needing time for the European Union to mature so far that it may generate a European welfare state in the known quality of the conservative or social-democratic model or an organised capitalism according to the model of the 'Deutschland AG'. The insoluble heterogeneity allows nothing but a liberal variety.

Transnational social citizenship: the society of individuals

Europeanisation of social rights does not simply mean the reconstruction of the national welfare state at the European level, but involves a fundamental change to the meaning of social rights in the context of an emerging society of individuals.

European integration is certainly an elite project, as Max Haller (2008) has pointed out in an enlightening study. Nevertheless, the elites do not possess any deeply rooted emotional relationship with Europe as their political home.

This is the conclusion of a recently published empirical study (Best, Lengyel and Verzichelli, 2012). Corporate managers see Europe as an economic space that offers them opportunities, where their enterprises have to ascertain their position. Scientists consider it a research space that opens up opportunities for support and cooperation. Politicians regard it as a political space that has to be formed in political competition for influence. All of them want to benefit from European integration. In contrast, the readiness to share achievements with others and to support needy people, or even countries, is less pronounced than within the borders of the nation-states. More than 50 years of European integration work have not changed much in this regard. When we follow the semi-annual Eurobarometer data, we see that the distribution of identification with Europe and/or one's own nation has remained constant over a long period of time. In the average of EU member states, 3 per cent consider themselves merely Europeans, 7 per cent Europeans and members of their own nation, 46 per cent members of their own nation and Europeans, 41 per cent merely members of their own nation, and 1 per cent neither Europeans nor members of their own nation. The remaining 2 per cent do not know where to position themselves (European Commission, 2010: 113). Pro-European identity increases along with the level of education, income and professional status. As the above-mentioned study shows, the relationship towards Europe is less determined by emotions and solidarity and more by rational calculus even among the pro-European elites. Is this a lag in development that it is possible to catch up with, or a more deeply rooted structural problem of the European Union?

Integration through homogenisation: the national path

To answer this question, we have to take into account the ways in which national feelings of belongingness have grown in historical terms. We will then see the myriads of requirements that have shaped this process and how improbable it is that it could be repeated at the European level (Münch, 1993: 15–42). In modern times, European nation-states came into being in the wake of long-lasting territorial struggles. The European system of nation-states experienced a first consolidation with the Westphalian Peace of 1648. At the Vienna Congress in 1815 it was rearranged once again. A further consolidation followed in the wake of the Italian and German formation of nation-states during the last third of the nineteenth century. The two World Wars have increased territorial struggles once more to an extreme level. From a historical viewpoint, the first mechanism to create strong collective identities was external demarcation and conflict settlement by war. The second mechanism was internal homogenisation, which pushed back regional autonomies and involved the centre's rule over the periphery in both linguistic and cultural terms. Based on this concentration of power on the centralised state, it became possible to build up a welfare system that allowed for the homogenisation of living conditions throughout the entire national territory, along with the homogenisation of the entire population's living standards. Class society was replaced with a levelled middle-class society, as Helmut Schelsky (1965) established as early as in the 1950s, diagnosing a development that was to reach its climax in the 1970s.

From that time on, it withdrew again to reach today's structure of a more strongly split society of globally oriented elites, a shrunken middle class living in precarious conditions and a new, very heterogeneous lower class.

A small pro-European and, beyond that, cosmopolitan elite is faced by the wide mass of an insecure middle class that identifies with Europe only in part and – to be on the safe side – clings to national loyalties. Furthermore, a growing and louder group arising from the European debt crisis supports increasingly national ties. Hence, the share of those who exclusively stick to their own nation in the Eurobarometer survey has clearly augmented in the more recent past. Economic integration advances, recently for instance in the form of a dynamism of crisis that has somehow affected all member states. The political representatives of the pro-European elites regularly set up rescue umbrellas, while a pronouncedly sceptical opposition forms against a further strengthening of European integration. This group can rely on an increased anti-European mood among the population. Europe-critical parties such as Alternative für Deutschland (AfD) keep attracting followers. Therefore, smart conservative politicians quickly appointed renowned Europe critics to important positions in the wake of the European crisis, even if these had played only a marginal role before. They were brought to the fore to allow such parties to gain votes in the elections for the European Parliament.

Integration without homogenisation: the European path

The European unification project's structure differs considerably from the historical development of strong nation-states that are capable of acting and redistributing. It is crucial to note that it has expressly replaced warlike struggle for territorial rule with peaceful cross-border exchange of goods and services. This is just how Emile Durkheim (1964) explains advancing international – and in particular European – labour division. A zero-sum game for territories is bound to be transformed into a profit maximisation game for economic growth from which everybody may benefit in the same way. Increasing affluence in Germany should not come about at the expense of affluence increase in France, the Netherlands, Spain or any other European country. This decision for Europe's economic integration as a so-called win–win game for all has lasting consequences for collective identities and solidarities. This is due to the fact that it ranks the individual and his/her unfolding higher than the collective – whether it is the historically evolved national collective or an imaginary European one. Recurring to another idea by Emile Durkheim (1973), we might speak of a European cult of the individual. This does not mean reckless egotism, but rather a cult that focuses on the human being's dignity and individuality and protects these through a whole set of laws and rights. The material foundation for this cultural change is growing specialisation, which comes along with the international – and particularly European – division of labour and the resulting individualisation of people, as Durkheim tells us (1964). Hans Joas (2011) calls this the sacrality of the person.

Integration through law: the European Court of Justice's central position

The European cult of the individual means that European law rates individual rights higher than collective rights. The extent of this position on individual rights has been shown in a series of more recent decisions taken by the European Court of Justice, which rate entrepreneurs' freedom of establishment higher than the workforce's collective right to strike (Viking, C-438/05; Lavall, C-341/05). As a matter of fact, significance has been shifted from the workforce as a collective to the enterprise as an investor. Fritz Scharpf (2009) concludes from this development that the EU member states will possibly have to set limits to the ECJ's liberalisation programme in their role as keepers of welfare state security in the European Council. The priority given to economic integration, which is at the foundation of the European unification process, necessarily involves that the use of individual rights is a matter of better-off individuals. In reality, the cult of the individual encompasses some leeway for reckless egotism. Nevertheless, we would not fully do justice to the ECJ's position as the crucial trustee of this cult if we measured its achievements solely by its judgments giving free way to economic liberty, from Cassis de Dijon (C-120/78) to Lavall (C-341/05) and Viking (C-438/05). Along the lines of the European directives aimed at abolishing any kind of discrimination, it has also put an end to the unequal treatment of men and women in employment with a whole series of judgments (Defrenne I, C-80/70; Defrenne II, C-43/75; Defrenne III, C-149/77; Jenkins *v.* Kingsgate, C-96/80; Bilka-Kaufhaus *v.* Weber von Hartz, C-170/84) (Münch, 2010: 25–83). What is, therefore, generated by the integration project is a Europe of individuals. Europe reaches a new level of development to realise what Norbert Elias (1996) called 'the society of individuals'. Nevertheless, free individuals think beyond the European space in the same way as they are no longer willing to be tied to merely national loyalties. This seems to be the cost of putting an end to the collective struggle for territories. It is, however, an even bigger task then to grant everyone their share in the unfolding of their individuality. The question as to how this should proceed in a world lacking the homogenisation and redistribution strength of powerful welfare states has not been solved to date and will keep European sociology busy for a long time to come.

There are many complaints about the increased inequality in today's society. Nothing is done, however, to change this situation. In this context, the focus is exclusively on the inequality of incomes and affluence. It is usually neglected that today, inequalities are no longer tolerated that were not perceived as such in the past. This goes, above all, for the inequality between the genders, and for restricted rights and chances for participation of minorities of all kinds. In our times, inequality is, therefore, an extremely complex matter. A closer look even shows interdependences of a kind: that the granting of more equality on the one hand produces new inequalities on the other hand. Hence, the strengthening of equal rights for the genders and any kind of minority, which is advanced by

the European integration project, has essentially contributed to individualising inclusion into society. Integration efforts are focused on the singular individual. The consequence of this development is the increasing splitting of society into singular persons and singular identity groups without any encompassing common features. Along with the singularisation of inclusion into society, participation in society has been tied even more strongly to the capability of organising interests, so that these have become more unequal due to the corresponding differences. A cross-identity republican spirit is lacking which might put a halt to separatism, as Pierre Rosanvallon (2013) established. It is extremely unlikely that such a republican spirit could resurface at the European level beyond the homogenisation force of the nation-state.

Citizenship in the world society: European cosmopolitanism

European citizenship is not the transfer of national citizenship on to the level of the European Union, but establishes itself as a linking structure between national solidarities and the global sharing of rights.

When Europe is a society of individuals (Elias 1996), it is also a suitable carrier of a culture of cosmopolitanism. Ulrich Beck and Edgar Grande (2004) support this idea. Cosmopolitan thought wants to translate contrasts from an either–or game into a both–and game, and zero-sum games into positive-sum games. An increase in European integration is to be accompanied by an increase in national integration, but also an increase in global integration. Contrasts are to be brought into a mutual relationship of increase. It appears logical that the cosmopolitan strategy requires a change in thought, which is not easy and meets with the resistance of historically deeply rooted thinking in national categories. Different to moral universalism, however, cosmopolitan thought should not remove cultural difference in the general human character, but should recognise it as such and yet make it tolerable and negotiable in a common frame of reference. Cosmopolitanism differs from multiculturalism in that individual claims to being different do not per se receive acknowledgement, but have to accept a process of balancing with other facets of difference, at least in formal terms.

Cosmopolitanism could be interpreted as a strategy of mediation between the moral universalism of respecting human and civil rights and the particularism of collective or individual ideas of a good life. On the one hand, we find the universally valid and uniform standards of human and civil rights, while on the other hand there is the diversity of ways of living. The nation-state created a tight form of mediation between these two poles by ensuring a high level of cultural homogeneity, especially through disciplination at school, and thus forced immigrants to assimilate. The model of the one and indivisible nation as the carrier of human and civil rights, which was born during the French Revolution, embodied this mediation between moral universalism and the ethics of a good life in an exemplary way.

Individual rights, open markets and equal opportunities for education: three pillars of the USA's liberal society

The United States of America has developed a far more pluralistic understanding of nation (Münch, 2001). The fathers of the American constitution attached special importance to making respect for civil rights compatible with a myriad of different ways of living. Hence, along with the immigration of people from most regions around the globe, the heterogeneity of essential ways of thinking and living has reached a level that is higher than anywhere else in the world. One result of the constitutionally anchored abandoning of homogenisation through state legislation is that the realisation of individual rights was transferred to jurisdiction. Fighting in court for one's own rights is the crucial tool to help the individual to obtain that way of life that he/she desires. In his classic work *On Democracy in America*, Alexis de Tocqueville (1976) called the American democracy a court democracy.

Basic tolerance towards a wide variety of lifestyles whose accordance is made through the courts is the symbol of a liberal society. This goes, above all, also for the extension of rights to immigrants (Soysal, 1994; Joppke, 1999). This is the *first pillar* of a liberal society. Its *second pillar* is an open market, where all can exploit their opportunities to arrive at their individual happiness. In contrast, the state's role is to grant equal chances of market access and rights to everybody. The access to education and further education, which forms the *third pillar* of a liberal society, is of crucial importance here. What matters is the production of pre-market equality, while the correction of competition on the market – for instance in the form of redistribution and social security against market risks – is far less important. The latter is judged as a too far-reaching homogenisation of ways of living. In a liberal society like that of the United States, we identify a relatively high level of tolerance for different ways of living, but also for inequality in the living standard. Diversity of ways of living and unequal living standards represent two sides of one and the same medal.

Open markets, the guaranteeing of individual rights by the courts, and the state's focus on granting equal opportunity as regards access to markets through education and further training are, therefore, the three pillars of a liberal society that have enabled a farther-reaching openness towards being different in the USA, in the sense of cosmopolitanism, than in the French model of the assimilating state-nation. The narrowing down of the term of 'nation' to refer to ethnic-cultural origin, which we find in the German tradition, has not even reached the openness of the French model (Brubaker, 1992) and is currently withdrawing due to the approximation to the pluralistic understanding of nation (Piwoni, 2012).

Individual rights, open markets and equal opportunities for education: three pillars of a liberal European society

Market, law and equal opportunities in lifelong learning are the crucial guidelines of European cosmopolitanism. The removal of barriers to market access by European law, the struggle against discrimination of the European Court of

Justice, and initiatives aimed at creating a European space of education and higher education (Lisbon strategy, Bologna process, European qualification standards, lifelong learning) are tools of mobilisation that detach the individual from national restrictions and extend the scope of action and the horizon of thought. The policy of market opening has improved the living standards of people at the European periphery to whom the European centre of affluence remained inaccessible in the past. The ECJ's legislation has ensured that rights to market access are actually granted and discrimination is dismantled. European educational initiatives have improved the chances for the effective exercise of individual rights all across Europe. This also includes an extended recognition of diversity beyond the borders existing within the nation-states, which is mainly a result of the ECJ's jurisdiction (Münch, 2008: 64–144). From the point of view of European cosmopolitanism, the ECJ's verdicts in the cases Laval (C-341/05) and Viking (C-438/05) not only give preference to the free choice of location on the part of enterprises as opposed to the collective right to strike on the part of employees, but also means the granting of opportunities to Latvian and Estonian employees which these workers did not know before. In this sense, the ECJ can be called a driving force of European cosmopolitanism.

European cosmopolitanism is accompanied by the falling power of homogenisation and the decreasing power to correct inequalities in the standard of living that issue from market competition. In this sense, the EU is not a carrier of the 'European' model of society of strong national welfare states, but rather a vehicle for getting closer to the American model of a liberal society offering a wider potential for cosmopolitanism. The fact that such a society also involves strong distortions and tensions can likewise be seen when looking at the USA.

Yet, decreasing inequality between nations is opposed to the correspondingly growing inequality within nations. As the aforementioned study by Jason Beckfield (2009) shows, the sum of inequality has dropped. Hence, worse-off people living at the periphery have a better life than before. In the sense of European cosmopolitanism, people at the European periphery attain a higher living standard while more inequality is admitted in the centre of Europe. The new problem of the states at the centre, therefore, is the exclusion of their least competitive citizens in an open market economy. Beyond all qualification measures, this also requires conventional post-market provisions.

Concluding remarks

As we see, the meaning of citizenship is changing fundamentally in the context of an emerging European society of individuals between cosmopolitan outlook and national solidarities.

The neo-functionalist integration theory of spill-over from Europe's economic integration to its legal and political integration needs a substantial relativisation. This is not a linear process that will ultimately lead to a political union following the model of a federal nation-state. The nation-states' strong historic evolution makes it impossible to reach the USA's level of integration. And yet, the

USA offers a model that might be easier to reach for the possible structures of a European political union than the model of a European nation-state – even one based on the federal variety of the German Federal Republic. The Single Market programme, including the dismantling of barriers to competition and discrimination of any kind, is accompanied by structures of a political, social and cultural integration that enter a relationship of homology to the former's structure. They are supported by this programme and have themselves a supporting effect on it. The policy of competition and non-discrimination is matched by the political Europe of checks and balances, the social Europe of individuals and the cultural Europe of cosmopolitanism. Hence, political regulation has a market-creating effect rather than a market-correcting one, while social integration aims at the individuals' capacity to participate in the market and cultural integration follows closely behind the market dynamism going beyond Europe (Figure 11.5).

Figure 11.5 Homology and interdependences in the process of European integration
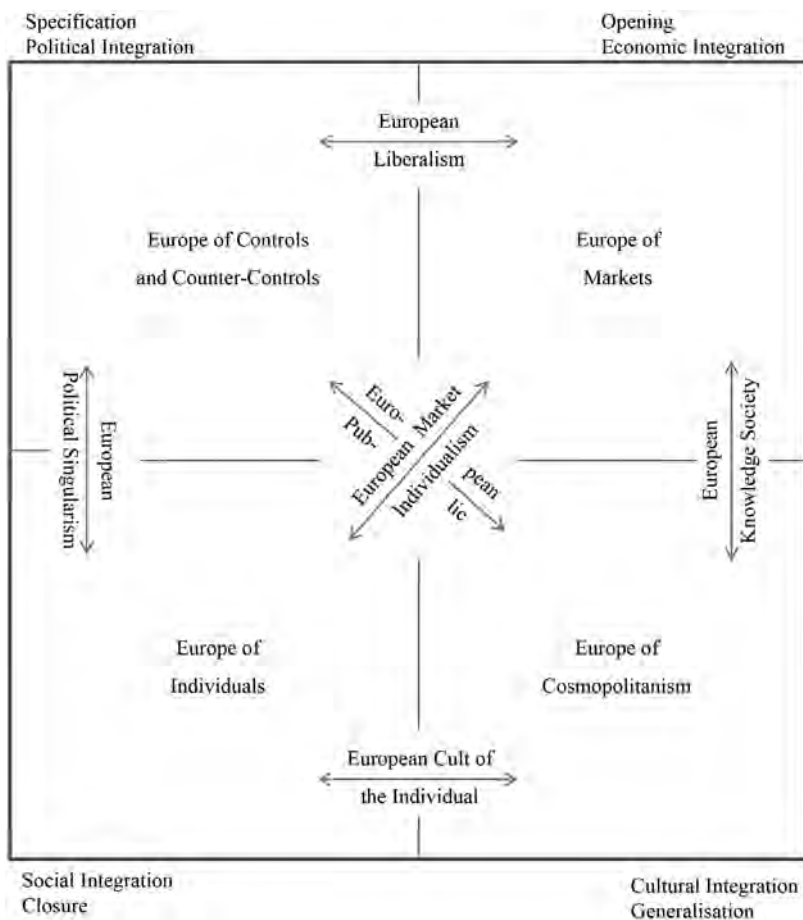
Market, politics, community and culture can be regarded as fields that mutually influence each other and that are structurally coupled in zones of interpenetration. The Europeanisation of these fields generates a multi-level system dominated by market opening, which produces related homologous structures in an inter-penetration with the likewise open fields of politics, community and culture. The European market opening is matched by political structures of controls and counter-controls, civic structures of individualisation of social inclusion, and cultural structures of cosmopolitanism. Between the different fields, matching structures act as mediators: liberalism in the relationship between market and politics; political singularism between community and politics market individualism between community and market; the knowledge society between culture and market; and the European cult of the individual between community and culture.

Note

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