No Foundations 15

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TABLE OF CONTENTS

Editorial

Law and the Other – Special Issue

1. Introduction

In recent years both European and traditional settler societies such as the USA, Canada or Australia have faced a moment that has been diagnosed as the crisis of recognition and multiculturalism and have experienced the rise of post-multiculturalism (Gozdecka, Ercan & Kmak 2014; Kymlicka 2010; Vertovec 2010). This has come as somewhat of a surprise, since Western societies have for years been aspiring to adopt laws and policies that tend to include rather than exclude different types of minorities and recognise a vast array of identities. This trend towards increased inclusion has been driving both national and international legal platforms, leading to affirmation of the rights of minorities, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men by the majority of constitutional orders (Skrentny 2010) and institutions such as the EU (Treaty on European Union, article 2). Recent years, however, have witnessed these hard won principles in crisis, accompanied by a departure from the rhetoric of inclusion, primarily in the context of ongoing arrivals of refugees and asylum seekers from Iraq and Syria. Constant references to a 'migration crisis' (Kenneth 2015) have led to such unprecedented changes as the victory of the Brexit platform (Johnston 2017), the election of Donald Trump (Klinkner 2017) or, more recently, the victory of Sebastian Kurz's conservative right-wing party in Austria (Oltermann 2017). All of these political movements have been driven to a significant extent by anti-immigration sentiment (Drummond 2009). The same tendencies have also been visible in traditionally multicultural countries such as the USA, Australia, or Canada, where control of immigration (Tasker 2017), detention of refugees in offshore camps (Doherty 2017) and targeting

culturally distinct populations (Karp 2018) have become the focal point of political campaigns and some policies adopted by the government. The most symptomatic example has been the recent approval by the United States Supreme Court of Donald Trump's revised ban on migration from Muslim countries (McCarthy & Laughland 2017). As noted by Dauvergne, this 'new politics of immigration' is characterised by such features as rapid change, defiance of partisan expectations, existential fear and, in particular, a new worldwide 'us' and 'them' divide, which takes an 'unprecedented place on the central political stage of all Western liberal democracies', leading to an end to both 'settlement' and 'society' as key immigration values (Dauvergne 2016, 8, Anderson 2013). The new politics of distinguishing between the local population and those who arrived later have been widespread in Europe (Bohman & Hjerm 2016) and globally (Hogan & Haltinner 2015). These exclusionary discourses have not only targeted new arrivals but also escalated beyond the realm of migration law and touched those who are culturally different (Gozdecka 2015). The most recent example of this escalating tendency can be seen in comments by the Australian Minister for Immigration, Peter Dutton, who lately targeted the Melbournian population of African descent, linking them to gang violence (Karp 2018).

Despite its aura of neutrality, law takes a more or less active part in processes of othering, sanctioning policies of marginalisation and exclusion of difference. Such measures as the Trump migration ban already mentioned, bans on minarets or burqa bans, democratically sanctioned by national legislatures in Switzerland, France or Belgium, the offshore detention of refugees or processes of interlinking migration law with criminal law (crimmigration; Stumpf 2006) have become not only legal but also increasingly more robust. As a result, law has sanctioned and strengthened Islamophobia, the perception of migrants and asylum seekers from the global South as criminal, dangerous and a threat (Joao Guia, van der Woude & van der Leun 2013) or refugees as bogus asylum seekers and immoral others, unable and unwilling to conform to Western legal and social norms (Mezzadra & Neilson 2013; Kmak 2015).

In that light, this special issue focuses on the theory and practice of contemporary processes of othering and investigates how these processes operate through laws passed and practiced. The objective is, however, not merely to illustrate that discriminatory and othering processes exist, but instead to examine how exactly legal techniques of othering operate. In this analysis, we will emphasise how these techniques, even when ostensibly neutral at first glance, in reality generate, perpetuate and fail to prevent creation of the 'other'. This special issue conceptualises these processes and tools and scrutinises how the legal other is created through 'governmental xenophobia',

'securitisation practices', 'the apparatus of human dignity', 'the common good', the 'legitimate community' or 'citizenship discourses'.

2. The other and apparatuses of othering

The term 'other' and 'othering' have a long history and have been used prominently in various research areas across the social sciences (Young 1990, Young 2000, Gingrich 2006, Dominquez 1994, Jensen 2011), the humanities (De Beauvoir 1949; Said 1978; Spivak 1985) and the law (Stabile 2016; Pedrioli 2012; Murphy & Green 2011; Todres 2009). Indeed, the word 'the other' has been used so frequently that some (Gingrich 2006) have argued that the term has mutated into a metaterm encompassing everything and nothing and thus risks becoming rather meaningless. But against that fear, the quest continues for outlining the mechanisms of othering. Ever since the rise of phenomenology in early XXth century France, the postcolonial writings of Edward Said and Gayatri Chakravorty Spivak and the ground-breaking studies of alterity by Emmanuel Levinas, 'the other' as a term seized the imagination of scholars across the board. The other is someone different from oneself (Levinas 1994; Derrida 1998, 197), but also someone different from the norm (De Beauvoir 1949), the rightless (Arendt 1985), bare life (Agamben 1998) or the part that has no part (Rancière 2010).

Managing and accommodating difference has occupied many disciplines, especially in relation to diverse perspectives on discrimination (see Davies et al. 2016, 61—65). To be sure, othering is not a term alternative to racism, sexism or class, but a way of addressing and classifying their various aspects. 'Hence othering concerns the consequences of racism, sexism, class (or a combination thereof) in terms of symbolic degradation as well as the processes of identity formation related to this degradation' (Jensen 2011, 65) As Young pointed out, othering is the process of identity politics that changes the merely different into the other (Young 1990, 99). When 'othered', the one that is not oneself becomes devalued and dehumanised, through a discursive process, changing the one into the 'other' (Jensen 2011, 65). Society and its institutions marginalise the other and shape the response to all forms of difference, from gender difference (Graycar 2002), to racial difference (Loomba 2015). "Such discursive processes affirm the legitimacy and superiority of the powerful and condition identity formation among the subordinate (Jensen 2011, 65).

Legal scholarship has been catching up with these processes. However, most of the scholarship on othering in law or through law retains either a focus on concrete groups being targeted by concrete legal measures (Murphy & Green 2011), a legal-historical analysis of marginalisation (Mulcahy & Sugarman 2015), human rights perspectives on inclusion (Arias & Gurses 2012) or on the processes of exclusion and discrimination more generally, but without a strong focus

on theoretical conceptualisation of the processes of othering (Wrench 2016; Simpson & Yinger 2013; O'Donovan 2016; Vrielink 2013; Juss & Zartaloudis 2015; Gozdecka 2015).

This special issue goes beyond the question of who is targeted and delves deeper into the questions how and by what means. Rather than focusing on discrimination, which we see as a result rather than the origin of othering, we want to expound the rationales behind the processes that have recently been occurring in human rights law, migration law and citizenship law. We conceptualise them as elements of 'othering apparatuses (dispositif)' in the vein of a Foucauldian understanding of the term (Foucault 1998). The authors deconstruct the techniques lying behind marginalisation of particular groups and examine their rationales and manner of perpetuation in the context of a broader set of technologies, mechanisms, knowledges and structures based on differentiation between citizen/foreigner, us/them, inside/outside. This issue contributes to critical legal methodology, which attempts to exemplify and bring to the fore the processes and strategies that result in production of the other. By exposing such knowledge this issue provides a backdrop for the processes of resistance to othering that would dispute the 'given' or the 'common sense' (Rancière 2010) and give a basis for new becomings, challenging the hegemonic us/them dynamics of the 'new politics of immigration' (Dauvergne 2016) and post-multiculturalism.

The investigation of the legal processes of othering is theorised and the primary focus of the articles in this issue is on the genesis and perpetuation of these processes. This investigation seems crucial today at a time when acceptance of difference appears to be waning and areas of law traditionally suited for accommodating difference have begun to emphasise coherence and ethno-national sentiments instead. These new discourses single out traditional minority cultures, emphasise and exploit their religious or cultural difference and frame them as a security problem (Gozdecka, Ercan & Kmak 2014, 53). It is therefore important not only to understand that these processes are occurring but to answer the question how they are possible and what has propelled their emergence despite the seemingly world-wide affirmation of equality, inclusion and rights.

3. Othering and law

This special issue begins by examining how these technologies, mechanisms, structures and processes work in particular contexts. The first focus area is the othering of migrants visible across different legal contexts. On this topic, Magdalena Kmak in her article *Crimmigration and othering in the Finnish law and practice of immigration detention* focuses on the concept of crimmigration and its othering role in Finland. The article focuses on multifaceted relations between 'the bordered' and

'the ordered' embedded in contemporary crimmigration practices in Finnish law. The article not only reveals how crimmigration features in the law and practice of administrative detention of foreigners in Finland but also shows how the strong relationship between 'the bordered' and 'the ordered' in Finnish law and practice contributes to processes of othering of foreigners. The article illustrates that othering occurs, on the one hand, through differing state response to crime and its prevention depending on a person's immigration status and, on the other, through directly linking migration with crime.

Following in a similar vein, Likim Ng in her *Securitization of Refugees: Increasing Otherness through Exclusion* examines the exclusion clause contained in Article 1F of the Refugee Convention and focuses on how emergency is enacted to suspend law by going above the normal political decision-making process and depart from international criminal law statutes and rules. By analysing select cases from Australia such *Dhayakpa v Minister for Immigration and Ethnic Affairs (1995) 62 FCR 556* and *Ovcharuk v Minister for Immigration & Multicultural Affairs [1998] FCA 1314*, this article shows how asylum seekers are presented as securitized by the language and discourse of decision-makers, which furthers the 'othering' of refugees. Relying on Agamben's theory of exception, Ng demonstrates how the exceptional nature of the exclusion clause becomes the norm and how it affects genuine refugees that are unable to access rights.

To illustrate that othering, once limited to migrants and refugees, can expand exponentially, Anne Macduff in the article *The Citizen's Other: Australian Political Discourse on 'Australian Values', Migrants and Muslims* examines the political construction of Australian citizenship. This article studies how ideas of citizenship are narrated in the field of political discourse. The analysis focuses on narratives of 'Australian values' that can influence the exercise of discretion by judges and decision-makers in deciding certain citizenship cases. Relying on critical discourse analysis, Macduff examines the 2007 legislative reforms and identifies how the content of 'Australian values' was articulated. The article goes on to show that such articulation was achieved through constructing the migrant and the Muslim as cultural Others that are particularly incompatible with Australian values. It further suggests that, while the narratives in which discourses achieve this exclusionary outcome are specific to historical and social contexts, they can provide a neutral and inclusive cover for exclusionary agendas.

Similarly, Aleksandra Gliszczyńska-Grabias and Witold Klaus examine the parallel between the treatment of migrants and treatment of other minorities in their contribution *Governmental Xenophobia and Crimmigration: European States' Policy and Practices towards 'the Other'*. This article focuses on what Jérôme Valluy calls "governmental xenophobia" and its role in constructing 'the Other'. It shows that both migrants, but also those existing inside the community such as Roma,

can be affected by public and legal discourse aimed at stigmatizing and identifying them as a source of problems, threats and dangers to the rest of society. Gliszczyńska-Grabias and Klaus examine practices including coercive instruments engaging criminal law and demonstrate how these approaches violate fundamental human rights, including prohibition of discrimination.

Continuing the focus on rights Dorota A. Gozdecka in her article *'Barbarians' and 'Radicals' Against the Legitimate Community? Cultural Othering Through Discourses of Legitimacy of Human Rights* focuses on how human rights discourses themselves may marginalise and otherise certain identities. Gozdecka examines the mutations of rights from instruments of inclusion to instruments of exclusion and examines how interpretations of the legitimacy of international human rights law can create and propagate otherness. The text employs the notion of a 'legitimate community of rights' and evaluates how it excludes those deemed too culturally different to belong. The article does so primarily in light of managing religious difference and argues that European human rights regimes have created two distinct categories of dissidents seen as subversive and a priori excluded from the protection of rights – the 'barbarians' and the 'radicals'.

To illustrate that even the most protective legal principles risk resulting in marginalisation and othering, Ukri Soirila examines the apparatus of human dignity in his article *Othering through human dignity*. While acknowledging that the concept of human dignity is significant and crucial for human rights, the article examines what the concept does to particular identities. Soirila argues that, despite its inclusive and all-encompassing aim, any use of the concept necessarily also produces 'othering' in presupposing some fixed notion of 'human'. By approaching human dignity not as a metaphysical concept but as an 'apparatus' (dispositif) that can be used to assemble various forces, discourses and sentiments, and to direct them to achieve concrete aims, the article focuses on how exclusion can occur with the help of the concept.

The issue provides a rich and encompassing comparative tapestry, illustrating that otherness can occur not only through straightforward rejection of equality, but quite the contrary, despite the best efforts at ensuring fair and inclusive legal conditions.

Dorota Gozdecka and Magdalena Kmak

Canberra and Helsinki, January 2018

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Crimmigration and Othering in the Finnish Law and Practice of Immigration Detention

Magdalena Kmak*

1. Introduction

In Minority Report, a science fiction short story written by Philip K. Dick, the system of crime prevention and management called 'Precrime' depends on the work of three mutants – precogs. Precogs can predict the future and 'precognise' crime not yet committed, which leads to the imprisonment of the future perpetrator. According to the protagonist of the story, John Anderton, '[p]recrime has cut down felonies by ninety-nine and decimal point eight percent' (Dick 1956).

Acting in a similar fashion, in a decision of 5 February 2013, the Helsinki District Court, with little deliberation, accepted the motion of the Finnish police to detain a Romanian citizen for preparation of a decision on his expulsion. The decision of the court was based on section 121(1) point 3 of the Aliens Act (*Ulkomaalaislaki* 2004/301) then in force, according to which 'an alien may be ordered to be held in detention if [...] 3) taking account of the alien's personal and other circumstances, there are reasonable grounds to believe that he or she will commit an offence in Finland' (District Court of Helsinki [DCH] PK 13/1231)[1]. The court agreed with the police that mere suspicion of a

* Associate Professor in Minority Studies, Åbo Akademi University, Åbo/Turku, Finland, University Researcher and Team Leader, Centre of Excellence in Law, Identity and the European Narratives, University of Helsinki, Finland.

[1] Throughout the text of the article the court cases will be referred to with the case numbers. The full reference will be provided in bibliography.

crime, coupled with an identifiable *modus operandi*, indicate that a person is likely to commit a crime in the future. Consequently, his administrative detention was considered justified.

This case is a telling example of the control-oriented approach towards foreigners in Finland, where the future criminality of a foreigner, based on mere suspicion of a crime, justifies administrative detention. Even though the legal provision giving a basis for the quoted court decision has recently been amended and the Minority Report-like approach has been abandoned in the case of common crimes, the new law has lowered the standard of proof for application of crime-based administrative detention of foreigners. In turn, this may arguably result in making its application more automatic. These developments reflect a strong relationship between crime and migration in the Finnish law on detention of foreigners, which has not been widely discussed thus far (Kmak 2015; Seilonen & Kmak 2015). This situation calls for analysis of the development, nature and purpose of this relationship and, most importantly, its implications for foreigners in Finland.

The main methodological point of departure for my analysis is the concept of crimmigration, first conceptualised, among others, by Juliet Stumpf in the US context (2006), and developed further by American and European scholars. I will in particular refer in this article to an understanding of crimmigration as a multifaceted relationship between 'the bordered' (immigration) and 'the ordered' (punishment) elements of contemporary measures of societal control (Franko Aas 2013). According to Katja Franko Aas, tensions between 'the bordered' and 'the ordered' embedded in contemporary crimmigration practices exert an influence on both the criminal justice domain, which acquires the role of border control, and the domain of immigration control, which is increasingly becoming used for the purpose of crime prevention (Franko Aas 2013).

The purpose of this article is to answer to the need, expressed by van der Woude, Barker and van der Leun (2017), to examine the applicability of the concept of crimmigration in the European context by looking at Finnish law and practice. The article will show, in particular, how the strong relationship between 'the bordered' and 'the ordered' in Finnish law and practice, which can be defined as crimmigration, results in the othering of foreigners, contributing to the call for mapping out the implications of law in othering practices (Gozdecka & Kmak 2018). As the article shows, in the Finnish case, othering happens through, on the one hand, differing state response to crime and crime prevention depending on a person's immigration status and, on the other, through directly linking migration with crime (see also Guia 2013, 19–20).

In what follows, I will first focus on the concept of crimmigration and its othering role. The aim of this section is to provide a background for

further analysis of the law and practice of control-based administrative detention in Finland, by referring to the most contemporary scientific discussions on crimmigration in Europe. Drawing on the work of other crimmigration scholars, my approach towards the understanding of crimmigration is to treat it as a 'sensitising concept' (van der Woude et al. 2014), encompassing a broad category of intertwinement of crime control and migration control (Franko Aas 2013) that leads, on the one hand, to immigrationalisation of criminal law (Pakes & Holt 2017, 69) and, on the other, criminalisation of immigration law (van der Woude et al. 2014, 507; see also Miller 2005; Stumpf 2006). Next, the article turns to current law and practice of detention in Finland. By presenting the result of monitoring decisions of the Helsinki District Court concerning approval and prolongation of detention of foreigners (Seilonen & Kmak 2015) and analysing current law on detention, this section shows how migration is linked with control measures in contemporary migration law and practice. Finally, in the last part of the article I will describe the practices of crimmigration in Finland, in the form of both immigrationalisation of criminal law and criminalisation of migration law and point to their othering role. This in turn warrants a different approach to crime and prevention depending on the legal status of the person in question.

2. The bordered and the ordered

The debate concerning the relationship between crime and migration emerged in the USA in the 2000s. The concept of crimmigration was used for the first time by Juliet Stumpf in 2006 as encompassing three scopes of interrelation between criminal and immigration law:

> (1) the substance of immigration law and criminal law increasingly overlaps, (2) immigration enforcement has come to resemble criminal law enforcement, and (3) the procedural aspects of prosecuting immigration violations have taken on many of the earmarks of criminal procedure (Stumpf 2006, 381).

Since then, crimmigration and its characteristics have been widely discussed, primarily in the context of US law and practice of detention of foreigners (see for instance Legomsky 2007). Recently, however, the crimmigration approach has become increasingly visible in other countries and regions, including the European Union, even though the scientific discussion continues to remain primarily USA-centred (van der Leun & van der Woude 2013, 42). The European manifestation of crimmigration has been different from the American one due to differing theoretical approaches to the phenomena of migration and crime, analysed primarily against a theoretical framework of broadly

understood securitisation (van der Leun & van der Woude 2013, 42). However, a number of attempts have been made by European scholars to conceptualise crimmigration practices in a broader European context. An important contribution was recently made in a special issue of *The European Journal of Criminology* titled 'Crimmigration in Europe' (edited by van der Woude, Barker & van der Leun) in which the authors focused on crimmigration law and practices in the EU internal border areas (van der Woude & van der Leun 2017), in Spain (Wonders 2017), Italy (Fabini 2017), England & Wales and Norway (Pakes & Holt 2017), Greece (Cheliotis 2017), the Netherlands (Brouver et al. 2017) and Sweden (Baker 2017).

Taking the most recent development in the scholarship of crimmigration in Europe, I refer in this article to crimmigration in its broad understanding, as a tool or lens through which one can look at historical and contemporary developments and application of law on detention in Finland, in particular, its othering qualities. This approach is inspired by van der Woude et al., who treat crimmigration not as defined but rather as a 'sensitizing concept' (2014, 561), in other words, a lens through which the law and practice of detention can be looked at and analysed. This approach allows crimmigration to be broadly defined as a multifaceted relationship between 'the bordered' and 'the ordered'. Whereas 'the ordered' in this understanding refers to the role that criminal law and policing carries with the aim of preserving security and establishing and maintaining an ordered and disciplined society, the bordered refers to the role of immigration and security laws in maintaining a clear distinction between the inside and the outside of society (Franko Aas 2013, 23). According to Franko Aas, in the contemporary globalising world, growing mobility creates novel configurations between these two aspects, which sometimes attain such a level of hybridity that can be called 'crimmigration control' (Franko Aas 2013, 25).

Crimmigration control in this understanding encompasses two phenomena dealt with in this article: immigrationalisation of criminal law (Pakes & Holt 2017, 69) and criminalisation of immigration law (van der Woude et al. 2014, 507). The former concerns situations where criminal justice acquires the role of immigration or border control (for instance, when a common crime constitutes a basis for immigration detention), immigration detention constitutes part of criminal procedure, the one procedure precedes the other, or both procedures are applied simultaneously (Stumpf 2013b, 66–68). On the other hand, criminalisation of immigration law concerns the situation when administrative law on immigration acquires a preventive role, which happens, for instance, when migration offences, such as irregular stay or work, are considered as crimes and dealt with through criminal law, when criminal law procedure is applied to immigration offences or when the role of immigration enforcement is to prevent future crimes (Stumpf

2013b, 66–68). Franko Aas underlines the complexity of this phenomenon, indicating that the two elements, 'the bordered' and 'the ordered' are put together in varying ways that 'demands concrete empirical investigation [...] an examination of their constitution in different institutional, national, and historical configurations' (Franko Aas 2013, 24), which constitutes the focus of this article.

One of the results of the crimmigration practices that this article is particularly interested in, is *othering*, understood as a process of turning one who is merely different into the other that later becomes devalued and marginalised (Young 1990; Jensen 2011). Othering has often been considered as a result of crimmigration laws and practices producing what scholars have been calling, a 'crimmigrant Other' (Bosworth & Guild 2008; van der Woude & van der Leun 2017). Othering as part of crimmigration means in particular differing or discriminatory state responses to crime and crime prevention depending on a perpetrator's immigration status, or situations when migration and migrants are, in the law or practice of national authorities and courts, directly linked with crime and criminal behaviour. As pointed out by Stumpf, this may concern cases of the 'use of crimmigration law to exert social control over groups marginalised by ethnic bias, class, or citizenship status' (Stumpf 2013a, 7). In this context the 'crimmigrant Other' can be understood as an individual that is no longer punished for committing an offence but rather for being part of a group considered as different, other, or as an enemy (Guia et al. 2013, 20). As the editors of this volume underline, legal scholarship has been catching up with these processes, however there is a need for more research to address both theoretical and practical implications of othering in law and through law (Gozdecka & Kmak 2018).

In this article I contribute to these calls by looking at the legal provisions on administrative detention of foreigners as well as the implementation of these procedures in Finland and identify some of them as falling within the definition of crimmigration. I also show that some of these practices result in turning migrants into the 'crimmigrant Other'. In the next section, I will look at the practices of the Helsinki District Court in applying section 121(1) point 3 of the Aliens Act as observed through monitoring and I will conclude by presenting the content and purpose of the current law on detention.

3. Detention of foreigners in Finnish law and practice before 2015

Up until the 1990s Finland was a country of emigration rather than immigration, lacking substantial discussion regarding policy towards non-citizens. The situation changed at the beginning of the 1990s, when the number of asylum seekers increased by 15 times. Such a dramatic change required not only logistical arrangements but also introduction of immigration policy programmes and comprehensive legislation

(Kmak & Seilonen 2015, 39). Despite these changes, the Finnish approach towards immigrants 'remained grounded in the perception that non-citizens constituted a potential threat to public order, national security and foreign relations' (Kmak & Seilonen 2015, 40). This attitude was also apparent in the comprehensive Aliens Act of 2004 and later amendments, including the most recent in 2015. In what follows, the article focuses on the Aliens Act of 2004 and its application by the Helsinki District Court. This gives a basis for further analysis of the Aliens Act currently in force, amended to transpose the Recast Reception Directive in 2015.

The comprehensive Aliens Act of 2004 allowed for detention of foreigners on three alternative bases: 1) there are reasonable grounds to believe that they will, by hiding or in other ways, prevent or considerably hinder issue of a decision concerning them, or enforcement of a removal decision; 2) detention is necessary for establishing their identity; and 3) when there are reasonable grounds to believe that they will commit an offence in Finland. The latter provision clearly required from the police and the courts' ability to determine the likely future criminality of a foreigner to be detained. The wording of section 121(1) point 3 and its application is so intriguing that it prompted me and my colleague Aleksi Seilonen to analyse how the police and the courts were applying it in concrete cases. Since the practice of detention in Finland has been raising concerns,[2] we decided to monitor the decisions of the Helsinki District Court, the role of which was to accept or reject decisions on detention made by the police (Seilonen & Kmak 2015).

Monitoring focused on three primary issues: 1) the practice of detention in Finland, including statistical information as well as the main grounds for detention and their interpretation by the police and the court, 2) the right to effective judicial proceedings and 3) conditions of detention, in particular, length of detention and placement of detainees in police prisons. Monitoring consisted of two types of activity – observation of court hearings by a group of volunteers and analysis of written judgments. In total, we monitored 167 cases obtained in two batches: first from 4 to 15 February 2013 (all cases dealt with by the court during this period, amounting to 57 cases, including observation and analysis of written decisions on both application and prolongation of detention) and the second from 15 February to 31 May 2013 (all first hearing cases regarding a decision on application of detention amounting to 110 written decisions).[3]

Among 167 decisions analysed, in 58 cases (nearly 30%) the decision on detention was based on section 121(1) point 3 of the comprehensive Aliens Act. In 10 cases, probability of future crime constituted the sole

[2] For instance, in relation to detention of vulnerable people and the practice of holding immigration detainees, under certain circumstances, in police prisons.
[3] For detailed information on the methodology and choice of monitored cases see Seilonen & Kmak 2015, 8–11.

basis for detention, and in the remaining 48 criminality was referred to in conjunction with one or two other grounds. In addition, nine monitored cases concerned criminality-based detention without referring to section 121(1) point 3 of the Aliens Act. Among 10 cases where section 121(1) point 3 was applied as the sole basis for detention, six of the persons concerned had previously been convicted of crimes and four cases concerned persons only suspected of crimes but without any criminal record. Crimes committed by detained foreigners included robbery, driving under the influence of alcohol, and drug smuggling: all carried a suspended prison sentence. In the remaining 48 cases where the criminality ground for detention was applied together with other grounds (risk of absconding and identity) the ratio of those suspected and convicted of crimes was reversed, that is, in only 10 cases out of 48 had the person been convicted. Suspicion of a crime was found in 32 cases. In six cases a foreigner was both suspected and convicted. Within this group, crimes encompassed the whole spectrum of behaviour, though mostly including theft and narcotics-related crimes. In three cases, the crimes were immigration-related but were referred to only in combination with theft. Finally, among those nine cases where crime was mentioned but a criminal offence was not treated as a basis for detention, six related to theft and three solely to immigration offences. Among these cases, only one person concerned had been convicted of an immigration offence (working in a restaurant without a permit) and the remaining detainees were suspected of crimes.

In monitoring, we considered two types of reasoning by the court as potentially relevant in establishing whether reasonable grounds exist to believe that a detainee will commit an offence: 1) the level of certainty that a crime will be committed in the future and 2) the type of criminal behaviour that could qualify as a basis for detention. However, analysis of monitored cases was complicated because in most judgments the court did not actually discuss the arguments put forward by the police, despite the obligation of the court to assess both the necessity and the proportionality of detention in accordance with sections 5 and 121 of the Aliens Act. Indeed, analysis of all monitored cases shows that the court engaged very infrequently in a proper balancing of the need to detain and the consequences of detention in each particular case. In what follows, I will focus on both aspects of reasoning by the court regarding application of section 121(1) point 3 and look in more detail at the balancing act as applied by the court (Seilonen & Kmak 2015, 44–47).

3.1. Level of certainty

To be sure, the wording of section 121(1) point 3 is a remnant of older regulations, where detention was a result of refusal of entry at the border. Such a measure could still have been relevant in cases where the sole purpose of a person's arrival in Finland was to commit an offence.

Indeed, in the monitored cases the police often used precisely that justification in decisions on detention in cases when a person was suspected or convicted of crimes (see for instance DCH PK13/3551, DCH PK 13/4285, DCH PK13/3955, DCH PK13/3811). The main difficulty in interpreting the level of certainty in this provision was the standard of proof required by law, which was set as 'reasonable grounds to believe' (*perusteltua aihetta olettaa*), located in between 'grounds to suspect' (*syytä epäillä*), applied in criminal law for initiation of a pre-trial investigation, and 'probable cause' (*todennäköisin syin*) required for arrest. Consequently, the ongoing pre-trial investigation in the case of a crime committed by a foreigner under consideration for administrative detention should not in itself justify detention. On the other hand, the law on detention did not require future criminality to be probable in order to justify placing a foreigner in a detention centre (Seilonen and Kmak 2015).

The decisions analysed show that the probability of committing a crime in the future was assessed based on past criminality of the foreigner. This concerned either conviction – or even mere suspicion – of crimes, and the latter prevailed as a justification for detention based on section 121(1) point 3. For instance, detention justified by the criminal intent of a foreigner's arrival in Finland was often based on a foreigner's arrest on suspicion of a crime (for instance DHC PK 13/4654). The level of certainty in these cases also varied. In most cases based on suspicion of crime as the sole reason for detention, detainees were either caught red-handed or admitted committing the crime. However, detention was also applied instead of criminal procedure or when criminality was disputable, as in the case mentioned in the introduction to this article. With regard to the former, in the case of two foreigners detained on suspicion of a crime, removal from the country was planned before the date set for the court decision in the criminal case (DCH PK13/1826, DCH PK13/1829). As regards the latter, this case concerned a foreigner who was suspected of robbery but was not recognised as a perpetrator either by the victim or by the witness. In addition, the stolen goods were not found on him. Despite these facts, the court accepted the police argument that detention in this case was justified because the person in question was suspected of robbery (DCH PK 13/1231). The court did not discuss the police considerations in that respect and in a very brief decision it only confirmed that the person was likely to commit an offence in Finland and for that reason should be detained.

This approach by the court – considering conviction or mere suspicion of crime as justification of probable future criminality – is deeply problematic. Even in cases of crimes already committed, the risk of further offending should also have been assessed. That risk would, for instance, be higher in cases of repeat offenders, but 'reasonable grounds to believe' would be much more difficult to justify in cases when a

foreigner committed – or was suspected of – only one petty crime. This rarely-questioned use of past criminality as a basis for administrative detention points to a strong interrelation between 'the bordered' and 'the ordered' elements of crimmigration in Finnish detention practice. Additionally, the findings from monitoring show an interrelatedness between criminal and administrative procedures, for instance when, as in the case described of detention of a Romanian citizen, administrative detention takes the place of criminal punishment when sufficient evidence for criminal conviction does not seem to exist or when the date of expulsion is set before the judgment in the criminal case is delivered.

3.2. Types of criminal behaviour

Unlike the standard of proof, the meaning of 'an offence' in the context of detention is not specified in the Aliens Act. The preliminary work on the Act only refers to the concept of 'an offence' in relation to grounds for expulsion of foreigners (which should be distinguished from grounds for detention). The cases analysed point to a mixed pattern of detention based on criminality. Here we identified that usually more serious crimes and multiple offences gave a basis for detention, which points towards the severity of a committed crime as an important factor in court decisions. The court also seemed to assess whether a certain crime or other circumstances of the case suggest potential future criminality. However, exceptions to all these generalisations appear in the monitored cases. Unfortunately, because of the limited reasoning offered and lack of data the court's view on the matter remains largely unverifiable.

In terms of the severity of crimes, most of the crimes in the monitored cases were of a more serious nature or involved multiple offences. Consequently, in those cases, when the court has rejected the criminality ground, suspected threat and petty theft or violent resistance to a public official were not considered as a basis for the criminality ground. However, this assumption is contradicted in other cases where relatively petty crime such as criminal damage and impersonating a public official were sufficient for detention in the context of theft. Similarly, petty theft together with a registration offence and false identity information or even suspicion of a single theft or theft together with immigration forgery was accepted by the court as a basis for detention on the grounds of future criminality by a foreigner (Seilonen & Kmak 2015, 36).

In these cases, too, the relationship between 'the bordered' and 'the ordered' is visible in the interrelatedness of criminal and administrative procedures, when even the pettiest crimes can constitute a reason for detention or, as will be shown below, administrative detention may constitute an add-on to a suspended prison sentence imposed by a criminal court.

3.3. Balancing act

The Aliens Act requires assessment of both the necessity and proportionality of detention of non-citizens. However, it does not provide clear guidance regarding this balancing act. Indeed, the court has engaged only infrequently in proper balancing between the need to detain and the consequences of detention. In most of the cases the court only referred to scarce justification from the detention decision issued by the police, without conducting any assessment of its own as to the necessity and proportionality of detention. For instance, one of the monitored cases involved an Estonian citizen punished for robbery by a suspended prison sentence of 11 months. Before the court decision was issued, the person spent two months in pre-trial detention. Despite that, immediately after release, he was detained by the police based on the need to prepare a decision on expulsion. The court ordered administrative detention without discussing the arguments raised by the defendant's lawyer indicating that prolongation of detention on a different legal basis was in this context unjust (DCH PK 13/3695).

In some of the monitored cases the court did engage in a balancing act. However, instead of assessing the necessity and proportionality of detention the court rather referred to its reasonableness. It is unclear whether that assessment corresponded to the requirement of a proportionality test under section 5 of the Aliens Act. In one of the monitored cases the court distinguished between the two, asserting that detention is 'neither unnecessary nor unreasonable' (DCH PK 13/3002). Interestingly, a reasonability test can be found in the Coercive Measures Act (CMA – *Pakkokeinolaki* 806/2011), which requires the court to consider such elements of cases as the nature of the crime, the age of the suspect and their other personal circumstances such as pregnancy, sickness or family circumstances. Even though it was difficult to assess, based on the collected cases, to what extent the court is resorting to the analogy from the CMA in immigration detention cases, this analogy seems to be at least possible if the same department of the court is responsible for both types of case (pre-trial detention and detention of foreigners). In a Court of Appeal decision (R11/1373 – collected as subsidiary material), the court approved a decision by the district court which clearly employed the analogy from the CMA and the CMA-based proportionality test, by adapting the provision from the CMA to correspond to the wording of the Aliens Act (for detailed analysis see Seilonen & Kmak 2015, 44–47).

Moreover, these aspects of court decisions point to the strong relationship between 'the bordered' and 'the ordered'. Here, monitoring exposed the decisive role of police and border guards in ordering detention of foreigners. Results of monitoring show that only in 14 analysed cases did the court provide its own justification for the decision on detention and only in 2 cases did not confirm the decision by the

police to detain the foreigner. Finally, the court seemed to readily apply terminology borrowed from criminal law, for instance in relation to the test of rationality of detention, which can be found in the Coercive Measures Act. Even though these standards surely overlap, such an analogy risks allocating too much weight to the need to detain in the context of criminal law considerations, which aim to protect public order (Seilonen & Kmak 2015, 45).

This article turns now to section 121(1) point 3 as amended in July 2015. In the next section, I will look at the wording of the new provision and present the government's justification for the amendment in more detail.

4. Current Law on Detention after 2015 legislative reform

The aim of the new amendments to the Finnish Aliens Act of 2004 (Laki ulkomaalaislain muuttamisesta, 2015) and to the Detainee Treatment Act of 2002 (Laki säilöön otettujen ulkomaalaisten kohtelusta ja säilöönottoyksiköstä annetun lain muuttamisesta, 2015) was to transpose the Recast Reception Directive (2013/33/EU) into Finnish law. Except for some public action by NGOs regarding detention of children and conditions of detention (see for instance Helsinki Times 25 February 2015) the new law was not widely discussed in Finland nor was there much academic discussion on the topic either.

The amended section 121(1) point 3 of the Aliens Act allows for detention if a foreigner is convicted or suspected of a crime and detention is required for securing the preparation or enforcement of a decision on expulsion. The amendment was justified in the government proposal, first, by lack of clarity and vagueness of the previous provision, which according to international monitors had even led to racial profiling (*Hallituksen esitys* 2014, 13). Second, the aim of the amendment was to make the new provision correspond to the requirement of protection of public order as mentioned in article 8(3) point e of the Recast Reception Directive. According to the government's reasoning, section 121(1) point 3 as amended 'would correspond to the "public order" basis for detention from the recast reception directive but would be much more accurate and much more defined'. In other words, the new basis for detention 'on the one hand would secure removal from the country and on the other protect public order before removing a person from the country' (*Hallituksen esitys*, 2014, 28).

The new law deals with some problems and concerns that emerged in monitoring. It indeed clarifies the content of the provision and frees the police and the court from the difficult task of assessing the future criminality of a foreigner. However, as I show below, this shift in the wording of the provision from forward-looking to past-oriented is in reality misleading due to the reference to the threat to public order which is, by definition, future-oriented. However, the consequence of

this shift, whether intended or unintended, is to lower the standard of proof required for detention and in consequence expand the possibility to detain foreigners on the basis of their criminality. Indeed, under the previous law the fact that the police had an ongoing criminal investigation concerning a person whose detention was under consideration under the Aliens Act (based on existing grounds to suspect - *syytä epäillä*) would not in itself be enough to justify detention, which required reasonable grounds to believe (*perusteltua aihetta olettaa*). This limitation does not seem to apply in the new law, which requires mere suspicion of crime (*epäillään syyllistyneen*) in order to justify detention. Even though those provisions are not identical, it is clear that suspicion of a crime (*epäillään syyllistyneen*) potentially warrants detention and the threshold for starting a criminal investigation (*syytä epäillä*) is very low.

This lowering of the standard of proof is particularly problematic in the context of the definition of 'public order' in the Recast Reception Directive. According to the recent judgment of the Court of Justice of the European Union [CJEU] in the *J. N.* case, this particular concept:

> [...] entails, in any event, the existence — in addition to the disturbance of the social order which any infringement of the law involves — of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (*J. N. v. Staatssecretaris voor Veiligheid en Justitie*, 2016).

A past-oriented focus on suspicion or conviction of crime as a basis for detention, introduced for the purpose of protecting public order (as explained by the government) seems largely disproportionate when compared to that definition.

In essence, the scope of section 121(1) point 3 depends on the practice of the authorities and courts. According to Advocate General Sharpston in her opinion in *J.N.* (2016), placing the foreigner in detention on the basis of article 8(3) point e is justified only if their past conduct represents a genuine, present and sufficiently serious threat (para 67) which has to be determined on a case-by-case basis (para 69). However, the very narrow wording of the new Finnish law does not invite the court to analyse the existence of such a threat. In the amended provision, assessment of the need for detention of a foreigner who has committed or is suspected of crimes is based only on whether detention is necessary for securing preparation or enforcement of a detention decision. However, as pointed out by Advocate General Sharpston, it is important to remember that '[t]he fact that an applicant is suspected, or has already been convicted, of an act punishable as a criminal offence under national law cannot, in isolation, justify detaining him on the ground that the protection of national security or public order so requires' (para 68). In other words, past convictions cannot automatically contribute to

showing that a person constitutes a present threat to public order (para 68) and the preventive character of provision 8(3) point e cannot have the purpose of punishing past conduct. Any other conclusion would cause difficulties under the *ne bis in idem* principle, since it would allow a person who has been convicted of one or more offences and who has served the relevant sentences to be 'punished again for the same offences through detention under the provision at issue' (para 97). The practice of the Helsinki District Court as identified in the monitoring also cast doubt on whether the court will conduct such a case-by-case analysis under the new provision, even considering the proportionality requirement under section 5 of the Aliens Act. This situation may in extreme cases result in preventive action against all foreigners who have been associated with criminal activities, which according to Advocate General Sharpston is against the purpose of the Directive.[4]

The government proposal quoted above, as well as the wording of the new provision, therefore shows that the strong link between migration and criminality continues to orient Finnish law on detention. In particular, the new provision lowers the standard of proof for detention, which is now based on mere suspicion of crime. In other words, the new provision automatically considers criminal acts (of which a foreigner has been convicted or is merely suspected) as indicators of a threat posed by the foreigner, without inviting the authorities and the court to assess the existence of a genuine, present and sufficiently serious threat to society. In consequence, the new law of detention, despite its past orientation, acquires a distinctively preventive role based on the need to secure the expulsion of a foreigner on the basis of some unspecified future crime. Indeed, according to the authorities the new law will 'secure removal from the country and protect public order before removing the person from the country' (*Hallituksen esitys* 2014, 28). This preventive orientation, coupled with a lowered standard of proof, seems to go further than the previous wording of section 121(1) point 3 of the Aliens Act, contributing to the strong relationship between 'the bordered' and 'the ordered' elements of the crimmigration regime. More research is therefore needed, in particular detailed monitoring of court decisions issued after the entry into force of the new law, in order to see whether the court has changed its reasoning in detention cases based on criminality of foreigners.

[4] See, however, the new section 121(1) point 6 of the Aliens Act according to which detention of a foreigner is allowed when, taking account of personal and other circumstances, reasonable grounds exist to believe that he or she will constitute a threat to national security. This provision has been introduced due to a change in the wording of section 121(1) point 3 which would not, under the current law, prevent authorities from detaining a foreigner based on the need to prevent future threats. This provision is highly problematic as it is clearly based on general prevention. According to the government '[i]t should be possible to take into detention a foreigner constituting an unforeseeable security threat already when the threat is not concrete enough for the measures of the police act or coercive measures act to apply' (*Hallituksen esitys* 2014, 29).

5. Crimmigration and othering in the context of administrative detention of foreigners

My purpose in this article is to show that certain legal provisions and practices involving administrative detention in Finland fulfil the criteria of broadly understood crimmigration and point to how the othering element of crimmigration functions under both the previous and the current law. Despite the scarcity of information obtained from court decisions, the cases analysed, government reasoning and legal provisions – both previous and currently in force – clearly point to the close link between 'the ordered' (criminal law) and 'the bordered' (administrative detention of foreigners) elements of the law on detention in Finland, attaining a level of the distinctive phenomenon of crimmigration. Crimmigration can be seen here both in the form of the immigrationalisation of criminal law and the criminalisation of administrative (immigration) law. However, often the boundaries between these two are blurred. One of the features of crimmigration that is also visible in the Finnish context is the phenomenon of othering, in other words, differing treatment as between foreigners and citizens in relation to crime prevention and punishment, or directly linking migration with crime. In what follows I focus on the legal provisions and practices indicating the interrelation between 'the bordered' and the 'ordered' and identify the othering qualities of some of those practices.

5.1. Immigrationalisation of criminal law and practices of othering

Immigrationalisation of criminal law as an element of crimmigration concerns the situation where criminal law acquires the broadly understood role of border control. This can mean, for instance, that crime is used as a tool for immigration management or that immigration procedure becomes part of – or an add-on to – criminal procedure. In the Finnish context, this phenomenon concerns situations where criminality, whether confirmed by a court or merely suspected, constitutes an automatic basis for administrative detention and when administrative procedure constitutes an add-on to criminal procedure. Judgments of the Helsinki District Court in relation to the previous and current wording of section 121(1) point 3 of the Aliens Act confirm that practice. The former example is visible from monitoring, in cases when even the smallest crimes, such as possession of 16 grams of marihuana – which would normally end with a fine in case of citizens – provided justification for administrative detention in the case of a foreigner, even though administrative detention is in principle related to the severity of the alleged crime.

The latter example is visible, for instance, in the case described concerning suspicion of robbery. In that case, the court merely followed the police argument that the person was suspected of robbery but

without discussing the basis for that argument in more detail. Plausibly, immigration detention in this case in practice replaced criminal punishment, which, according to the findings of the police investigation, would most likely not be possible. In another case mentioned, a person convicted to an 11-months suspended prison sentence had already spent two months in pre-trial detention before being detained on the basis of administrative law for the purpose of expulsion. In this case, deprivation of liberty clearly constituted an add-on to the suspended prison sentence imposed by the criminal court (see Legomsky 2007; Pakes & Holt 2017, 65). Finally, in the case of two foreigners detained on suspicion of a crime, removal from the country was planned before the criminal court decision in the criminal case would be delivered, pointing to the instrumental role of criminal arrest for migration enforcement. That approach shows the cumulative effect of criminal and migration law where administrative detention or deportation takes the place of or follows criminal procedure. In such cases, as mentioned by Pakes and Holt '[a] prison sentence alone is not enough: the job is done only once deportation has been achieved *and* [emphasis in original] measures are in place to prevent re-entry' (Pakes & Holt 2017, 74). This approach is confirmed by the representative of the police quoted in one of the analysed decisions: '[e]nforcement of the decision [on expulsion] will happen soon and commission of a new offence would prolong expulsion from the country' (DCH PK 13/664).

Both of these practices by the Helsinki District Court contribute to the othering effect of the law and practice of detention. In particular, by applying detention in cases of most mundane crimes that do not normally warrant detention, or by applying detention twice as a consequence of the same behaviour (in both criminal and administrative procedure), they poorly reflect the requirement of non-discrimination. In consequence, they turn foreigners into 'crimmigrant Others', those who are treated more severely in both criminal and administrative procedure because of belonging to a group of people with precarious – or without – legal status (Guia et al. 2013, 19–20).

5.2. Criminalisation of immigration law and practices of othering

Criminalisation of immigration law takes place when administrative law on immigration acquires a preventive role. This may happen, most commonly, when migration offences, such as irregular stay or work, are considered as crimes and dealt with through criminal law, but also when criminal law procedure is applied to immigration offences (Stumpf 2013b, 66–68) or when the role of immigration enforcement is to prevent future crimes. Interestingly, the multifaceted relationship between 'the bordered' and 'the ordered' in Finnish detention policy is not characterised by criminalisation of immigration offences. As can be seen from monitoring, immigration-related crimes were never

considered as a sole basis for applying section 121(1) point 3 of the Aliens Act. In the Finnish context, this phenomenon is demonstrated, first, by strengthening the role of the police and border guards in the administrative procedure, second, the use of analogy from criminal procedure in administrative detention cases, as described above, and, third, the preventive character of Finnish immigration detention law as seen in the practice of the police and the courts. In the case of the first element, as the results of monitoring show, only in 14 out of 167 cases analysed did the court provide its own justification for the decision on detention and only in 2 cases did not confirm the decision of the police to detain a foreigner. The second aspect can also be pointed to in some cases when the court applies terminology borrowed from criminal law, for instance in relation to the test of rationality of detention, which can be found in the Coercive Measures Act.

However it is the third situation – the preventive role of detention law – that constitutes the most interesting element of crimmigration, resulting also in differing practices towards foreigners in comparison to citizens, whose preventive detention has to fulfil much stricter conditions in order to be justified. As we underlined in the monitoring report:

> [h]aving the focus on the suspicion of a crime committed blurs the line between immigration detention and arrest within a criminal procedure. Administrative immigration detention cannot serve as preventive detention in cases where prosecution is not the object of detention or as a measure applied to circumvent restrictions on other forms of legal actions. In the context of the standard of proof, in some cases the accepted basis for detention seems problematic either because the claimed involvement in crime is rather weakly established or the threat posed to public order is quite insignificant in comparison to right to liberty (Seilonen and Kmak 2015, 37).

The preventive element of detaining foreigners is, however, visible not only in the practice of the Helsinki District Court but also in how the government justified the new law on detention as quoted in the previous section of this article. The othering element has been retained in the new law where the standard of proof for detaining a foreigner has been lowered as juxtaposed with the definition of public order from the Recast Reception Directive. This new provision detaches article 121(1) point 3 from the original purpose, which was to prevent entry of foreigners who cross the border with the sole purpose of committing a crime. Even though this intent was previously not explicitly stated in the law, it was visible in practice, where the police referred to it when issuing decisions. The new law, however, provides explicit support for the use of suspicion of crime as justification for detention; moreover, its narrow formulation does not invite the court to apply restraint and limit detention based on the criminality ground. Such consistent and automatic use of crime as a

basis for detention suggests a bias towards coercion and punishment beyond the requirements of necessity and proportionality, which in particular targets foreigners, thus contributing to their othering.

6. Conclusions

The purpose of this article was to contribute to a deeper understanding of the phenomenon of crimmigration and the implications for the law and practice of detention of foreigners in the processes of othering. By analysing the strong relationship between crime ('the ordered') and migration ('the bordered') in Finnish law and practice, the article shows that this relationship attains a level of strength that simultaneously transgresses and synergises the disparate roles of migration and criminal laws, such as crime prevention and protection of public order – in the case of the former – and border control in the case of the latter. The claim posed in this article is based on recent developments in Finnish law and on decisions of the Helsinki District Court through the lens of crimmigration, understood as a two-pronged process: immigrationalisation of criminal law and criminalisation of administrative law. This approach allowed me to show that the strong relationship between migration and crime prevention are orienting contemporary perceptions of migration in Finland and in certain situations have acquired the unique characteristic of crimmigration.

These crimmigration practices contribute to the process of turning foreigners into 'crimmigrant Others'. Treating criminality as an automatic basis for administrative detention, using administrative procedure as an add-on to criminal procedure or the preventive role of administrative detention fulfil the definition of crimmigration and result in differential treatment of foreigners. This othering effect has been retained in the new law on detention, which provides explicit support for using suspicion of crime as justification for detention and lowers the standard of proof for detention of foreigners. These changes further contribute to the othering function of Finnish law.

These practices put in question the claim by the Finnish government according to which detention in Finland is applied in accordance with the principles of reception, service and care, and its 'starting point is that foreigners are not criminals' (*Hallituksen esitys* 2014, 7). Even though the practical arrangements for detention and conditions of detention in Finland confirm this approach in principle, the judgments analysed in this article as well as the wording of the new section 121(3) of the Aliens Act often point to different practice, grounded in a historically strong control-oriented approach to migrants in Finland. More research would, however, be required to confirm this trend. In particular, an analysis of the most recent judgments issued after the entry into force of the Aliens Act of 2015 and after setting up the new detention centre in Joutseno

would be needed. Such a study would in particular allow a comparison between decisions issued by the Helsinki District Court with those issued by the Southern Karelia District Court responsible for detention decisions in the case of Joutseno detention centre, and, in the result, would shed more light on the existence and scope of the most recent crimmigration and othering practices in Finland.

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Securitising the Asylum Procedure: Increasing Otherness through Exclusion

Likim Ng*

Under the Refugee Convention, states can exclude asylum seekers from refugee status if they have committed international crimes. This article shows that in the Australian jurisdiction Article 1F, otherwise known as the exclusion clause, has the potential to take on the burden of a national security provision from other articles of the Refugee Convention. Unlike its original intention to exclude those undeserving of international protection, the exclusion clause expands the intention to exclude refugees for the purposes of national security reasons. In the securitisation process, a state of emergency is enacted where it is necessary to suspend law by going above the normal rules and realms of governing.

This article analyses select cases from Australia such as *Dhayakpa v. Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556 and *Ovcharuk v. Minister for Immigration and Affairs* [1998] FCA 1314. These cases show how asylum seekers are constructed as security threats by the discourse of judges and tribunal Members. Constructing excluded asylum seekers as threats to the order, safety and even the morality of society dehumanises these refugees. By securitising the asylum procedure, this increases 'othering'. The danger is that the exceptional nature of the exclusion clause has the possibility of becoming the norm with 'genuine' refugees also being increasingly subjected to subpar fair trial standards. For example, there is an increased normalisation of

* PhD Candidate, Australian National University.

indefinite detention for refugees that appear to be a security threat. We see the arbitrary character and indefinite nature of detention, the refusal to provide information and procedural rights and difficult conditions of detention, which can inflict serious psychological harm. Australia's restrictive policies and case law towards refugees and asylum seekers makes the jurisdiction particularly applicable to examine emergency laws and powers.

1. Introduction

In 2016, the UN Human Rights Committee condemned the indefinite detention by Australia of five asylum seekers who were incarcerated without charge for unknown security reasons (Human Rights Committee 2016). Between September 2009 and September 2010, these asylum seekers entered Australian territorial waters by boat. They disembarked at Christmas Island where they did not hold valid visas to enter Australia and were placed in immigration detention facilities for their arrival as an "unlawful non-citizen" in an "excised offshore place". The Department of Immigration and Citizenship recognised these asylum seekers as refugees who were unsafe if returned to their countries of origin. However, they were subsequently refused visas to remain in Australia following adverse security assessments made by the Australian Security Intelligence Organisation (ASIO). These asylum seekers were not given any reasons for the adverse security assessments made against them, nor were they able to challenge the merits of their security assessments within the administrative law structures. Under s.36 of the *Australian Security Intelligence Organisation Act* 1979, there could be no review of the facts and evidence for the decision since they were not citizens or holders of either a valid permanent visa or a special visa. The asylum seekers were kept in detention since they did not wish to return voluntarily to their country of nationality (Human Rights Committee 2016, 2). Since the detention was authorised by domestic law, there was no basis under Australian law to challenge inhumane or undignified treatment resulting from that "valid" law (Human Rights Committee 2016, 3). The following story paints the picture of the result of securitising the asylum procedure through the application of Article 1F. This article shows how the security lens spreads to affect not only those asylum seekers that have committed international crimes, but also other 'genuine' refugees who have had an adverse security assessment made against them.

Protecting Australian society from acceptance of refugees with criminal backgrounds has become a heightened issue of national security. An increased number of cases have emerged where asylum seekers are refused refugee status because there are 'serious reasons' to consider that they have committed international crimes. The exclusion

clause considers perpetrators of crimes against peace, war crimes, crimes against humanity, serious common law crimes and acts contrary to the purposes and principles of the United Nations, undeserving of protection (Zimmermann & Wennholz 2011, 583). Although they would normally qualify as refugees, these asylum seekers are excluded from protection under the Refugee Convention by Article 1F, otherwise known as the exclusion clause.[1] Moreover, the exclusion clause was designed to ensure that international framework would not stop serious criminals from facing justice. However, with more states employing universal jurisdiction and international justice mechanisms this reduces the role of the exclusion clause as a means to ensure fugitives face justice. In this light, the exclusion clause is an exception to human rights guarantees. As such, the UNHCR Guidelines have recommended that the exclusion clause should be interpreted with caution. Since these asylum seekers would otherwise be considered refugees who risk persecution, there could be serious possible consequences resulting from the exclusion for that individual (UNHCR Guidelines 2003, 502-503).

Before the terrorist attacks in September 11, 2001 the exclusion clause was rarely applied, but now it has become a regular occurrence in refugee determination hearings (Gilbert 2014, 2). Dyzenhaus believes that this link is related to the devotion to rethinking and strengthening of security legislation after September 11 (Dyzenhaus 2003, 2). Heightened security has not only been reflected by terrorism statutes but is also seen towards those in society who have fragile legal statuses (Gerard 2014; Hammerstad 2014). The potential danger of deciding exclusion clause cases through a security lens is that 'vague and political understandings of national security have given the executive wide scope to conveniently deal with those who are considered threats' (Dyzenhaus 2003, 2).

Notably, 2001 was also the year where border protection was a major election issue in Australia. The November 2001 election was contingent on two major events; the terrorist attacks of September 11 and the Tampa crisis where the Coalition government of Australia refused permission for a Norwegian freighter carrying 433 mainly Afghan asylum seekers to enter Australian waters. The issues of asylum seekers and terrorism became linked together as a part of the politics of the election (McAllister 2003, 448). The Australian government connected the events of September 11 and the Tampa crisis by stressing the need to screen asylum seekers for possible terrorist connections (McAllister 2003, 449). Border protection had a major influence on the election results, with the Coalition party ultimately benefiting from a tougher stance on terrorism and asylum seeker policies (McAlister 2003, 453-454).

[1] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1f.

This article deals in particular with cases from the Australian context. Australia's restrictive laws and policies of deterrence towards refugees and asylum seekers (See Gammeltoft-Hansen 2014, 577) make the jurisdiction particularly applicable to show what happens when securitisation affects the asylum procedure.2 It aims to show that the exclusion clause has taken on a security burden from other provisions of the Convention. Firstly, this article will examine how the asylum procedure has been securitised, and address the dangers of securitisation. Secondly, it will analyse original intention of the exclusion clause and its relationship with other clauses where asylum seekers are denied protection. Thirdly, it will undertake a case exploration of how the asylum procedure has been securitised through the construction of excluded asylum seekers as threats. The case examples in the article show that this threat can be to the order, safety and even international morality of the receiving state. Finally, the consequences of the securitisation of the asylum procedure will be examined, which sees subpar fair trial standards and a disregard for complementary protection obligations. Securitisation casts these refugees in the realm of 'the other' where they can be denied procedural safeguards. This section shows how this treatment becomes normalised to affect other refugees that have received adverse security assessments made against them by ASIO. Instead of being decided through the Australian court system, exclusion clause cases are now being decided by this security organisation. Overall, this article shows that Australian courts have moved further way from the humanitarian approached espoused by the UNHCR, which has noted that the exclusion clause must be 'viewed in the context of the overriding humanitarian objectives of the 1951 Convention' and 'should always be interpreted restrictively and be used with great caution.' (UNHCR Background Note on the Application of the Exclusion Clauses, 503).

2. Securitising the Asylum Procedure

A 'security' lens can be applied during court processes and procedures. Barry Bunzan, Ole Waever and Jaap de Wilde originally described securitisation in the Copenhagen School Securitisation approach (Bunzan, Waever and Wilde 1998, 46-87; Waever 1995, 46-87). These works view security as being about survival (Bunzan, Waever & Wilde 1998, 21). Usually, an issue is handled within the 'normal' political process and is politicised in parliament through legislation. As a result of securitisation, the issue is lifted from the normal rules and realms of

[2] Gammeltoft-Hansen describes Australia's refugee law and policy as one of deterrence and points to Australia 'excising' more than 3,500 islands from its migration zone, thereby precluding access to ordinary asylum procedures for people reaching these islands (Gammeltoft-Hansen 2014, 577).

governing to implement special measures (Bunzan, Waever & Wilde 1998, 23-26). The area of migration has been increasingly described in security terms, and as a result of the securitisation of migration legal rules can be lifted from the normal processes. For exclusion clause cases, as a result of identifying a security threat, emergency measures are enacted and the asylum seeker who would otherwise be considered, as a refugee is no longer afforded the protections of the Refugee Convention. We also see subpar fair trial standards being applied, such as excluded asylum seekers being subjected to indefinite detention and a disregard for the principle of complementarity protection.

The connection between the theoretical assumptions of securitisation and the practical judicial administration of migration is that the government and the courts and tribunals can have a similar agenda to determine excluded asylum seekers as threats. The securitisation of migration has broader political implications since 'the state, by determining who is a 'threat' shapes the political debate in terms of threat and survival' (Triandafyllidou & Dimitriadi, 2014, 8). Balzacq also emphasises the link between political dimensions and how it relates to administrative processes in migration law. Policy instruments and the discourse from administrative processes can mutually reinforce each other in the securitisation process. The choice of policy instrument is typically a locus of intense power games and on a general level discourse can either pre-date a policy tool or be a 'latent development' of the instrument (Balzacq 2007, 76-78). To that end, the Australian government's restrictive and deterrent migration policies can work with the language of courts and tribunals in the securitisation process.

The court system can create legal borders, which can be strategically used to exclude people from legal rights and procedures. Basaran writes that 'liberal democracies that continue to operate under the rule of law and value of legal rights restrict or even suspend fundamental rights at the same time for a specific category of people at specific places' (Basaran 2008, 339). In exclusion clause cases, courts can work with policy instruments to interpret the exclusion clause from a security perspective. As a result, the protections of the Refugee Convention are suspended for excluded asylum seekers who have been categorised as threats. Although courts and tribunals are still functioning under the auspices of merits and judicial review, giving the asylum seeker a legal status, they also excise the protections of the law through exclusion. We see not only the increased number of excluded asylum seekers but also more broadly an example of the issue of the securitisation of asylum procedure.

The consequence of adopting a security lens through the application of the exclusion clause is 'othering'. The concept of 'othering' has been generally used as a term, which concerns the consequences of racism, sexism and class (or a combination hereof). 'Othering' also includes the process of identity formulation related to symbolic degradation (Jensen,

2011, 65). Particularly, when 'othered' the one that is not the self becomes devalued and dehumanised through the discursive process, changing one into the 'other' (Jensen 2011, 65). In the context of the exclusion clause, this article describes 'othering' as shifting the lens to view excluded asylum seekers as security threats to society. In other words, the construction of the asylum seekers as a security threat leads to 'othering', where they are cast in the light of 'the other' who can be 'justifiably' denied protection under the Refugee Convention and other fair trial standards. 'Othering' as this article describes results in the denial of the safeguard of rights. Jenkins, in her article entitled 'Bare Life: Asylum-Seekers, Australian Politics and Agamben's Critique of Violence', frames refugees as the 'obvious other' in the context of the arbitrary denial of procedural safeguards to non-citizens who are threats (Jenkins 2014, 2). In other words, the process of 'othering' occurs where these excluded asylum seekers are being included in the national court process to determine whether they are a security threat, only to be excluded from protection and have fair trial standards withdrawn.

Agamben provides a theoretical explanation for the dangers of constructing these asylum seekers as security threats. The exclusion clause can be seen as the exception to the Refugee Convention, where these are asylum seekers who would otherwise fall under the protection of the Convention. These exceptional circumstances of asylum seekers who have committed international crimes are marked by the concentration of power by decision makers and the reduction of law (Agamben 2003). This concentrated power determines whether emergency action needs to be taken. The idea is that the security of society is at stake so there is 'no choice' but to exclude these asylum seekers from the protection of the Refugee Convention. In that sense, we see the judge or tribunal member decide whether the refugee is a security threat that needs to be excised from the protection of the Refugee Convention. Therefore, in a 'crisis' such as the emergency of excluding asylum seekers who have committed international crimes, the language of necessity and exception need to be studied.

However, what appears to be a factual determination of whether the asylum seeker has committed an international crime is actually an exercise of concentrated power to determine which emergency is a fact. What we see is the indiscrimination between fact and law where the decision makers have the power to influence facts for the purpose of securitisation. When judges and tribunal members use language, which reflects that these excluded asylum seekers, are dangerous and necessary to exclude, less emphasis is placed on the legal text. This is particularly the case where the decision maker includes a securitisation lens instead of just determining as stated by Article 1F that there are "serious reasons to consider whether the refugee has committed an international crime". This results in the weight of the Refugee Convention being diminished and the inclusion of an interpretation by

the judge to determine which refugee should be excluded as a security threat. This article argues that a securitisation approach to the application of Article 1F signals the reduction of a humanitarian approach. As such, we see that subpar fair trial rights for excluded asylum seekers and 'genuine' refugees are also permissible through this securitisation lens. The problems arise when the emergency is socially constructed for political purposes rather than Article 1F being applied restrictively with caution.

In exclusion clause cases we see the 'other' created through discourse of court and tribunal decisions, which construct the asylum seeker as a threat that should be excised from protection. The case examples in the article show that this threat can be to the order and safety of the receiving state, and even to international morality. The Copenhagen Securitisation approach is useful as a lens to bring to light the process, which leads to 'othering'. The Copenhagen Securitisation approach studies the language and discourse decision makers use to construct threats in emergency and exceptional circumstances (Bunzan, Waever & Wilde 1998, 23-26). Therefore, securitisation should be seen as refugees being socially constructed as threats (Waever 1995, 55). In this light, when there is an existential threat this comes with a special demand to combat that threat (Bunzan, Waever & Wilde 1998, 25).

Australian case law shows the connection between the political dimension of interpreting Article 1F through a security lens and practical judicial administration. This article puts forward that securitisation leading to 'otherness' can be perpetuated through the discourse of tribunal members and judges characterising these asylum seekers as security threats. The cases this article examines, discuss how the discourse of judges constructs asylum seekers as security threats to society, order and safety, and even morality. The *travaux préparatoires* shows the original intention of the exclusion clause was be determine whether the refugee was worthy of protection. This article shows that this expansion has expanded to accommodate a security lens.

The decisions, which exclude asylum seekers, are made through the Australian administrative process for protection visas. This process begins through the regular refugee status determination procedure with a decision by a delegate of the Minister for Immigration and Home Affairs (Lindsay 2005, 55). A Tribunal Member of the Administrative Appeals Tribunal (formerly known as the Refugee Review Tribunal) or the General Division of the Administrative Appeals Tribunal (AAT) can review the merits of the decision of the Minister's delegate. In the case of merits review, the Administrative Appeals Tribunal conducts a complete rehearing of the applicant's case. This includes an informal hearing, which reviews the correctness of the delegate's decision and gives the applicant the opportunity to discuss material that was not presented before the delegate (Lindsay 2005, 57). The next level of appeal is to the judicial review system to the Federal Circuit Court of

Australia, Federal Court of Australia and High Court of Australia respectively. These courts can determine whether the administration has made a jurisdictional error. If such an error were found, this would mean that in law, the administrative decision was not regarded as a decision at all. A jurisdictional error can include an error in procedural fairness, the identification of the wrong issue, an error where there is new evidence on appeal, and an error where Tribunal made an unreasonable decision, which resulted in the Tribunal exceeding its jurisdiction. If a jurisdictional error is found, the matter will be remitted to the Tribunal to hear the case again (Lindsay 2005, 61-65). Concerning, is that the administrative law process, and its comprehensive appeals process, is being denied to Article 1f cases, now that ASIO is determining the cases.

3. Securitisation through exclusion from protection

The exclusion clause is part of Article 1 of the Refugee Convention, which defines the term 'refugee'. In defining who is a refugee, Article 1F of the Refugee Convention states that the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

a. he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
b. he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
c. he has been guilty of acts contrary to the purposes and principles of the United Nations.

In Australia, Article 1F has been adopted under the Section 5H(2) of the *Migration Act 1958* (Cth) where a person is not considered a refugee if the Minister has serious reasons for considering that:

a. the person has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
b. the person committed a serious non-political crime before entering Australia; or
c. the person has been guilty of acts contrary to the purposes and principles of the United Nations.[3]

[3] Legislation in Canada and the UK as a part of the European Union, have also incorporated Article 1(f). The domestic laws incorporating Article 1(f) for Canada and the European

Article 9 of the Refugee Convention contains a derogation clause, which presupposes that there may be circumstances, which warrant and justify contracting states withhold all or certain components of refugee status (Davy 2011, 781). The article permits state parties to suspend rights across the Convention in a state of emergency[4]. Historically, provisions in international treaties such as Article 4 of the International Covenant on Civil and Political Rights 1976 and Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 have allowed for states to maintain their sovereignty and suspend the protection of basic rights in times of emergency. The drafters of these treaties were aware that crises could provide reasons for governments to enhance their powers, dismantle democratic institutions, and repress political opponents. However, they also accepted that sovereign nations have a responsibility to protect their citizens and domestic institutions.[5] It assumes that there may be circumstances, which warrant justifying that contracting states can withhold refugee status. Similar to these international treaties, Article 9 (or the Provisional Measure) of the Refugee Convention is meant to operate as an equivalent emergency clause. Article 9 states that:

> Nothing in this Convention shall prevent a Contracting State, in time of war, or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in this case in the interests of national security.

Generally in international law the term 'provisional measures' is regularly used to limit the duration of measures applied, often to preserve the rights of the states (Davy 2011, 781). Article 9 does not specify what is considered a provisional measure or which core rights are to be considered non-derogable. However, the measures have been characterised by these four broad elements which are not present in Article 1F:

> First, the measures are bound to certain situations (*i.e.* war or other grave and exceptional circumstances). Secondly, the measures are supposed to serve particular public interests (*i.e.* the interest of national security). Thirdly, the measures are first applied on account of nationality and they must—at some point—be individualized, *i.e.* directed against defined individuals on account of an individualized threat. Fourthly, the measures are limited in time:

Community are Section 19(1)(j) of the *Immigration Act 1976* and Article 12(2) of the Directive 2011/95/EU respectively.

[4] Wouters 2009, 42 as cited by Edwards 2012, 622.

[5] Nowak 2005 as cited by Helfer & Fariss 2011 at 676.

> they may be applied only pending the determination of whether the person is in fact a refugee (*i.e.* a 'true' refugee) (Davy 2011, 781).

After the Second World War, overwhelmed by an influx of people claiming refugee status, severe measures were taken such as internment to ensure there was no threat to national security. In the 1940s some Allied countries were afraid that they might have taken in 'dangerous bogus refugees' who supported the axis powers. For situations such as war, grave and exceptional circumstances, Article 9 provided a *carte blanche* that contracting States could introduce measures of control to contain the threat of national security. If contracting states decided to do so, the duties under the 1951 Convention would not bind them (Davy 2011, 781). Article 9 also expressly gives the contracting state measures which are 'essential to National Security' in response to war or other grave circumstances (Davy 2011, 781). The term 'national security' is rarely defined, with some flexibility of the interpretation left to national governments. However, national security is considered to be a very high-ranking public interest, encompassing political independence, territorial integrity and the functioning of government or other vital public institutions (Davy 2011, 795). For example, in the case of *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2001] 3 WLR 877, the House of Lords expressly stressed indirect threats to security of the United Kingdom caused by modern terrorism as falling under Article 9 (Davy 2011, 795).

However, the security burden of Article 9 has shifted to also include Article 1F where states can exclude asylum seekers applying for refugee status. Instead of Article 9 being the emergency clause, Article 1F also acts as a quasi-permanent emergency measure and a 'national security' provision. Perhaps this shift has occurred due to the high bar, which needs to be met for Article 9 to apply such as the inflexibility of the definition of 'national security'. As a result of excluding asylum seekers from protection for reasons based on national security, Article 1F has also been used as a suspension clause. Therefore, Article 1F functions to suspend rights across the Convention for asylum seekers who are a security threat.

Scholars argue that the original purpose of Article 1F was to deem that some persons who face a real chance of being persecuted were nonetheless underserving of international protection (Hathaway and Foster 2014, 524). The drafters were persuaded that if states parties were expected to admit serious criminals as refugees they would simply not be willing to be bound to the Convention (Hathaway & Foster 2014, 525). The categorical nature and systemic purpose of Article 1F is said to make it clear that Article 1F is not the basis for excluding a specific person seeking protection who is adjudged to pose a risk to the receiving state. Therefore, the general purpose is not the protection of society of refuge from dangerous refugees rather it is to exclude from the

beginning those who are not genuine refugees.[6] As a result, this article argues that Article 1F is different to Article 9 because exclusion should be considered different from suspension. In other words, the purpose of suspension is to suspend the rights of the Convention in times of national security and exclusion to exclude refugees who are not considered deserving of protection.

Further, the purpose of Article 1F was not intended to allow the *refoulement* of a genuine refugee to his or her native country. This is the case even if he or she poses a danger to the security of the country of refuge or to the safety of the community. Under the provision for *non-refoulement,* Article 33 states that:

> (1) No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of a country in which he is, or who, having been convicted by a final judgment of a particular serious case, constitutes a danger to the community of that country.

Although similar to Article 1F, Article 33 and Article 1F are to be distinguished as serving two different purposes. According to a UNHCR Statement, 'unlike Article 1F, Article 33(2) does not form part of the refugee definition and does not constitute a ground for exclusion from refugee protection.' Specifically, the UNHCR articulates that 'while Article 1F is aimed at preserving the integrity of the refugee protection regime, Article 33(2) concerns the protection of national security of the host country.' [7] The UNHCR further recommended that a 'decision to exclude an applicant based on a finding that s/he constitutes a risk to security of the host country would be contrary to the object and purpose of Article 1F and the conceptual framework of the 1951 Convention.'[8] Moreover, it is problematic to apply to Article 1F(a) as a security clause because this article is written in the past tense with wording such as 'has committed' and 'has been guilty.' This hints that the article applies to international crimes that have been committed in the past. If the asylum seeker poses a security risk, this finding would be in relation to crimes that are committed in the future. In contrast, Article 33(2) uses wording such as 'reasonable grounds for regarding as a danger to the security of a country in which he is (…)' This wording looks toward the future

[6] Hathaway and Foster 2014, 529 citing *Pushpananthan v. Canada* (Minister of Citizenship and Immigration) [1998] 1 SCR 982, para 58.
[7] UNHCR Statement on Article 1F 2003, 8 as cited by Hathaway & Foster 529-530.
[8] Ibid.

conduct. This confuses Article 1F(a) with Article 33(2), which looks at the future risk and is written with the future tense. The purpose of Article 33(2) is to expel and withdraw protection from *refoulement* from recognised refugees who pose a danger to the host state in the future.

This view is supported by the *travaux préparatoires* which indicated that the legislative history of Article 1F showed that the signatories to the Convention wished to ascribe special meaning to the words 'purposes and principles of the United Nations' in the context of the Refugee Convention. The general tone of the Convention is that 'refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systematic denial of core human rights is the appropriate standard' (Hathaway 1991, 108). Therefore, the purpose of Article 1F is to define who is a refugee in light of the human rights object and purpose of the Convention (*Pushpanathan v. Canada*, paras.55, 57-58). Justice Bastarache, in the case of *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 agrees, reasoning that the general purpose of Article 1F is not aimed at the protection of society:

> Thus, the general purpose of Article 1F is not to the protection of the society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33 of the Convention. Rather, it is to exclude *ab initio* those who are not *bona fide* refugees at the time of their claim for refugee status. Although all of the acts described in Article 1F could presumably fall within the grounds of *refoulement* described in Article 33, the two are distinct. (*Pushpananthan v. Canada*, para 58).

In contrast, the Australian Department of Immigration stated that 'the inclusion of Article 1F in the Refugee Convention serves two interrelated purposes. These are to: protect the public safety and security in receiving countries; and [to] preserve the moral integrity of the international protection regime' (Department of Immigration and Multicultural and Indigenous Affairs 2002, 23).[9] In light of the original intention of Article 1F shown in the *travaux préparatoires*, the interpretation of the Australian government is a securitised interpretation because its wording points to the protection of public safety and the security of the country of refuge. The result is that Article 1F has taken on a security character instead of Article 9, the national security suspension clause which suspends rights in times of emergency, and Article 33, which is related to the *refoulement* of refugees in light of future acts. The interpretation of Article 1F by the Australian government reflects the link between the political dimension and the

[9] As cited by Hathaway & Forster, 2014 at 529.

securitisation lens by showing how a security framing can be used by the Department of Immigration.

4. Securitisation in Case Law

The case *Dhayakpa v. Minister for Immigration and Ethnic Affairs* is an example of the construction of asylum seekers as a security threat. Here, we see the decision maker interpreting Article 1F as an article 'protective of the order and safety of the receiving state'. In this case, Justice French of the Federal Court in reviewing the decision of the Tribunal's approach to Article 1F decided that:

> (...) The exemption in Article 1F(b) however, *is protective of the order and safety of the receiving state.* It is not, in my opinion, to be constructed so narrowly as to undercut its evident policy. The fact that a crime committed outside the receiving State is an offence against the laws of the State does not take it out of the ordinary meaning of the words of Article 1F(b). Nor does the fact that the crime has subsequently been punished under the law of the receiving State. The operation of the exemption is not punitive. There can be no question of twice punishing a person for the same offence. *Rather that it is protective of the interests of the receiving State. The protective function is not limited according to whether or not the punishment has been inflicted in Australia or elsewhere.* Nor on the language of the Article or its evident policy, is it necessary that the disqualifying crime have any connection to the reason for seeking refuge [emphasis added] (*Dhayakpa v. Minister for Immigration and Ethnic Affair,* para 29).

Despite the *travaux préparatoires* stating that the general purpose of the Convention is not for the protection of society from dangerous refugees, this paragraph shows the judge constructing the excluded asylum seeker as a security threat. This quote shows that the 'protection of the order and safety of the receiving State' is the reason for exclusion. The Judge interprets Article 1F as having a protective function to exclude asylum seekers.

This security interpretation of Article 1F was affirmed by the Full Federal Court in the case of *Ovcharuk v. Minister for Immigration and Affairs* [1998] FCA 1314. In this case, the Full Federal Court referred to the same paragraph in *Dhayakpa v. Minister for Immigration and Ethnic Affairs* when determining that a charge or conviction did not need to be required to determine that 'serious reason for considering that a person "has committed" a specific type of crime.' Justice Whitlam also agreed that the policy of Article 1F has a protective role in the order and safety of the receiving State:

> Counsel for the appellant criticize French J's identification of the "evident policy" of Article 1F(b). They say his description of that policy reflects that which his honour earlier noted (at 564) was set out in the 1992 UNHCR Handbook. However, his honour expressly observed subsequently (at 565) that the Handbook is not a document, which purports to interpret the Convention. *In any event, I respectfully agree with French J that the transparent policy of Article1F (b) is to protect the order and safety of the receiving State.* That is why para (b) deals with topics that are very different to paras (a) and (c) in Art 1F [emphasis added] (Reasons for Judgment of Whitlam J).

Moreover, to determine the meaning of Article 1F, Justice Sackville of the Full Federal Court stressed the French representative's view at the Conference of Plenipotentiaries of the Statutes of Refugees and Stateless Persons held in Geneva in July 1951. Noting competing views from the UK, Netherlands and French representatives, the judgement emphasised the view of the French representative, choosing only to quote the French representative's point of view:

The minutes record this contribution from the French representative (at 19):

> To understand the French point of view, it was necessary to imagine oneself in France's situation - that of a country surrounded by States from which refugees might *pour in, some of whom might commit crimes*. The definition of the term 'refugee' should therefore contain a clause designed to protect his country, to enable it to exercise the right of asylum it had always so liberally granted, without thereby having to grant to the persons enjoying that right the status of refugee. Unless such provision was made, entry would be permitted to refugees whose actions might bring discredit on that status" [emphasis added] (Reasons of Judgment of Sackville J).

The emphasis on the French representative's view affirms the security lens applied when determining the character of Article 1F. The language by the French delegate paints an image of refugees as a threat which should be combated for they might "pour in, some of whom might commit crimes" and should be defended against. Further, the Tribunal Member in the case of *N1998/532 v. Minister for Immigration & Multicultural Affairs* adopted the reasoning of Justice French in *Dhayakpa v. Minister for Immigration and Ethnic Affairs*. In the reasons for decision Tribunal member stated:

> *The purpose of Article 1F* is found both in a commitment to the *promotion of international morality* and the pragmatic recognition that states are unlikely to agree to be bound by a regime which requires them to protect *undesirable refugees*. In Ovcharuk (supra) it was held that the purpose of Article 1F(b) is *to protect the order and safety of the receiving State*. Each of these elements is to be taken into

> consideration by the Tribunal [emphasis added] (*N1998/532 v Minister for Immigration & Multicultural Affairs*, para 97).

This is an example of how the security purpose of Article 1F(b) has now spread from the interpretation of Article 1F(b) to include the whole of Article 1F. The security lens in *Dhayakpa v. Minister for Immigration and Ethnic Affairs* was adopted in *N1998/532 v. Minister for Immigration & Multicultural Affairs.* Where the previous case dealt with only Article 1F(b), this case referred to 'the purpose of Article 1F.' The common law system where subsequent cases reaffirm the reasoning in previous ones helps to spread the security lens. We see language describing excluded asylum seekers as 'undesirable' and the emphasis on the 'promotion of international morality.' The choice of this language is a reflection of the otherness that securitisation can perpetuate. Otherness involves the dehumanisation and degradation of the asylum seeker. This case is a reflection of otherness as these asylum seekers are dehumanised by their construction as undesirable and not of the international moral standards to which the country of refuge proscribes. This affirms the superiority of the country of refuge as having a higher moral standard and places the identity of the excluded asylum seeker as subordinate (Jensen 2011, 65).

5. Perpetuating otherness through exclusion

The danger is that securitisation can lead to subpar fair trial standards for these asylum seekers now that they have been constructed as a security threat and such can be 'othered'. Excluded asylum seekers who are faced with torture or the death penalty arguably should fall under international obligations of complementary protection. Therefore, an excluded asylum seeker should not be sent back to the country where he or she faces persecution (McAdam 1, 2005). However, Australia's *Migration Act* was amended to include s.197C, which states that Australia's *non-refoulement* obligations are irrelevant to the removal of unlawful non-citizens (*Migration and Maritime Powers Legislation Amendment Act*, 2014). Asylum seekers excluded under Article 1F are considered non-citizens and can be removed regardless of international obligations or whether they would be persecuted upon return.

Also concerning is that recently Australia has been substituting or overlaying its own 'national security' test for the exclusion of asylum seekers instead of applying Article 1F (Saul 2013, p.33). Australia has been relying on the *Australian Security and Intelligence Organisation Act* 1979 to carry out adverse security assessments to exclude asylum seekers who have committed international crimes (Juss 2017, 156). Australian court decisions have legitimised the power ASIO to make security assessments. ASIO was also given powers to interpret detention

provisions of the *Migration Act 1958*.[10] Moreover, in May 2014 the Australian Parliament passed the Migration Amendment Bill 2013, which introduced s.36, which means that to be granted a protection visa the applicant must not have been assessed by ASIO to be directly or indirectly a risk to security.

This treatment spreads to other recognised refugees who have been detained after receiving adverse security assessments. Between January 2010 and November 2011, ASIO issued an adverse security assessment to 54 refugees. None were excluded pursuant to Article 1F of the Refugee Convention – some were placed in indefinite immigration detention, whereas others were released into the community (Saul 2012, 686). These refugees were not given a statement or reasons explaining why the adverse assessments were made. Concerning is that no merits review tribunal was made available to contest the accuracy of the assessments. The refugees continued to be held in detention pending their removal from Australia in absence of a valid visa. However, Australia has recognised these people as refugees and could not return them for complementarity protection reasons as they had not been excluded under Article 1F or the exception to *non-refoulement* under Article 33(2). The result has been lengthy and potentially indefinite administrative detention. Three of the detainees are dependent minor children of refugee parents and one child was born detention and has spent his life of more than two years there (Saul 2012, 688). In 2012, Saul, on behalf of five refugees from this group, made a complaint to the UN Human Rights Committee that 'genuine refugees' with adverse security assessments made against them were also placed in indefinite detention without trial. The Committee condemned the indefinite detention of these recognised refugees who had been illegally detained from 2009-2015 because ASIO had made an adverse security assessment against each of them. The Committee was particularly critical of the arbitrary character and indefinite nature of detention, the refusal to provide information and procedural rights, and difficult conditions of detention, which can inflict serious psychological harm (Human Rights Committee 2016).

There have also been problems with way ASIO has been politically influenced. This year, ABC News leaked a sensitive cabinet document from 2013 named *Transitional arrangements for current permanent Protection visa applicants* where the former immigration minister agreed that the Department of Immigration and Border Protection should intervene in ASIO security checks to try and prevent asylum seekers from being granted permanent protection visas. When faced with up to 700 asylum seekers who 'must' be granted permanent protection under existing legislation, the former immigration minister

[10] Saul 2012, 689 citing *Plaintiff M47/2012 v. Director-General of Security* (2012) 292 ALR 243; *Plaintiff S138/2012 v. Australian Security Intelligence Organisation* [2012] HCATrans 128 (30 May 2012).

agreed that his secretary should write to the director-general of security to request ASIO delay security checks. This would mean that people close to being granted permanent protection would miss the application deadline. The former minister also agreed to reissue an order to the Administrative Appeals Tribunal to hear cases in a particular order to further slow down processing (ABC News, 2018; Minister for Immigration and Border Protection, 2013).

Also concerning is that the security body has been denying these asylum seekers access to legal representation. The Inspector General of Intelligence and Security found that ASIO were not offering all refugees the right to a lawyer in their interview. Asylum seeker service group, the Refugee Advice and Casework Service said the majority of its lawyers had been denied entry to the interviewing process. The inquiry determined that the ASIO officers had no legal basis to exclude lawyers from interviews (Inspector General of Intelligence and Security Annual Report 2011-2012, 29; Kaldor Centre, 2016).

Although asylum seekers excluded by Article 1F are able to have some form of legal status in order to appear before courts and tribunals these decisions are now made by a security intelligence organisation that does not give reasons for its decisions. Asylum seekers that have committed international crimes become further excluded from the political community and are therefore unable to access fair trial rights. The inability to access rights begins from the asylum seeker being a non-political subject and who ends up in a camp (See Rancière, 2004). These aggressive discourses, which characterise asylum seekers as national security threats and other refugees, are also viewed through this security lens. Bypassing legal standards becomes the norm to the point where the exception grows.

The danger of the securitisation of the exclusion clause is the expansion of this space, which normalises subpar fair trial protections. In the cases of ASIO determining Article 1F cases rather than the court system, this shows that the area of excluding asylum seekers who have committed international crimes has entirely fallen into the security realm. Where an officer of an intelligence security organisation decides the fact of who is a threat that should be excised, this results in the reduction of law. The exclusion clause becomes a space where the acceptance of low fair trial standards is increased. This reflects Dauvergne's argument that, '[t]he increasing hostile public and political discourse towards refugees and asylum seekers has penetrated the doctrine of refugee law itself' (Dauvergne 2013, 79). The result of securitisation has been 'othering', where we see subpar fair trial standards such as protracted detention without charge, which has led to serious mental health issues and lack of legal representation. It may no longer seem exceptional that we see the children of refugees who have been excluded for adverse security assessments being held and born in detention facilities.

6. Conclusion

The above cases have shown when applying the Article 1F in exclusion clause cases, judges and tribunal members have constructed asylum seekers as 'security threats'. Discourse in these judgements and decisions have described these asylum seekers as threats to the order, safety, and even the morality of society. Originally, the purpose of Article 1F was to determine those who were unworthy of protection. However, by applying a security lens to these cases this means that Article 1F takes on a security burden from other clauses of the Refugee Convention such as Article 9 and Article 33. This article argues that this change in lens leads to 'othering' where excluded asylum seekers are constructed as threats which should not be protected under the Refugee Convention and are also subjected to subpar fair trial standards.

Overall, this article has made the claim that these security acts are not always positive. There is the danger that these subpar fair trial standards become normalised for not only excluded asylum seekers but also other refugees. This is a result of the reduction of law, which accompanies decision makers being given unfettered power to determine which asylum seekers are a threat and should be excluded. These asylum seekers can be excised from the protection of the Refugee Convention and other fair trial norms. Securitisation as a lens expands spatially to affect other refugees as subpar fair trial standards are normalised. We see complaints from the Human Rights Commission of refugees also being subjected to indefinite detention where there has been an adverse security assessment made against them by ASIO. This has led to a lengthy, arbitrary in character and indefinite nature of detention, a lack of legal representation, the refusal to provide information and procedural rights, and difficult conditions of detention, which can inflict serious psychological harm. The result of an insistence on protecting our society from loosely defined security threats is at the expense of the law, which is at core of our own social fabric, which we are ironically trying to protect.

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The Citizen's Other: Australian Political Discourse on 'Australian Values', Migrants and Muslims

Anne Macduff*

1. Introduction

Over the past two decades, governments around the world have been increasingly concerned with national membership (Yuval-Davis, Anthias & Kofman 2005; Goodman 2010; Flynn 2005). Many governments have developed a range of interconnected legal reforms and policies to manage the issue (Baubock 2010). One popular approach has been to place restrictions on access to citizenship status (Joppke 2008; Kvenien 2002; Bosniak 1998).

However, a dilemma accompanies the desire to restrict access to membership. The dilemma is how to restrict access while ensuring that membership is culturally inclusive. This is particularly a dilemma in countries such as the US and Australia, which have been countries of immigration and their national narratives are closely linked to welcoming migrants. Moreover, these modern, democratic countries have a commitment to accommodating cultural diversity. Dis-enfranchising migrants does not align well with a liberal ethos and

* Senior Lecturer, ANU College of Law, Australian National University.

leaves the governments of these countries exposed to allegations of discrimination from those migrant groups, often on the basis of race, national origin or religion.

In 2007, Australia underwent significant reform to its laws governing access to citizenship status. Key amendments included a longer residential period for migrants,[1] and the introduction of a citizenship test.[2] The government justified these amendments on the basis that they would help migrants better understand Australian values, and therefore be better able to commit to citizenship.[3] This approach appears to navigate the dilemma, restricting access to membership while applying the new citizenship criteria to all migrants regardless of race or ethnic origin.

However, this article argues that much more is going on than the Australian government explicitly acknowledges. Through the introduction of the concept of 'Australian values', politicians narrate citizenship status in racially exclusionary ways. 'Australian' values are imagined in opposition to the migrant Other generally, and the Muslim Other in particular. Evidence for this argument is located in the parliamentary discourse surrounding the citizenship law amendments.

While there are many uses of the term 'discourse' (Wodak & Meyers 2009, 2), the term is broad enough to include a wide range of communicative acts including words, body language, actions, practices and images (Fairclough 1992, 3—4). Also, discourse does not merely reflect the objects in the world already made, discourse constitutes those objects and brings their characteristics and possibilities into being. Discourse is 'a practice not just of representing the world, but of signifying the world, constituting and constructing the world in meaning' (Fairclough 1992, 64). This article analyses how Australian political discourse reflects and reinforces the meaning of citizenship status in opposition to a racialised Other.

This article focusses on how 'Australian values' and citizenship are narrated in one field of 'elite' public discourse,[4] political discourse. The discourses are 'elite' in the sense that they emanate from sources of information which are respected, and influence discursive structures and themes adopted by the public and individuals in society (van Dijk 1993, 280). Political discourse is one form of elite discourse because it is a significant and influential (Billig 1995). Van Dijk argues that what

[1] The residential period for permanent residents who wished to acquire 'citizenship by conferral' (or naturalisation) doubled from two years to four years; *Australian Citizenship Act 2007* (Cth) s 22.

[2] Australian Citizenship (Citizenship Testing) Amendment Act 2007.

[3] Explanatory Memorandum, 1; Robb 2006, 127; Hardgrave 2004, 1.

[4] Critical Discourse Scholars Reisigl and Wodak refer to 'fields' when referring to a 'field of action defined by different functions of discursive practices'. A discourse about a topic can find its starting point within one filed of action and proceed through another one. Discourses then 'spread' to different fields and relate to or overlap with other discourses.' Reisigl & Wodak 2009, 87 - 90. Alternatively, Teun van Dijk refers to discourse 'genres' (van Dijk, 1993).

politicians say matters because they set political agendas, make decisions, and have more opportunities to contribute to the content of the news than other individuals in society (van Dijk 1993). The language used in parliamentary debates both reflects and influences the language used by the news media, which in turn can influence the way in which the public debate is framed. The ways in which politicians narrate and explain legislative amendments can also influence how the legislation is applied.[5]

The first section of this article explains the selection of the texts and the method for analysing those texts. It explains the focus on the 2007 parliamentary Hansard debates and why these are significant sources of political discourse about the legal status of Australian citizenship. This section also introduces Critical Discourse Analysis (CDA), the methodological approach used to analyse the dominant narratives circulating in the selected texts.

The second section explores how Australian politicians explained the 2007 legislative reforms through narratives of protecting and enhancing 'Australian values'. It then identifies how the content of 'Australian values' was articulated. While there was agreement that Australian values included a commitment to democracy and gender equality, this section argues that most politicians struggled to identify these values with any specificity.

The third section critically argues that Australian values were more clearly articulated when politicians were able to describe them as something that migrants lacked. This analysis articulates how the political discourse represented the Muslim Other as particularly incompatible with Australian values, which created and reinforced a culturally exclusionary narrative about the legal status of Australian citizenship.

The Australian experience is a warning to other communities seeking to restrict access to membership through laws which require a commitment to liberal, political values. This article suggests that the language of liberal values does not inoculate legal reforms from complicity with racially exclusionary agendas. The challenge is to identify and render them visible in their specific historical and social context.

2. Political Discourse on Citizenship

This section outlines the rationale behind the selection of materials in this article, and the method used to analyse those materials.

[5] For the rules governing the interpretation of Commonwealth legislation, see *Acts Interpretation Act 1901* (Cth). The use of an Acts purpose to help identify the meaning of a provision is set out in s15. Relevant provisions include sections 21(h), 21(5), 24 and 25 of the *Australian Citizensip Act 2007 (Cth).*

2.1. Sources of Political Discourse – Hansard and Second Readings Speeches

This article analyses the Hansard transcript of the parliamentary second reading speeches associated with two bills; the Australian Citizenship Bill 2005 (Cth) ('Citizenship Bill'), and the Australian Citizenship Amendment (Citizenship Testing) Bill 2007 (Cth) ('Testing Bill'). The Hansard transcript represents the range of views that parliamentarians held about the meaning of Australian citizenship.

The second reading speeches were an opportunity for politicians to reflect on the meaning of citizenship as a legal status. In the Commonwealth Parliament of Australia, the Minister usually begins the debate on a new bill by outlining its purpose and key features (Evans 2008, 237; Harris 2005, 355). Other government and opposition members follow and outline their views about the new bill (Harris 2005, 355). Speeches may be made on the same day or at a later date (Harris 2005, 354). In their speeches, parliamentarians may discuss any matter relating to the bill, including principles, objectives, alternatives, recommendations or further arguments supporting why the bill should be adopted or rejected (Evans 2008, 237; Harris 2005, 355). Each parliamentarian may only speak once, and there is a time limit of 30 minutes (Harris 2005, 355). Sometimes, the speech is a spontaneous response to the unfolding debate. Other times, the speech is prepared earlier and then read aloud (Evans 2008, 490; Harris 2005, 355),[6] particularly when the debate is technical or when the parliamentarian wishes to refer to documents (Evans 2008, 194). Although parliamentarians may discuss the content of previous speeches, direct interaction between parliamentarians is restricted. Interjections and interruptions are regulated according to parliamentary rules (Commonwealth of Australia, Standing Orders). The interjections and interruptions are not generally recorded in the Hansard transcript unless they are referred to by the Speaker. Hansard is the edited transcript of these and other statements made in the House of Representatives and the Senate (Evans 2008, 83; Harris 2005, 210; Commonwealth of Australia 2011, 8).

Although the second reading speeches have a limited public audience, they nonetheless influence and reinforce wider debate. Debate during parliament is open to the public and sessions are broadcast by national radio.[7] While the record of the speech in Hansard is not circulated widely, within a few days the full text is uploaded into a searchable

[6] For instance if it is a prepared statement, or the ministerial statement or the Minister's second reading speech. See Evans 2008, 194.

[7] Speeches are livestreamed through <www.aph.gov.au>, and broadcast through ABC NewsRadio http://www.abc.net.au/newsradio/parliament/.

database on the Australian Parliament House website.[8] Copies of the Parliamentary debates are later printed, bound and made available in public libraries.

Although Hansard is usually only accessed by politicians or lawyers, the views aired by the politicians in these debates are influential (Billig 1995). The speeches reinforce or challenge popular views through their access to the media (Every & Augoustinos 2007, 415; Pickering & Lambert 2002, 66). Parliamentarians are aware of the influence of their speeches on the media. For instance in the citizenship debates, Byrne MP commented 'I see nothing in this [the parliamentary debate]. I see slogans' (Bryne, 2006, 121). Danby MP also stated that 'I will not name the community because that would create a distracting headline' (Danby 2007, 49).

Furthermore, politicians are particularly influential individuals because they claim to represent the general Australian public. For instance, Gash declares that as a politician 'It is not for me to stand here and say 'this is my opinion'. I am simply reflecting what the majority of my constituency says to me and in turn, I am relaying their sentiments to the House' (Gash 2006, 153). Because the role of politicians is to represent the views of their electorate and key interest groups, they legitimately claim to speak on behalf the Australian people and reflect what is understood to be the prevailing 'common sense' view of Australian society.

The second reading speeches of these two bills capture an extensive and representative discussion about the citizenship law reforms, described by Martin Ferguson MP as 'a long debate' (Ferguson 2006, 141). Many parliamentarians made speeches on the bills as they passed through the House of Representatives and the Senate. One third of parliamentarians in the House of Representatives gave a speech about the Citizenship Bill,[9] and one eighth of the senators.[10] One tenth of all the members of the House of Representatives gave a speech about the Testing Bill, and one eight of all the senators. The parliamentarians who spoke represented all the major political parties; the Australian Liberal Party, the Australian Labor Party, the National Party, the Greens and the Democrats.[11]

Despite the extensive discussion, it is surprising that the politicians, by and large, did not debate the specific legal changes introduced by the

[8] Hansard transcripts are publicly available in written form through the Australian federal government website <www.aph.gov.au>.

[9] Fifty-seven parliamentarians spoke. In 2006 and 2007, there were 150 members of the House of Representatives, see Commonwealth of Australia 2011, 410.

[10] Nine senators spoke. In 2006, there were 76 members of the Senate in 2006, see Commonwealth of Australia 2011, 209.

[11] The other political parties from the 41st Parliament included the Family First Party (1 member), the CLP (2 members), and 3 Independents. None of the Independents or minor parties spoke to any the 3 bills. For a list of parties and their members see Commonwealth of Australia 2011, 409-410.

bills. Indeed, the parliamentarians perceived many of the legal changes to be 'less controversial' (Forshaw 2007, 1). The reforms were largely understood as extending existing provisions and frameworks and therefore 'the principles underlying the existing legislation remain the same' (Barresi 2006, 159). Instead, the politicians used their speeches as opportunities to explain the importance of enhancing Australian citizenship status.

2.2. Methodology – Critical Discourse Analysis

This article applies Critical Discourse Analysis (CDA) to identify the narratives about Australian citizenship status that were circulating in political discourse surrounding the two Bills.

Although there are a number of different research approaches that can be characterised as CDA (Wodak & Meyer 2009, 5), CDA scholars all seek to do more than merely describe patterns of language. CDA 'aims to investigate critically social inequality as it is expressed, constituted, legitimized, and so on, by language use (or in discourse)' (Wodak & Meyer 2009, 20). CDA also recognises that although multiple and contesting discourses operate in society, at particular times certain discourses emerge and dominate our understanding and ways of perceiving the world (Gee 2011, 37). These dominant discourses often support a particular ideology, set of interests or the 'figured worlds' of a particular group (Gee 2011, 185, 205). The particular group whose interests are maintained are usually also those who have control over social resources, either within the group, institution, or social structure (Gee 2011, 185, 205). Although ideology and power are often not visible, CDA argues that the ideological effects can be uncovered through an analysis of the discursive relationships that exist in social practices, language and texts (Fairclough 1992, 40; Wodak & Matouschek 1993, 227). CDA explains how discourses create and shape social relations structures (including institutions) and texts (events or practices), including legal texts such as cases and statutes. However, ideological effects are not simply 'found' in the text. They are also produced and reinforced by the interpretative process undertaken by the analyst. This means that while CDA aims to be critical, it is necessarily also limited and constrained by its own social and historical context. CDA should not for instance, be understood as a tool to determine an alternate 'value free' truth.

This article uses CDA to interpret all of the parliamentary second reading speeches relating to these two bills. These speeches were analysed, and notes were made about the frequently recurring linguistic cues and themes, and the language in which these themes were articulated. Connections between themes were observed and then linked to how they supported common-sense assumptions which appear to

'spring from daily experiences and which reflect dominant institutions' (Chant, Knight & Smith 1989, 387). Themes can be said to be dominant when they proliferate, spread across different spheres and potentially displace other discourses (Lawrence 2012, 23). Gee argues that discourse analysis can show where there is 'convergence, agreement, in linguistics details' (Gee 2011, 123). Articulating how themes are expressed and linked exposes the ideological structures that they convey (Wodak 2008, 57).

In Australia, legal scholars have used CDA to show how the exclusion of asylum seekers is legitimised through the discourse embedded in migration law.[12] There is also an emerging analysis of discourse on Australian citizenship (Dyrenfurth 2005, 89; Fozdar & Low 2015), although it does not specifically examining the role of Australian citizenship as a legal status. This article adds to this interdisciplinary scholarship which uses CDA to critically examine the impact and force of Australian citizenship as a legal status.

3. Migrants and Australian Citizenship

3.1. Citizenship: A Migrant's Commitment

The specific legal reforms to the *Australian Citizenship Act 2007* (Cth) were justified, in broad terms, as enhancing Australian citizenship. For instance, many parliamentarians expressed the need to ensure that Australian citizenship is 'not too easy to get' (Georgiou 2007, 29), 'not taken lightly' (Burke 2006, 2), 'not taken for granted' (Gash 2006, 152), or 'handed out like confetti' (Emerson 2007, 62). Cadman MP stated 'the more substantial the citizenship requirements, the more substantial the commitment' (Cadman 2007, 58).

Generally, politicians expressed the clear view that Australian citizenship status would be enhanced through a stronger commitment to shared 'Australian values' (O'Connor 2007b, 12). Australian citizenship has 'combined people into one community based on a common set of values' (Andrews 2007, 42). Citizenship is a 'commitment to Australian values and way of life' (Johnson 2006, 137). Citizenship was conceived of as a 'common bond' (May 2006, 165), or 'glue' that 'holds our family together' (Hardgrave 2007, 49), and builds 'social cohesion' (Vale 2007, 14). 'As Australia has matured [...] citizenship has become a powerful force in the creation of a united and cohesive society' (Cobb 2005, 9). Social cohesion is desirable because it creates a 'stable, secure, prosperous nation' (Danby 2007, 49).

The activities of the migrant were central to statements about a commitment to Australian values. Citizenship is 'a key part of the

[12] For Australian scholarship see; Danielle Every and Martha Augoustinos 2007; Pickering 2001; Pickering, 2004; Pickering and Lambert 2002.

Government's ongoing commitment to help migrants successfully integrate into the Australian community.'[13] Citizenship is the 'glue holding our culturally diverse society together' (Robb 2006, 127), and citizenship is a 'unifying force in an increasingly diverse population' (Sawford 2006, 211). The Australian citizenship program was described as successful because it is a means by which the nation is 'more inclusive of migrants' (Vamvanikou 2006, 196). As one parliamentarian observed 'What is the point of offering citizenship if it does not unify newcomers to Australia?' (Gash 2006, 152).

While the observation that citizenship status primarily concerns migrants may seem obvious, it is only so because it has entered the 'common-sense' assumptions of daily life. The selective and limited nature of this focus is exposed when it is appreciated that the 2007 amendments also changed the criteria for citizenship acquired in ways other than by migration.[14] The legal reforms to the provisions regulating citizenship by adoption, descent and citizenship by resumption were barely mentioned.

The amendments were designed to enhance the importance and value of citizenship status by requiring that migrants do more to demonstrate that they would commit to Australian values. For example, in introducing the Citizenship Bill, Andrew Robb MP stated that the purpose of the extended residency period is to 'enable more time for new arrivals to become familiar with the Australian Way of Life and the values which they need to commit to as Australian citizens' (Robb 2006, 128). The longer residency period gives migrant applicants more time 'to associate themselves deeply with the values that we consider the essence of this country' (Johnson 2006, 137). A longer period also enables migrants to 'feel accepted and welcomed' (Hull 2007, 21), at 'home and comfortable' (Owens 2006, 168).

Similarly, the purpose of citizenship testing was to 'ensure a level of commitment to these values and way of life from all Australians' (Andrews 2007, 4). Dana Vale MP stated that citizenship testing 'will mean that they [migrants] can take their place with us as one people under one flag' (Vale 2007, 14). Indeed, the citizenship test would 'be a mechanism to provide assurances that the applicants for the test understand some common values' (Australian Government 2006, 11) and would be 'reassuring' (Johnston 2007, 132). Ripoll remarked that the citizenship test is 'another hoop to jump through which makes earning it more valuable' (Ripoll 2007, 25).

Only a minority of parliamentarians were concerned that the changes should not make the acquisition of citizenship too difficult (George

[13] Explanatory Memorandum, Australian Citizenship Amendment (Citizenship Testing Bill) 2007, 1.

[14] Note that this was in contrast to the thrust of other amendments to citizenship by descent and resumption, which eased access. These were largely not discussed by the parliamentarians in the reading speeches.

2007, 45; Georgiou 2007, 49, Hall 2007, 42; Hurley 2007b, 72; Tony Burke 2006, 2; Brendan O'Connor 2007, 34; Gavin O'Connor 2007b, 13). Different aspects of the reforms were identified as potentially problematic. Many in the opposition Labor party were particularly concerned that while an extension of the residency period from two to three years was necessary due to national security concerns, the increase to four years was unreasonable (Tony Burke 2006, 2; Corcoran 2006, 230; Garett 2006, 182; Webber 2007, 44).

A few parliamentarians also expressed concern about whether the commitment to citizenship could be demonstrated through a test (Bartlett 2007b, 69; Kirk 2007, 61; George 2007, 45; Nettle 2007b, 64, McEwan 2007, 76; Melham 2006, 192; Owens 2006, 168; Roxon 2006, 177). Some felt that the existing requirement that new citizens make a pledge was sufficient evidence of a commitment to Australia (Hall 2006, 234, Melham 2006, 192). Others worried that the citizenship test was an unnecessary English language test (Bartlett 2007b, 69, Broadbent 2007, 37; George 2007, 45; Hall 2007, 52; Allison 2007, 34; Crean 2006, 204, Hall 2006, 234; Irwin 2006, 179; Melham 2006, 192; Plibersek 2006, 216; Price 2006, 155; Quick 2006, 117; Wilkie, 2006, 230).

Despite some concern, only a handful of parliamentarians explicitly concluded that these new requirements were barriers to citizenship (Georgiou 2007, 29; Ellis 2006, 221; Emerson 2006, 161; Hall 2006, 234; Ripoll 2006, 241; Tanner 2006, 188; Vamvanikou 2006, 196). Moreover, these concerns were largely overshadowed by the wider bi-partisan support for other aspects of the reforms, and strong consensus that the importance of citizenship should be enhanced. Both amendments were clearly justified on the basis that they helped and supported applicants to be 'fully informed' (Vale 2007, 14) about Australia, 'understand the commitment' to citizenship (Cadman 2007, 58), and allowed migrants to be 'ready to participate' (Lundy 2007, 12). The amendments were understood to be beneficial to both the Australian community and migrants because they required migrants to be more knowledgeable about 'Australian values'.

3.2. Articulating 'Australian Values'

Although it was clear from the political discourse that citizenship status was primarily a migrant's commitment to 'Australian values', many of the speeches failed to clearly identify the content of those 'Australian values'. 'Australian values' were described as 'common values' (Andrews 2007, 42), 'core values' (Ripoll 2007, 25) or just plain 'Australian values' (Webber 2007, 44). Australian values are understood as those values 'that define us as Australians' (May 2006, 165). Parliamentarians use the

term 'Australian values' interchangeably with 'Australian Way of Life' (Robb 2006, 127).[15]

In a few speeches, parliamentarians started to elaborate on the various features of 'Australian values'. For instance, a commitment to Australian values includes a commitment to 'fully participate in the opportunities that life in Australia offers,' (May 2006, 165) to 'live here,' (Randall 2006, 158) to 'make Australia home' (Georgiou 2007, 29). There is also a sense of a commitment to 'support [...] Australia, as a nation' (Emerson 2007, 62), to 'pledge loyalty' (David Johnson 2007, 132), to 'Australia and its people' (Andrews 2006, 127). Although there is no official national language of Australia, some parliamentarians stated that a commitment to Australian values requires speaking 'English' (Randall 2006, 158). Australian values also include: 'a fair go' (Hardgrave 2007, 49), 'a shared future' and a 'common destiny' (David Johnston 2007, 132), 'signing up to responsibility' (Hardgrave 2007, 49), to 'make an effort' (Thomson 2006, 180), and 'to share democratic values' (George 2007, 45). Some parliamentarians mentioned the importance of Christian values because Australia is 'a Judeo-Christian country' (Michael Johnson 2006, 137). Beyond these broad claims, there were few clear and consistent statements about the specific content of Australian values.

Only a few parliamentarians rejected the idea of 'Australian values' or an 'Australian way of life' (Irwin 2007, 40; Kirk 2007, 61; Allison 2007, 34; Hoare 2006, 185; Vamvanikou 2006, 196; Gavin O'Connor 2006, 201). Some noted that values such as democracy, egalitarianism and a 'fair go' are more universal values than Australian values (Corcoran 2006, 230; Ripoll 2007, 25; Melham 2006, 192). However, these opinions are in the minority. Even whilst acknowledging that 'Australian values' are difficult to define, many politicians maintained that the concept of Australian values and Australian Way of Life was still useful. '[W]hile it is difficult to read the mind of Australian society, we can look at the behaviours that we want to promote in this country. [...] We can take these manifestations and explore the sentiment that drives these behaviours' (Barresi 2006, 159).

4. Narrating Difference: constructing the Migrant Other

The process of identity formation occurs in defining what is, as well as what is not (Hall 1992, 272). Triandafyllidou argues that the

[15] The 'Australian Way of Life' is a term first used in the 1950s to describe a unique Australian national identity. It is thought to have been coined by Richard Ward in his popular book, 'The Australian Legend'. It captures an understanding of Australians as a people who, although culturally British, are shaped by their unique physical environment and 'Way of Life' to produce traits that reflect an 'Australian type'. This way of life is thought to be captured by life in the bush, and the need for a practical, strong and resourceful individual, typified in the bushman.

construction of migrant groups within a society as the Other helps to define a distinct national identity (Triandafyllidou 2001). This section explores how politicians created narratives about Australian values in opposition to the cultural differences of migrants generally, and the Muslim migrant in particular.

4.1. Migrants and Difference

The reading speeches suggested that migrants are culturally different. This difference is at first represented by describing the migrant's acquisition of citizenship status in terms of physical distance and displacement. For instance, citizenship for a migrant is a 'step' (Cadman 2007, 58), a 'big step' (Hall 2006, 234) a 'very big step' (Livermore 2006, 237), an 'important step' (Slipper 2006, 146) and a 'profound step' (Johnston 2007, 132). Taking this step is described as a 'significant and massive decision' (Ripoll 2007, 25).

However, the notion of difference as distance should be read carefully. In the speeches, parliamentarians described some nations as 'further away' from the Australian nation than others. Migration 'can be a long or a short step' (Byrne 2006, 120). These references are potentially not so much about geographic distance. The language of 'steps' evokes not only the physical journal of migration but the extent of perceived cultural difference. The way that physical distance stands in for cultural distance is captured by the former Minister Andrew Robb who noted explicitly that 'European values are closer to Australian values than others' (Robb 2006, 127). The two Bills are therefore primarily 'to do with new arrivals, especially those from new and emerging communities who nowadays are often from countries far removed from Australian culture' (Robb 2006, 127). The bigger the step, the larger the cultural difference.

There is an assumption that it is migrants who will need to change to become citizens, which reinforces the cultural difference of migrants. First, the speeches made a distinction between the migrant's identity arising from their nation of origin and their adopted Australian identity. This distinction is reflected in comments such as 'The choice to stay as a citizen is electing to say 'I like things the way they are'' (Gash 2006, 152). Moreover, citizenship testing 'will demonstrate that new migrants accept Australia' (Cadman 2007, 58). 'It is not unreasonable that they will embrace our traditions, culture and history, together with our values and respect for Parliamentary democracy' (Vale 2007, 14), and '[we] expect those coming here from other lands accept the values we cherish beyond mere lip-service as a ticket to self-indulgence' (Gash 2006, 152). Other aspects of a migrant's identity are assumed to give way to their allegiance and loyalty to their new Australian national identity.

A further assumption is made that a nation's identity will remain constant and the same. This insistence is expressed in this warning 'In our house, you must follow our rules or else go somewhere else' (Gash 2006, 152). Adding a citizenship test 'sends a message [...] to those who want to subvert or change Australia to their own form of dictatorship - that Australians show solidarity' (Cadman 2007, 58). Comments such as these reinforce the message that migrants should not seek to change Australian society. In this way, the requirement that migrants commit to Australian values communicates to migrants that they commit to assimilation, to becoming 'the same'. Australian academic Stratton notes 'It is the claim to a core culture which enables conservatives to argue for a return to assimilation. Assimilation, in the Australian case, implies that the core culture remains the same whilst it is the migrant who is transformed' (Stratton 1998, 16). The language of cultural assimilation, although largely abandoned in Australian in the 1970s, re-emerged in 2007 in the parliamentary debates on citizenship. Many parliamentarians stated that migrants wishing to apply for Australian citizenship must 'integrate' (Ferguson 2007, 66) 'integrate successfully' (Markus 2006, 130), and even 'assimilate' (Gash 2006, 152).

The legal status of citizenship requires a commitment to 'Australian values'. This commitment is one that migrants make to integrate into Australian values, which is understood as a process of transformation and assimilation. Moreover, some migrants require 'more' integration than others.

4.2. The Integration Problem

If the bestowal of Australian citizenship status involves the cultural integration of the migrant, there is a risk that some will not be able to integrate adequately. A consequence of a political discourse that emphasises the cultural difference of migrants is that it enlivens the possibility, indeed the logical eventuality, of an 'integration problem.'

Some speeches articulated what a failure to integrate might involve. These migrants might 'come and not make any effort to fit in' (Thomson 2006, 180), or 'cling to the cultural values of the old country' (Gash 2006, 152). Signs of clinging to cultural values include creating ghettoes 'where children are raised physically here but psychologically in a foreign country' (Danby 2007, 49). They might live in the Australian community but separate themselves. One parliamentarian worried that migrants might 'live in enclaves' (Emerson 2007, 62). Other signs of a failure to integrate included 'not speaking English' (Randall 2006, 158). The speeches implied that the failure to integrate is the failure of migrants to sufficiently commit to Australian values and not, for instance, economic reasons, lack of social supports or indeed, structural exclusion from Australian society. Some speeches concluded that the

reason that migrants are unable to integrate is because they are too culturally different.

Parliamentarians conveyed that the failure of migrants to integrate was undesirable because it undermines the meaning and value of Australian citizenship. Parliamentarians expressed concern that without integration, migrants might take up citizenship but not value it appropriately. They might, for instance 'take it for granted' (Gash 2006, 152). They might see the ceremony as a requirement rather than a celebration and once they have their certificate just 'walk out of citizenship ceremonies' (Byrne 2006, 121). Tanner MP expressed this general sense of concern, observing that the citizenship reforms 'were part of a wider debate in the community [...] which gives rise to a considerable concern about where Australia is heading, what the underlying ethos is for the community on which our society is built, and what it is going to be in the future' (Tanner 2006, 188).

Migrants might use Australian citizenship not only for personal economic gain, but they might also change the underlying political and social values of Australian society. The presence in Australia of the unintegrated migrant was understood to threaten the nation because the migrant may 'want to corrupt' or 'subvert or change Australia to their own form of dictatorship' (Cadman 2007, 58). 'We have to make sure that the rules that we have agreed on that make us feel free, remain the dominant rules and laws irrespective of how they are challenged or attacked' (Bishop 2006, 209).

In the face of these worries, some parliamentarians articulated a protective posture over citizenship status, restricting access to citizenship status. 'Australia rightly defends its freedom to choose who enters this land of ours and when and how people enter' (Henry 2006, 172). This protective posture was expressed in different ways, including using the strong rhetoric that citizenship is 'a privilege, not a right' (Campbell 2006, 19). As this statement is not strictly true about citizenship by birth (Rubenstein 2017), it conveys a desire to manage the threat to the nation through the laws relating to citizenship status. There were also assertions that parliamentarians had a special role to play in protecting the Australian nation and its national identity from threats, including cultural threats. '[It is] our responsibility to ensure that this country remains positive, free thinking and tolerant' (Gash 2006, 152).

In this these speeches Australian values are racialised through the assumption that migrants are culturally different, and unless they integrate or assimilate, incompatible with Australian values.

4.3. The Muslim Other

Triandafyllidou argues that while migrants are frequently represented as different to the national population, at different times certain migrant

groups are represented as the nation's Other (Triandayllidou 2001). Through the nation's Other, the values of the national community are highlighted. The elements of a nation's identity that emerge as significant are those that enable the nation to claim comparative uniqueness and separateness from other nations (Triandafyllidou 2001).

The building of national identities in opposition to the Muslim migrant is successful in Australia, in part, because of its association with wider narratives. Western nations have a long colonial history of negative tropes about the Muslim Other (Said 1979). These colonial tropes have recently re-emerged in other liberal, democratic nation-states including the UK, Europe and the US.[16] While scholars have argued that the Australian national identity has been constructed predominantly in opposition to the Asian Other, this section argues that Australian values are now constructed in opposition to the Muslim Other.

Othering is a process where an identity is constructed by what it is not. Some parliamentarians demonstrated a reflexive awareness that they were engaged in constructing Australian values through this othering process. Burke MP noted that 'we can often identify Australian values more easily by what they are not' (Burke 2007a, 42). Ripoll MP also acknowledged that 'I think there would be less agreement on defining what it is to be Australian than there would be on defining what it is to be 'unAustralian'' (Ripoll 2006, 242).

Although diverse ethnic groups were identified in the speeches, Muslims were the only group that parliamentarians criticised as holding values that are incompatible with 'Australian values'. For instance, Thompson MP observed that wearing headscarves and following Sharia law is inconsistent with 'Australian values' (Thomson 2006, 180). Johnson criticised an Australian Muslim religious leader because that leader described Australia as a 'Muslim country' (Johnson 2006, 137). Cadman MP denounced the participation of those 'of Middle Eastern appearance' in the 'Cronulla race riots' (Noble 2009). The Cronulla race riots was a day of heightened racial tensions between Lebanese (Muslim) Australians and 'White' Australians, which took place in 2005 in his Sydney electorate. Cadman MP elaborated 'These people failed to understand their commitment and responsibilities and privileges of being Australian' (Cadman 2006, 14). It is noticeable that Cadman MP did not criticise the violent behaviour of the other participants who were involved, those who were not of 'Middle Eastern appearance'. Other characteristics that were identified as incompatible with Australian values include: terrorism, violence, gender inequality and religious fundamentalism. These characteristics have been associated with

[16] For a selection of literature see Morgan & Poynting 2012; Taras 2012; Rothe & Muzzatti 2004; Nayak 2006; Poynting & Mason 2006.

Muslims and Islamic culture, both in the past and more recently in the wake of September 11 (Poynting 2004; Noble 2009).

In addition, only two Australian citizens throughout all the speeches were criticised as unAustralian.[17] These two individuals were both Muslim: Dr Ameer Ali and the controversial religious figure, Sheik al Hilali.[18] Only Johnson's referred to both Dr Ali and the Sheik. Johnson MP criticised Dr Ali as unAustralian for stating that 'Australia is a Muslim country' (Johnson 2006, 137). However, all ten politicians specifically referred to Sheik al Hilali during their speeches.

Sheik al Hilali was an important Islamic leader in Australia. In 2007 he was the only religious leader to hold the title of 'Grand Mufti of Australia', which he held whilst an Imam at the Lakemba Mosque in Sydney. Prior to 2006, he had been publically criticised for holding very conservative Islamic views. In these ten speeches, the behaviour of the Sheik was described as a particularly egregious example of behaviour that did not reflect Australian values. Bishop MP directly stated 'I cannot not comment on the comments of Sheikh al-Hilali when we are talking about the concept of citizenship. There is a person who ought never to have been allowed permanent residency, let alone citizenship, in this country' (Bishop 2006, 209). Ferguson MP described the Sheik as 'unAustralian' (Michael Ferguson 2007, 66). Gash MP was likely referring to the Sheik when she commented that 'publicity has been given to a handful of cases where an individual who identifies as an Australian citizen is then seen to engage in anti-Australian behaviour' (Gash 2006, 152).

These ten parliamentarians identified specific characteristics and behaviours as evidence of the Sheik's failure to commit to the Australian values and Way of Life. The Sheik is 'disloyal to our country and values' (Johnson 2006, 137). Johnson MP stated that 'in recent days the issue of citizenship, loyalty to our country and values in our country has come to the fore with the remarks of a leader in the Muslims community. Of course, I refer to Sheikh al-Hilali' (Johnson 2006, 137). Cadman MP raised as a concern not only the Sheik's loyalty but the Sheik's inability to speak English.

> Sheik Taj al-Din al-Hilali, whom I do not know; he became an Australian citizen. [...] Did that man, who does not speak English now, to the media [sic] understand what he was doing when he took the oath? I believe he has transgressed the weak oath that we have at the moment. (Cadman 2006, 14.)

[17] Other individuals are mentioned, although these individuals are upheld as model Australians. Although these individuals come from a range of cultural backgrounds, only twice are Muslim individuals positively described. See parliamentary speeches by Jenkins 2006, 149 and Edwards 2006, 124.

[18] See the reading speeches of Burke, Thompson, Tanner, Bishop, Cadman, Markus, Johnson, Slipper, Gash, Barresi (all speeches in ACA). Note that Sheik's name is spelled different ways.

The Sheik was described as unable to commit to Australian values because he did not believe in democracy, gender equality, and the Australian legal system. Nor was he loyal to Australia's institutions, as demonstrated by an inability to speak English. This inability to commit to Australian values was linked to the Sheik's religious identity. This narrative is successful because of a long, colonial history of negative tropes about the Muslim Other as associated with violence, misogyny and anti-democratic beliefs (Said 1994).

As a religious leader, the Sheik is portrayed as a representative of Muslim culture and beliefs. The ways in which he is understood to be unAustralian is linked to his perceived cultural practices and religious beliefs. So although the Sheik is one individual, he is used in these 10 speeches as an example which works to demonise Muslims more widely. Identifying the Sheik reinforces the wider public narrative that Muslims are incompatible with Australian values and therefore citizenship.

4.4. The Racialisation of Australian Citizenship

The narratives which attribute a particular person's behaviour as being caused by their religious or cultural affiliations, and then generalising this behaviour to all those with the same religion or cultural affiliation, is the process by which 'racialised' identity is produced.[19] This is the process through which a group of people come to be identified and distinguished, and justifies an uneven allocation of social resources such as access to membership. An understanding of the racialisation of Australian citizenship through narratives of Australian values in political discourse can now be situated in its social and historical context.

In these speeches, there are a number of interconnecting assumptions. First, there is a culturally distinct group called Muslims.[20] Second, due to their cultural identification, Muslims are unable to commit to Australian values. Therefore, Muslims in Australia are not suitable for Australian citizenship. In this way, although the amendments do not explicitly exclude those identified as Muslims from accessing Australian citizenship, the narratives used by the parliamentarians about Australian values clearly imply this.

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[19] Of course, race is a concept that has been scientifically discredited. However, it continues to circulate. In particular, cultural groups are now 'racialised' (Balibar 1991, 17). Although race, culture, ethnicity and religion are different forms of social identity, they sometimes overlapc (Reisgl & Wodak, 21). This article has used the concept to 'race' as an inclusive term to capture the diverse ways in which cultural and religious practices are associated with visual and physical traits (Stratton 2009).

[20] In Australia, as elsewhere, migrants who identify from Muslims may have originated from very diverse countries such as Indonesia, Pakistan, Lebanon, Malaysia, Iran and the Sudan, each with distinct religious and cultural practices.

The racialised assumptions about Muslims are noted by some parliamentarians. A few challenged the implication that Muslim values are inconsistent with Australian values (Nettle 2007b, 64). Some parliamentarians suggested that the language of Australian values was designed to target specific members of the Australian community, particularly Muslims (Bartlett 2007b, 69, Nettle 2007b, 64; Bartlett 2007a, 20, Anna Burke 2006, 163; Byrne 2006, 121; Edwards 2006, 124; Laurie Ferguson 2006, 132; Garrett 2006, 182; Hayes 2006, 168; Jenkins 2006, 149; Owens 2006, 168; Tanner 2006, 188, Thompson 2006, 180; Vamvanikou 2006, 196). Some noted that integration into Australian values is a coded exclusionary message (Laurence Ferguson 2006, 132), a process of 'singling out Muslims' (Allison 2007, 34), but 'not nam[ing] them' (Danby 2007, 49). The view that Muslim values are inconsistent with Australian values is criticised as emphasising a ''white picket fence' view of Australia' (Nettle 2007a, 25; Allison 2007, 34). Burke outlined the consequences of an exclusionary notion of citizenship and stated 'part of the context of this debate [citizenship testing] was keeping people from becoming citizens, weeding out undesirables, and the fact that some people had become citizens who should not have, and this would be a way to stop them' (Burke 2007a, 42).

These speeches articulated the meaning of citizenship status in opposition to the perceived cultural difference of the Muslim Other. The political discourse both reflects and reinforces the public view that Muslims are generally incompatible with Australian values. This incompatibility is presented as a threat to Australian citizenship. This in turn, helps to identify and represent a clearer sense of what the Australian national identity is, by what it is not.

This is not the first time that the language of Australian values and 'Australian Way of Life' has been used in an exclusionary fashion to bolster a sense of national identity. Australian scholar Richard White observes that the language of Australian values was deployed in the 1950s to articulate threats to the nation posed by migration, communism and the cultural influence of America (White 1979, 534). However, this article provides evidence to support the claim that the archetypal threat to citizenship and the Australian nation is no longer the Asian Other or the communist Other (Markus 1979; see also Ang 2001; Fitzgerald 2007; Walker 1999), but the Muslim Other (Hage 2003; see also Noble 2009; Poynting 2004.). These narratives about Australian values and the nation not only circulate in the reading speeches of politicians, they influence those who make decisions under the *Australian Citizenship Act 2007* (Cth). It also raises fear and suspicion about Muslims, who are already Australian citizens, questioning their commitment to Australian citizenship and placing their actions and activities under intense public scrutiny. In turn, this suspicion may well spur acts of public racist violence and discrimination.

5. Conclusion

This article explained how in 2007, Australian politicians emphasised citizenship as a commitment to 'Australian values'. These Australian values were broadly identified but culturally inclusive, including liberal values of democracy and equality.

Although the Australian government states that it regulates access to citizenship in a culturally inclusive manner, that article argues that the historical and social discursive context suggests otherwise. This article uses CDA to demonstrate how neutral reforms can nonetheless be complicit with racially exclusionary agendas. A critical analysis of the speeches demonstrated how the language of 'Australian values' enabled politicians to express concern about the failure of Muslims to integrate into the Australian community. The speeches also communicated how Muslims values were incompatible with Australian values. This racialised Australian citizenship by representing it in opposition to Muslim Other. In this way, the Australian political discourse on citizenship status perpetuates the racialization of the Australian nation.

The parliamentary speeches reviewed in this article are 'elite' discourse because politicians have privileged access to the media. The narratives of fear and suspicion about the Muslim Other expressed by politicians in these speeches reflect those same narratives in the public sphere, which serves to reinforce and naturalise them. As countries around the world increasingly focus on restricting access to membership through laws and policies, scholars committed to cultural diversity will need to remain attuned to these exclusionary narrative strategies hidden in the racially neutral language of national values.

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‘Governmental Xenophobia’ and Crimmigration: European States’ Policy and Practices towards ‘the Other’

Aleksandra Gliszczyńska-Grabias* & Witold Klaus**

1. Introductory remarks

Migrants, refugees, asylum seekers – these are ‘the Others’ arriving in a new, often unknown and hostile destination. Even if the place of arrival (or residence) is an otherwise democratic, fully rights-protective European state, ‘the Other’ often encounters not merely social hostility but also another reaction, called by Jérôme Valluy ‘governmental xenophobia’. This xenophobia is defined as a combination of public discourse and actions aimed at stigmatising migrants, identifying them only as a source of threat or danger to the rest of the society, and then undertaking actions aimed at finding a solution to the problem so created (Valluy 2011). With the fearmongering escalating by the day, many European states has started to react to this problem created by themselves. The effect of ‘governmental xenophobia’ is multiplying restrictions in adhesion policy, expulsions rules and practices. To facilitate these processes, regulations stemming from criminal law are

* Associate Professor, Poznań Human Rights Centre, Institute of Law Studies, Polish Academy of Sciences.
** Head of Department of Criminology, Institute of Law Studies, Polish Academy of Sciences.

engaged. This criminalisation of migration policies and implementation of criminal law into migration legislation aimed at raising control over migrants, results in an emergence of a new phenomenon called 'crimmigration' (Stumpf 2006), which can be described as the manifestations, or rather as the result of 'governmental xenophobia'. In consequence, in some states immigrants are punished for committing crimes established and constructed specially for the sake of controlling them, while not applicable to the 'legitimate' citizens (Aliverti 2013). This approach is embedded in a desire to draw a strong distinction between 'Us' and 'Them', between the citizens and migrants, and – in the social perception – between the 'good' and the 'bad' (Kmak 2015; Franko Aas 2011; Holslag 2015).

Simultaneously, there exist another 'Other' in the European crimmigration sphere–'the Other' represented by the Roma community. Even though the link between the migrants and Roma may seem to be loose, in particular as most Roma are citizens of the EU (especially after the enlargement of the community in 2004 and 2007), the similarities in the crimmigration treatment of these groups are striking. Roma groups are, and always has been, migrants. Migration is embedded in their lifestyle, in their culture. And because of that Romani communities for ages has been presented as a 'race of criminals' who is genetically inclined for committing crimes, and their lifestyle has been perceived as a threat to public order and safety of European societies (Sigona & Trehan 2011, 119-120). At the same time, the methods of oppression towards Roma varied in the past between enslavement, enforced assimilation, expulsion, internment and mass killings, whilst today they consist mostly of various forms of discrimination, forced evictions and homelessness, lack of health and social care, no job opportunities, hate crimes, as well as crimmigration policy implemented against them. Roma are stopped and detained by the police more often than other citizens, while in custody they have much narrower access to legal aid, resulting in more severe judgments issued against them, not to mention the cases of criminalization of their traditional nomadic lifestyle.

This article identifies practices of numerous European states characterized as manifestations of 'governmental xenophobia' and 'crimmigration' as its special phenomenon, while at the same time demonstrating the ways these practices breach fundamental human rights, including prohibition of discrimination. Europe has been selected as a case-study for the purpose of this article as currently it is the area that reflects and cumulates, in an unprecedented way, all phenomenon the article relates to. It also proves that both the old, Western Europe's democracies and former Central and Eastern member states of the European community are not free from using the same practices towards 'the Other', relying very often on the same – universal xenophobic attitudes fed by the same fears and prejudice.

The article chooses to concentrate on two examples of victim groups: migrants and Roma, who are distinguished by their 'otherness' – the feature that transgresses the distinction between "others" coming from the outside world and those being, theoretically, the part of European inner-communities. It contemplates some dramatic social and legal effects of this type of state action, reflecting upon the current position of migrants and Roma – the position Michael Walzer analogised with the situation of resident aliens (*Metics*) in ancient Athens who lived in the realm of necessity (while the Citizens lived in the realm of choice), with their fate determined purely by the conditions of economic life. Such a distinction between both groups, as described by Walzer, was an effect of unequal distribution of their memberships, and consequently their power. Only one group had been granted the right to vote and consequently could influence the process of law-making. Consequently, members of the privileged group preserved the existing system from introducing any changes that could affect their supreme position (Walzer 1983). This paradigm had been copied throughout ages. Its today's reflection is a discriminatory distinction between citizens and immigrants and between citizens and Roma, manifested in the state laws and practices. The choice of Roma for the purpose of the analysis has been also dictated by the fact that the ages-long discriminatory, hostile and very often criminal behaviour of the state towards them can be perhaps perceived as a prototype or a model for the way of treatment of undocumented migrants and refugees today.

Lastly, the authors try to suggest possible answers to the remaining question whether there are chances for a transformation of social attitudes that will compel the changes of governmental policies, or if we should rather demand, by applying to international human rights law standards, a responsible and humane government policy leading to the cessation of othering in law and through law.

The search for the interconnections between different - but most fragile minority groups, as well as between phenomenon of crimmigration and governmental xenophobia forms an innovative, core research challenge of the article.

The article relies not only on the available literature in the subject, but also on different kinds of empirical materials, such as reports, statistical data or the case-law of the European Court of Human Rights. This approach aims at demonstrating also the practical implications of theoretical considerations concerning crimmigration and governmental xenophobia, being not only rhetorical or theoretical concepts but also dangerous tool of behaviour resulting in multiple human rights violations. This approach was thought as an innovative 'added value' to the existing literature and way of analysing the phenomenon debated here.

2. Governmental Xenophobia

The term 'governmental xenophobia' was coined by Jérôme Valluy to describe a conjunction of discourse and actions of public authorities, whose aim is to stigmatise foreigners in the eyes of society and to make citizens perceive them only as a source of threat or danger, only to later undertake an initiative of solving such a self-created problem, also with the tools of law (Valluy 2011, 116-117). This idea can be easily extended to any other ethnic group labelled as 'the Other' – Roma being the prime example here.

The first element of 'governmental xenophobia' is the creation of 'the Other'. In the process of selecting a group that would be labelled as such, an ethnic distinction (actual or perceived) between the labelled group and the majority of the society plays a crucial role. Importantly, the power of labelling lies in the hands of people in power – rich, males, usually white (Becker 1973, 204). This description happens to characterise most of the members of many of the current European governments. Such practices based on the will to "protect" the society by public authorities from others who enter or want to enter the state's territory were presented by Michel Foucault in his lectures at the College de France in 1976 as the beginnings of the idea of 'racial' purity (Foucault 2003, 80-84). However, the term 'race' is not used anymore – it has been replaced by the term 'culture'. What can be observed at present is described as the fight to preserve cultural homogeneity in the societies of the Global North. But as Maggie Ibrahim points out:

> The principle, or position, which link immigrants and the demise of the nation, is that cultural differences threaten the existing way of life. It is thus seen as rational to preserve one's culture through the exclusion of the other cultural group. This negative attitude toward migrants should be understood as racism. (Ibrahim 2005, 166.)

This is the face of 'new racism'. Once one group has been labelled as 'the Other', it is presented as the enemy – the source of threat and danger, the cause of a large part of day-to-day problems in the society. This forms the second element of the definition of 'governmental xenophobia': the enemy should be dehumanised in order to achieve further justification for its different treatment. As Jock Young stressed:

> This process of resentment and dehumanisation allows us to separate them off from the rest of humanity (us) but it also permits us to harden ourselves to deal with the special instance of a threat. We can act temporarily outside of our human instincts because we are dealing with those who are acting inhumanely. This technique of neutralisation permits the transgression of our general prohibitions against violence. (Young 2007, 35-36.)

In addition, a 'suitable' enemy is one that never dies – it can (and should) be attacked constantly, it can be undermined (authorities have to produce results), but it cannot be ultimately defeated. This fight can be carried on and used for political gain (Christie 1986). Thus, the immigrants fit this role perfectly. For many years they have been portrayed as the ones who threaten our (European) culture, lifestyle, economy, and are coming after benefits, which are and should only be ours. To prevent this threat the governments stepped up efforts in order to protect their citizens and launched a campaign aimed at fighting migrants.

This leads to the third element of the definition of 'governmental xenophobia' – the actions taken towards the problem, to challenge it, deal with it. In modern democratic and liberal states the only way for governments to act is to make their actions legal and legally legitimate. This approach can be unfold in two different type of actions. At the one hand, governments could refuse to take any legal steps, and as a result leave some groups out of legal protection. The very good example here could be undocumented migrants on whom themselves and on their exploitation we (as societies and governments on our behalf) turn a blind eye, denying them any rights (Noll 2010). On the other hand, special legal provisions for fighting migrants had to be created. They serve as a justification of actions undertaken by the governments who explain that the law requires them to act against 'the Other'. The practice of implementing the policy of 'governmental xenophobia' proves that most suitable legal instruments are stipulated in criminal law and could be easily adopted to migration law – broadened and changed when necessary (Zedner 2013). That's why criminalisation of 'the Other' is a necessary step on the path towards gaining better control and assuring the public opinion that the government is struggling with the enemy.

Undoubtedly, the highest incidence of cases which we have dubbed 'governmental/state xenophobia' can be observed in the Global North countries in the periods of election campaigns when exploiting the negative emotions and social fears of 'the Other' may bring the most tangible electoral dividends. That such strategies indeed produce real political benefits is well demonstrated by the election results, both at the level of nation-states and at the EU level.[1] This phenomenon is directly correlated with the fact that many mainstream political parties adopt the rhetoric of extremist forces; as a result, the European political populism is constantly growing, and manifests itself mainly in the general rejection of the principle of equality of treatment, and in the more and more overt hostility towards migrants and refugees (Gerard 2014; Goodman 2017; Klaus et al. 2018). At the same time, hitherto fringe parties have entered the political mainstream, only slightly changing

[1] See the analysis of the European Humanist Federation available on http://ec.europa.eu/justice/events/assises-justice2013/files/contributions/24.europeanhumanistfederationtheeuandthechallengeofextremismandpopulism_ehf_e.pdf.

their rhetoric and symbolism: they have, for instance, begun to apply modern methods of communication, and abandoned the most direct uses of racism, xenophobia and homophobia, also identifying some deeply felt social concerns, at the same time offering populist and radical solutions, especially to the problems concerning immigrants (Vysotsky & Madfis 2015).

Consecutive public opinion surveys in the European states demonstrate some very disquieting data concerning the attitudes towards minorities. The old, 'traditional' racism has become mixed with the new forms of xenophobia addressed mainly against immigrants and refugees. Equally disquieting, and not unrelated, are surveys which show a level of dissatisfaction with democracy and its institutions (Gottfried Report 2014). For example, the Eurobarometer polls of 2003-2011 prove that up to seventy-five percent of respondents in the EU states declare their lack of trust in the functioning and programmes of political parties. It is against this backdrop that both the political incumbents and those who aspire to rule, adopt programmes, slogans and actions which can only be termed 'governmental xenophobia'. Simultaneously, as noted in one of the reports, in 2010, 'almost 70 percent of citizens follow news about immigration and integration "closely" while almost half said their vote choice would be influenced by parties' policies on immigration' (Goodwin Report 2011, 14). As a result of such political facts, citizens come to perceive (or consolidate their perceptions) immigration as one of the gravest and most dangerous social problems, they believe that there are too many immigrants, and that immigrants 'steal' the benefits that only citizens deserve; there is also a stronger support for border controls (IPSOS Report 2011; Klaus et al. 2018).

3. Creating 'the Other'

The society (or, more precisely, those who rule on its behalf) needs to legitimate distinctions created between different social groups, resulting in labelling one of them as the non-belonging "Other" who deserves a different, usually violent, treatment. In other words, the use of violence against 'the Other' should be justified and presented as just and appropriate. Hence it presents various arguments to justify the exclusion of a marginalised group, including those of religious (being the chosen nation), ideological (stemming from nationalism), linguistic (using degrading, ridiculing expressions to describe 'the Other'), or ethnic kind. The language sphere is extremely important in creating 'the Other'. Using derogatory terms to describe certain groups arouses prejudice against them within society and dehumanises them. This is what Hitler did referring to Jews as "vermin", as well as Stalin, when he spoke of 'kulaks' (Galtung 1969; van Dijk 2006; Holslag 2015). The face of symbolic violence 'may be invisible, but it has to be taken into account if

one is to make sense of what otherwise seem to be 'irrational' explosions of subjective violence' (Žižek 2008, 2).

Symbolic arguments from the sphere of culture are most often used while creating 'the Other'. The group that holds power puts its achievements before the achievements of other groups and so displays (or justifies) its supremacy, excusing the fact that other groups have social rules forced upon them or are excluded from the society. As a result of demonstrating the superiority of a certain culture, structural violence[2] used by the stronger group starts to be perceived by its members as right, or at least as less wrong. Using such violence is thus fully justified. Therefore, there is a shift in the perception of the acts of violence (mostly symbolic or structural, but consequently often leading to physical acts of violence) through ignoring the use of unlawful force. Such symbolic power bears particular significance since it creates social reality and its image only by making certain claims, while people who are subjected to this power firmly believe its legitimacy, often without critical reflection (Bourdieu & Wacquant 1992, 147-148). As a result, 'with the violent structure institutionalized and the violent culture internalized, direct violence also tends to become institutionalized, repetitive, ritualistic, like a vendetta' (Galtung 1990, 302).

A modern example of such a creation of an enemy are immigrants, and among them particularly refugees and asylum seekers. The British media have been giving the subject of refugees negative coverage for a long time, alongside politicians who use many ethnic slurs towards forced migrants. As a result, the very words *refugee* and *asylum seeker* have started to be used as insults amongst young people in Britain (Cohen 2006, xxi). Playing the asylum seeker card has started to be very popular among politicians in a number of EU states to achieve their political goals, especially after 2015 refugee and migration crisis. It was used in arguing for Brexit (Goodman 2017) or as a tool to win the elections or strengthen the political position of a political party, as in the case of Poland or Hungary (Nagy 2016; Klaus et al. in print). It seems that nowadays we found ourselves fully in the position described a few years ago by Zygmunt Bauman:

> Refugees are very embodiment of 'human waste' [...], 'asylum seekers' have now replaced the evil-eyed witches and other unrepentant evildoers, the malignant spokes and hobgoblins of former urban

[2] Structural violence is a kind of social injustice, created mostly by the division of power within society. It leads to unequal life chances, which leave both physical and mental traces. While physical violence can be described as a single event, structural violence is a process whose effects have been deeply ingrained (and are still being ingrained) into social structure so deeply that at times even groups subjected to violence, as well as perpetrators, may be unaware of it, and perceive its instances not as violent but customary and regular demeanor. Structural violence leads to objective consequences in the form of social inequality, frequently without subjective intentions (e.g. racist or sexist motivation) of individuals who cause them (Galtung 1969, 196-178).

> legends. [...] Nothing is left [for them] but the walls, the barbed wire, the controlled gates, the armed guards. Between them they define the refugees identity – or rather put paid to their right to self-definition, let alone to self-assertion. (Bauman 2007, 41, 43.)

The current situation, hence, is not surprising at all. For many years foreigners in the Global North countries have been perceived as 'unwanted' and treated as pictured by Bauman. In 1990s migration started to be:

> [...] identified as being one of the main factors weakening national tradition and societal homogeneity. It is reified as an internal and external danger for the survival of the national community or western civilization. This discourse excludes migrants from the normal fabric of society, not just as aliens but as aliens who are dangerous to the reproduction of the social fabric. (Huysmans 2000, 758.)

To keep 'the Other' away, walls and fences were build and places of custody (called detention or guarded centres) to imprison immigrants (only because they were undocumented) were established.[3] This trend is continuing and expanding towards more countries (Karamanidou 2015; Klaus 2017).

The instruments of enforcing the strategy of 'governmental xenophobia', even though used mostly against foreigners – the migrants, are also implemented towards another category of minorities, who have been part of European societies for many centuries, living here legally and peacefully the Roma. The type of hostility and demonisation of that group is not significantly different from the treatment of migrants: the main difference may lie in the fact that, as far as the Roma are concerned, there are at the moment almost no special categories of crimes 'tailored' for them (although we could identify some of those practices in the past)[4]. And yet, statistics of detentions, arrests and

[3] And in some cases the process of making them undocumented is observed. It is again a state strategy targeting migrants that makes process of legalisation extremely difficult. And at the end of this process migrants are punished, although they are victims of the process of illegalisation (Bauder 2014).

[4] One should add though a particular example of bans on begging, which is not openly directed against Roma but in practice serve as a measure tailored for this minority group. As indicated in one of the reports on the issue: "Only four countries include an explicit begging ban in their national legislation: Greece, Hungary, Italy and Romania. And in some countries, bans on begging are unconstitutional: for example Germany and Italy. However, many countries punish begging under their Penal Codes, or as actions that 'breach the peace' and are therefore disrupting public order. In Germany, Italy, France, and Poland there are specific conditions under which begging is generally forbidden, for example, begging with children, and in some cases, what is deemed 'aggressive' begging, or begging with a 'dangerous' animal (France). In Italy for example, the 'enslavement of older people or minors for the use of begging is also forbidden, in order to protect potential victims of such schemes". If we look at the bans on begging as an attempt of the governments not to counteract forced begging and abuse of the weakest by criminal groups but as an effort undertaken to eliminate Roma from the public

punishments of Roma people clearly indicate that it is a group which is targeted by relevant authorities for special monitories and punitive treatment (ECRI General Policy Recommendation, 3-4). The Roma are 'the Other' of Europe, being subjected to 'governmental xenophobia' in almost the same way as the migrants and refugees entering Europe from African or Middle East countries are.

A shameful fact is that most of the estimated 10-12 million Roma in Europe face marginalization, prejudice, xenophobia and discrimination in their everyday lives (EU-MIDIS 2009).[5] The slow progress in remedying these human rights violations is often being attributed to the insufficient involvement in improving the situation of Roma children, who are unable to succeed because of the hereditary disadvantages. As a result, shocking cases of abuse, humiliation and discrimination of Roma children are reported, leading to international protests but at the same time remaining unsolved as structural problems. After the sadistic behaviour of Slovak police toward a group of Roma children became publicly known (arrested Roma children were forced to strip and slap one another violently in the face in the police station), the responsible police officers were suspended (Nicholson 2009). But alarming questions remained unanswered: was this an isolated event or had similar violations taken place before? Did the police officers even fear disciplinary repercussions? Is there a serious oversight in training or instructing the police and, therefore, the responsibility for these actions lies higher up? The truth is that the general hostile, humiliating and disrespectful attitude of European societies towards Roma people allows for shocking situations in which public hospitals in Slovakia do not hesitate to conduct forced sterilisation of Roma women with the aim of decreasing their fertility, on the basis of an alleged cultural tendency of the Roma to have too many children (ECRI Report 2009).

Also hate speech and hate crimes against Roma people, especially those coming from the Southeast Europe, have become disturbingly widespread in recent years. 'Gypsy pest', 'thieves', 'dirt' – these are common expressions directed at Roma by 'ordinary citizens' in much too many European states. Observing the rallies of masked hooligans 'cleansing' the neighbourhoods of Roma in Hungary (ECRI Report 2009), it is difficult not to think of the pre-war 'cleansing' of the Jewish population.

Roma people are also brutally exploited as victims of trafficking and forced into stealing, begging and prostitution in foreign countries – mostly old European democracies like Germany and France (EU-MIDIS 2009). This negative phenomenon remains to be one of the most alarming manifestations of violations of their rights. The traffickers

areas and "hide" their poverty and "otherness", than the bans can and should be perceived as one of the manifestations of the governmental xenophobia. FEANTSA Report (2015), p. 4.

[5] The number given by the European Commission. Data available on http://ec.europa.eu/justice/discrimination/roma/index_en.htm.

successfully cross the borders with Roma (mostly women and children), as they usually have easy access to legal documents, etc. The nature of the exclusion here is the lack of state protection offered to Roma victims of trafficking (including police and border control agencies), insufficient support for Roma families who are very often confronted with the criminal structures active within Roma communities, a small number of crisis intervention centres offering such counselling, weak cooperation on the international level on the issue of deportation of Roma detained because of criminal activities they were forced to take part in.

All examples provided above share a common denominator: the manifestations of discrimination, racism and xenophobia targeting Roma are the direct or indirect result of the governmental and law enforcement agencies actions, state policies and legal regulations disadvantaging Roma and making them even more vulnerable. Two most significant examples of 'governmental xenophobia' against Roma people are the conduct of the police forces and states' laws and policies concerning the education of Roma children.

Discriminatory and unlawful treatment of Roma by the police forces in many European states is a trend that has already been subject to a whole line of jurisprudence of the European Court of Human Rights (ECtHR).[6] The conclusions arriving from the analysis of the reported cases of such police behaviour indicate a very visible pattern, consisting of the belief of the police that they are simply allowed not to oblige the standards of treatment otherwise used towards majority-belonging members of the community (Śledzińska-Simon 2011, 28-29).

As noted in the 2014 Report of the European Commission on the discrimination of Roma children in education:

> Regardless of its shape or form, the segregation of Romani children amounts at least to indirect discrimination under the European Convention on human rights and fundamental freedoms. So far, no justification offered by States has been accepted by the European Court of Human Rights to justify it. There is no reason to doubt this structural discrimination would amount to discrimination under the Racial Equality Directive as well. (EC 2014 Report, 54.)

The attitude of the governments, lawmakers and law-enforcement powers that allow for discriminatory and brutal treatment of a particular minority, clearly amounts in the case of Roma to 'governmental xenophobia'. This attitude is rooted in perceiving Roma as the unwanted 'Other' who differs, alienates itself and does not belong to the ethnic majority, and in consequence – to the European society. This ethnic otherness allows police officers to act brutally while dealing with Roma and makes states segregate Roma children at schools exactly within the realm of 'governmental xenophobia'.

[6] This jurisprudence will be analysed in more detail in the subsequent part of this article.

4. Fighting 'the Other' with the tools of law

Once created, the enemy – 'the Other' should be fought and defeated. This is what the public expects and thus it becomes a task for the government willing to gain or keep the power. The latter has many instruments in its hand, the most powerful of which is the law. Making some group or its behaviour illegal, the government are obliged, as they claim, to deploy legal instruments and law enforcement agencies in fighting against those who violate the law. It is a founding idea behind criminalisation of migration and immigrants.

The very idea of criminalisation of members of certain groups mostly stems from the fact that they are perceived by a society as a source of crime. It is not a new phenomenon. Returning to historical comparisons, one may cite an example of authorities' fear of groups which were relatively free, because they had been deprived of social control, and were not so bound by limitations imposed by society. In other words, they lived according to their own norms, different from those generally accepted in a certain group. As such, they could threaten the authority of certain groups. Migrants have always been perceived as one of such groups. The same applies to Roma, with their nomadic lifestyle, a separate language and customs (Klaus 2015; Nail 2015; Sigona & Trehan 2011). Like vagabonds in 15th century who were persecuted and detained, and:

> the reasons for these proceedings lay not only in the offence committed, but in the simple fact of being without hearth or home. The vagabond was [perceived as] a criminal, on the one hand because he refused to work as God had ordained, and on the other, because vagabonds, as a group, committed crimes, since it was from their ranks and thieves, bandits and other villains were recruited. (Geremek 2006, 42.)

In the fight against 'the Other', created as the first act in the process of "governmental xenophobia", the state uses instruments of control that include familiar institutions previously tested as useful in implementing criminal law. To describe the results of 'governmental xenophobia' we can use the term 'crimmigration' coined by Juliet Stumpf. It is a perfect illustration of how two previously separate systems – immigration and criminal law – had become one. It was facilitated because both systems are based on a similar rule – the idea of inclusion and exclusion – which means separating certain people or groups from the majority of the society. As noted by Strumpf, 'both are designed to create distinct categories of people – innocent versus guilty, admitted versus excluded or, as some say, "legal" versus "illegal"' (Stumpf 2006, 380).

Crimmigration in practice manifests itself in three major areas. The first is the noticeable interference between criminal law, migration and

penalisation of migration laws as a new category of crimes (before the appearance of the phenomenon of crimmigration, civil or administrative penalties were mostly applied). One could find a new idea behind this process – the idea of prevention from a potential threat. Foreigners are detained just for breaking migration laws, not criminal ones. And it the process of detaining they are usually deprived of any procedural guaranties. Moreover, people are deported just because they are perceived by the law-enforcement or security services agencies as being able to commit a crime or as posing a threat to national security. And no proof of that (that complies with legal standard of proof) is requested (Zedner 2013). Secondly, crimmigration is visible in how organised immigration forces are becoming more similar to the law-enforcement forces (such as the police or the army), using the same or very similar means, for instance technical (e.g. guns, uniforms). Finally, the two systems come together in the case of actions taken against breaching immigration laws. In this regard, the most important element is keeping migrants in custody or under detailed surveillance (Stumpf 2006). Simultaneously, foreigners are often denied a number of rights and solutions guaranteed in the criminal law and available to citizens. It is particularly visible with undocumented migrants, who are often denied their basic human rights because of their unregulated status (Welch 2003; Dauvergne 2013).

As a result, foreigners are prosecuted for crimes which have been created solely in order to control them and which cannot be committed by citizens. Loïc Wacquant (1999), referring to the overrepresentation of African Americans in the American penitentiary system, calls migrants the 'blacks' of Europe, and notes that they are people who, in many Western European countries, are often and easily incarcerated. It does not result from a more criminal lifestyle of immigrants or a higher number of serious crimes they commit. It is the outcome of two factors. Firstly, the creation of a specific and new type of crimes which are migration crimes punishable by prison, and which can only be committed by migrants. Such crimes involve: irregular stay, illegal employment and the UK-specific example of 'no document offence' which means entering the UK without a passport or with a fake one (Aliverti 2013, 93-110). Secondly, as a result of mixing immigration laws with the criminal law, detention is used against non-citizens as a consequence of relatively petty crimes (e.g. fare evasion) only because they are committed by migrants. Consequently, what often happens is a practice of 'double sentencing'. First the immigrant is punished on the basis of criminal provisions for breaking the law and detained, and then administrative and legal means are used against them that usually result in their expulsion to the country of origin (see e.g. Gerard 2014; Klaus 2017). This way, people who deserve to be protected as refugees, are punished only because they entered a given state without possession of valid documents, which is considered to be illegal (Aliverti 2013, 144).

Moreover, the criminal law and the penitentiary system are used '[...] not only to curb crime but also to regulate the lower segments of the labour market and to hold at bay populations judged to be disreputable, derelict, and unwanted' (Wacquant 1999, 216). Such a process has been going on for centuries against representatives of various marginalized groups. What can be noted currently is the perpetuation of this phenomenon which continues to control certain excluded social groups and uses instruments of criminal law. They were designed, among others, to control workforce and, depending on economic conditions, 'introduce' them to, or 'remove' them from the market. An identical process happens in the US against undocumented migrants. During prosperity they remain unnoticed by public authorities – they become 'invisible'. They are allowed to live in the country because they are needed. This tactic changes drastically during periods of crisis. Migrants are then blamed for taking the Americans' jobs, and, in consequence, 'fished out', sentenced for even a trifling offence, which offers a ground and justification for their deportation (Welch 2003, 329-330).

One of the most severe manifestations of the policy of crimmigration is the idea of detention in dedicated 'detention centres'. This euphemism describes institutions which are de facto prisons; there are high walls with barbed wire, bars in windows, guards in uniforms. They are treated as prisons by the detained foreigners, who firmly object to having been placed there because they do not perceive themselves (and do not want to be perceived by others) as criminals. The time spent in detention is experienced by them as psychological torture, something truly humiliating (Bosworth 2014). The only grounds for such treatment is the lack of citizenship of the country 'the Other' arrived in:

> Non-citizenship emerges in this analysis as both a legal and an affective category. It is an identity through which the State governs individuals without recognizing them as subjects. [...] In practical terms, the only relevant legal status of a detainee is his or her lack of [...] citizenship. Citizenship, unlike a criminal sentence or conviction, is (meant to be) an absolute: you either have it and its attendant rights and obligations or you do not. There are no (legal) degrees of citizenship upon which decisions about where individuals could be detained or the length of their detention could be based. (Bosworth 2012, 134, 128.)

The grounds of such approach lie in the differentiation between 'us' and 'others', citizens and strangers. It is being explained by the membership theory, based on the idea of a contract between the authorities and people (sovereign) who are granted protection from the authorities. However, what is typical of the contract is the fact that it is binding only between the parties who accepted it. Thus, those who are not the parties of the agreement cannot demand rights equal to those of

citizens, and consequently are subject to mechanisms of crimmigration (Stumpf 2006; Walzer 1983, 52-63; see also Hammar 1990).

The consequences of widespread control of migrants are immensely negative. As noted by one of the authors:

> Social control aimed at illegal immigrants and criminal aliens we shall remain mindful of its various contradictions often reflecting on how self-defeating laws and policies perpetuate injustices against unpopular people who have few resources to defend themselves against ambitious enforcement campaigns, particularly those fuelled by moral panic, bigotry, and racism. (Welch 2003, 331.)

Such actions lead to multiple violations of basic human rights of migrants, detained in various closed institutions (prisons or detention centres), denied procedural rights which are evident for citizens in democratic countries (e.g. the right to legal representation). It is the result of particular discrimination, be it racial, ethnic, or national, which can be called 'institutional racism'. In states where such forms of racism function, the laws, customs and practices constantly contributing to inequality are passed, leading to the deprivation of certain privileges (Williams 1985; Anthias 1999). Such phenomenon can – and as we believe, should – be described as an expression and an effect of 'governmental xenophobia', to use Valluy's terminology.

At the same time, Roma people – despite theoretically belonging to the category of 'us' and being parties to the contract within the membership theory, also qualify as 'the Other' not only in the eyes of the societies, but also in the eyes, and actions, of the governments. In the case of Roma these consist mostly of multidimensional exclusion and deprivation of basic human rights, including the right to dignity, healthcare and education. There are no detention centres for Roma people, but as 'the Other', they face similar expulsion practices. When in 2010 the former President of France, Nicolas Sarkozy, decided to expel a few thousands of European Union citizens of Romani origin from the French territory (for a small financial compensation), the EU Commission itself intervened and most media did not hide their outrage.[7] The French public opinion, however, was divided – for some, the Roma with their nomadic lifestyle, darker complexion and a strange language, taking advantage of the state's aid, were perceived as unwanted strangers, as 'the Other', not adapted to the French social landscape. The measures used to expel them undoubtedly should be categorised as a manifestation of 'governmental xenophobia' and tools used in this situation demonstrate the implementation of the crimmigration scheme against Roma by the French government.

Moreover, what definitely allows for including Roma into the group of victims of xenophobic state actions, resulting in discriminatory

[7] See https://www.theguardian.com/world/2010/sep/14/roma-deportations-france-eu-disgrace.

treatment, is the exclusion of members of the Roma minority from a number of public services and essential social benefits as a consequence of their precarious administrative situation and often their statelessness, resulting in a lack of administrative documents attesting their legal status. As quoted by Olivier De Schutter, referring to the key findings of a 2003 Council of Europe report:

> Many Roma lack identity cards, birth certificates and other official documentation of their legal status. Such documents are often required to access public services. Statelessness, and the lack of status within the State of residence, as well as problems with documentation impede access to a range of rights including access to health care. These situations are created by a variety of factors, including information and financial barriers, eligibility criteria that have a disproportionate impact on Roma, and discrimination by local authorities. (De Shutter 2009, 21.)

The use of criminal law measures against Roma is also a noticeable issue within the discussion on the processes of othering of this minority in Europe. The measures used differ however from those applied in the case of migrants: no 'special' offences are being created with the aim of targeting Roma exclusively (with the exemption of bans on begging introduced in several European states), but the prejudice and myths of 'Gypsy criminality' as a distinguishing feature of the whole Roma population has led to different and discriminatory treatment by the police and judicial system when a Roma becomes a perpetrator of a crime or an offence. As pointed out by one of the authors commenting on this phenomenon in the case of Slovakia:

> There is a prevailing negative view by a part of the majority population, where mainly due to an increased crime relapse rate of the part of the Roma community the criminality problems are generalized and believed to regard all Roma. Unfortunately, these views can also be observed in the discriminatory practices of state officials. (Mlynek 2016, 7.)

It needs to be stressed that in fact the criminality rates in some Roma-inhabited areas are higher than in other parts of a given state or community. However, the crucial factor here is, as Dimitrina Petrova defines it, the understanding – understanding of the historical and social context: 'one cannot deny the existence of Roma crime, as righteous proponents of the "Romani cause" sometimes do. It is more important to understand its nature and to realize that Roma are also victims, not only of ordinary crime but of crimes with racial animus as well' (Petrova 2004).

5. 'Governmental xenophobia' and crimmigration as a violation of human rights

The problems discussed in this article have been identified by the organisations and institutions specialized in monitoring the protection of human rights by European states, as well as the judiciary element of the European human rights protection system, namely, the European Court of Human Rights. In the common opinion of all these bodies and institutions, practices that we qualify as manifestations of 'governmental xenophobia' (and sometimes additionally as crimmigration), constitute clear and unacceptable violations of human rights standards.

Analysing the human rights record of Italy, the ECRI stated (referring to the Lampedusa crisis) that it

> notes that the events in North Africa concern all European states and will undoubtedly necessitate some sharing of responsibilities. It nevertheless stresses that this situation does not relieve Italy of the obligation to ensure full respect for the rights of individuals coming under its jurisdiction. It notes with concern reports that – despite the Italian authorities' stated commitment to guaranteeing access to asylum procedures for any persons requiring it – dozens of people arriving from Egypt in mid-February were immediately returned to that country without having had the option of stating whether or not they wished to claim asylum. (ECRI 2012, 41.)

ECRI also recommended that Italy considers alterations to Identification and Expulsion Centres (CIEs) and the living conditions there; to ensure that all persons held in CIEs have access to medical care and investigate all allegations of ill-treatment in these centres and punish those responsible. In its report on the Netherlands, published in 2013, ECRI noticed with concern several legal provisions and examples of state policy that clearly indicate the willingness of the government to maximize the obstacles for immigrants and refugees. One of such examples were the provisions in the Civic Integration Act according to which a failure to pass the civic integration examination shall be a ground to impose a fine, or withdraw a temporary permit to stay. Another example given were the provisions of the Aliens Act providing that, in order for a refugee to obtain family reunification, the family must already have been formed at the time the refugee fled their country and the spouse of the refugee must have the same nationality as the refugee.

Another monitoring body – EU Fundamental Rights Agency has published an alarming report on criminalisation by the EU member states of migrants in an irregular situation and of persons engaging with them. FRA found that certain apprehension and reporting practices disproportionately interfere with fundamental rights of migrants in an irregular situation. The report indicated, among others, that

> national legislation may require public authorities and service providers to report the offence of irregular entry and/or stay to the law enforcement agencies. Because of a real or perceived danger of detection, migrants in an irregular situation often refrain from approaching medical facilities, sending their children to school, registering their children's births or attending religious services. (FRA 2014, 6.)

Both of the monitoring bodies mentioned above: ECRI and FRA, are also deeply concerned with the situation of Roma in Europe. In their reports they point out various examples of discrimination and hatred suffered by Roma and caused by the state actions, qualifying such actions as pure violations of human rights. Just as an illustration, two examples of deep concerns voiced by ECRI and FRA can be provided. In its fourth periodic report on Slovenia, ECRI noted with concern that:

> one of the most serious issues related to Roma housing in Slovenia is the lack of access to a safe water supply in or near some settlements. [...] According to one study, 17% of Roma obtain water from springs or neighbours, 2% from cisterns and 2% have no access to running water at all. Another report states that some communities are forced to walk considerable distances to collect water in jerry cans from petrol stations, cemeteries or polluted streams. [...] ECRI deplores this situation. Lack of access to safe drinking water has a direct negative impact on the health of the Roma communities concerned, as well as indirect repercussions on their everyday life in other areas, such as education and employment. It contributes significantly to perpetuating the cycle of poverty and marginalisation of the Roma population. (ECRI 2014, 28-29.)

The 2016 Second European Union Minorities and Discrimination Survey conducted by FRA revealed that:

> Some 80% of Roma surveyed live below their country's at-risk-of-poverty threshold; every third Roma lives in housing without tap water; every third Roma child lives in a household where someone went to bed hungry at least once in the previous month; and 50% of Roma between the ages of six and 24 do not attend school. This report underscores an unsettling but unavoidable reality: the European Union's largest ethnic minority continues to face intolerable discrimination and unequal access to vital services. (FRA 2016, 3.)

The 2018 FRA Report a 'persisting concern: anti-Gypsyism as a barrier to Roma inclusion', brings even more worrisome reflections on how the situation of Roma derogates, in particular when it comes to hateful, xenophobic attitudes against them. (FRA 2018, 10-14)

However, the most authoritative interpretation of the human rights violations caused by manifestations of 'governmental xenophobia' targeting both migrants and the Roma community, is to be found in the jurisprudence of the European Court of Human Rights.

In the so-called migration cases dealt with by the Strasbourg court, a number of state provisions and policies concerning detention of migrants have been challenged and found as violating the European Convention's standards. In *Mathloom v. Greece*[8], the applicant was an Iraqi national who had been kept in detention for over two years and three months with a view to his deportation, although an order had been made for his conditional release. The Court held that there had been a violation of Article 5 para. 1 (right to liberty and security) of the Convention. It found, in particular, that the Greek legislation governing the detention of persons whose expulsion had been ordered by the courts did not lay down a maximum period and therefore did not satisfy the foreseeability requirement under the Convention. In another case, that concerned a Syrian Kurd's detention by Cypriot authorities and his intended deportation to Syria after police operation on 11 June 2010 removing him and other Kurds from Syria from an encampment outside government buildings in Nicosia in protest against the Cypriot Government's asylum policy.[9] Overall, the Court concluded that there had been a violation of Article 5 para. 1 (right to liberty and security) of the Convention in respect of the applicant's entire period of detention. In particular, the Court stated that the only available recourse in the Cypriot domestic law that would have allowed the applicant to have had the lawfulness of his detention examined, was ineffective and thus contrary to the Convention: the Court held that the average length of available proceedings, eight months at the relevant time, was undoubtedly too long for the purposes of fulfilling the right to have lawfulness of detention decided speedily by a court.

When it comes to Roma, in tens of its judgments the Court has so far clearly indicated particular patterns of state-imposed discrimination against them, as well as of states' non-reaction towards violence against Roma (including acts of violence and hate crimes committed by police forces). Along with the practice of the facto forced and automatic segregation of Roma children at schools[10], the ECtHR found on

[8] *Mathloom v. Greece* (no. 48883/07).

[9] *M.A. v. Cyprus* (no. 41872/10).

[10] See among other cases where the ECtHR indicated the systemic problem of state-enforced segregation of Roma children, on the basis of state-sponsored laws that have a disproportionately prejudicial effect on Roma children: *D.H. and Others v. the Czech Republic* (no. 57325/00), *Horváth and Kiss v. Hungary* (no. 11146/11) , *Lavida and Others v. Greece* (no. 7973/10). In *Lavida* the applicants were restricted to attending a primary school in which the only pupils were other Roma children. The Court held that there had been a violation of Article 14 (prohibition of discrimination) of the Convention taken in conjunction with Article 2 (right to education) of Protocol No. 1, finding that the continuing nature of this situation and the state's refusal to take anti-segregation measures implied discrimination and a breach of the right to education.

numerous occasions the existence of a systemic problem with the treatment of Roma minorities in a number of European states (Śledzińska-Simon 2012, 26-33). One of the most significant examples of cases examined by the Court where it clearly referred to facts that we identify as manifestations of 'governmental xenophobia', was the case of *Stoica v. Romania.*[11] During a clash between officials and a group of Roma, the 14-year-old applicant, a Romanian national of Roma origin, was allegedly beaten by a police officer despite a warning that he had recently undergone a head surgery. The important part of the complaint concerned the allegation that the ill-treatment and rejection of the demand to prosecute the police officer who had beaten the applicant had been motivated by racial prejudice towards Roma people. The Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention, both under its procedural and its substantive limb: on the one hand, it found that the Romanian authorities had failed to conduct a proper investigation into the applicant's allegations of ill-treatment; on the other hand, Romania had not satisfactorily established that the applicant's injuries had been caused otherwise than by the treatment inflicted on him by police officers. The Court further held that there had been a violation of Article 14 (prohibition of discrimination) of the Convention taken in conjunction with Article 3: neither the prosecutor in charge of the criminal investigation nor the Romanian Government have presented proof that the incident had been racially neutral; on the contrary, the evidence clearly indicated that the police officer's behaviour had been motivated by anti-Roma racism.[12]

What should be stressed in particular is the fact that the ECtHR has turned out to be the only effective judicial mechanism of stating the cases of pattern-like, systemic discrimination and violence targeting migrants and Roma, where the state is either not reacting in a way consistent with the human rights protection standards and its obligations, or where the state itself is implementing laws and policies contrary to such standards, and, according to our classification, belonging to the category of 'governmental xenophobia'.

6. Concluding remarks

One would be tempted to imagine that in the Western democracies which have been, for decades, the architects and participants of the international system of human rights protection, based as it is on the respect for human dignity, on prohibitions of discrimination, and on combating all forms of intolerance, the phenomenon of governmental or

[11] *Stoica v. Romania* (no. 42722/02).
[12] Other similar judgments of the ECtHR include: *Cobzaru v. Romania* (no. 48254/99), *Škorjanec v. Croatia* (no. 25536/14), *Nachowa and Others v. Bulgaria* (no. 43577/98 and 43579/98).

state xenophobia is simply impossible to exist. Even more so, when we take into consideration Europe's history in 1930s with numbers of similar behaviours and legislations preventing liberal states from inflows of Jews from Nazi Germany, such as borders closures, incarcerating refugees from the Third Reich, or compulsory expulsions to Germany (Caestecker & Moore 2010). But it appears that the temptation to manage and orchestrate social fears in order to use them against a group defined as the common enemy is, despite the echoes of history, often too hard to resist nowadays. The benefits of implementing these strategies, also by means of criminal law, seem to prevail over the very real dangers produced as a result, such as the consolidation of xenophobic and racist social attitudes, depicting 'the Other' as an enemy or violating basic standards of human rights protection.

The awareness of these dangers, and in particular of the mechanisms which trigger such phenomena, is the key to reflecting about the much-needed change. It is also – perhaps particularly – important for those societies which have only recently become, or which are yet to become, the destination for 'the Others': migrants, refugees, asylum seekers (Klaus 2017). They need to bear in mind lessons from the past, like the concept of moral panic introduced by Cohen in 1972. In his own words we could define a phenomenon as moral panic when:

> A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people (...). Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic passes over and is forgotten (...) at other times it has more serious and long-lasting repercussions and might produce such changes as those in legal and social policy or even in the way the society conceives itself. (Cohen 2006 [1972], 1.)

This idea explains the mechanisms of creating panic in societies by inculcating anxiety in people's perception, and it was used to fuel the 'fear of crime' (Garland 2008). Now "regular criminals" have been replaced by the 'criminal Other' that serves the same purpose of spreading fear and exclusion, also with the instruments of law.

In his excellent piece on why human rights fail to protect undocumented migrants, Gregor Noll (2010) analysis a hypothetical example of Anna, a school-aged child of undocumented migrants, and whose parents are facing a dilemma or rather a fear of being reported to the authorities and possibly, deported from the territory of a host state, if they decided to enrol Anna to a local school. Keeping in mind all differences between the situation of Anna, an undocumented migrant, and another Anna – a girl from a Roma community who attends a local

school, as the only Roma child in the classroom, one can easily list all kinds of discrimination, prejudice and obstacles Roma children are facing while enrolled into public schools with the majority of non-Roma kids. All this results in various violations of human rights of minority groups.

As the governments of many European states are turning towards xenophobic and nationalistic attitudes and policies, the only real solution to the problems caused by the practices of 'governmental xenophobia', and crimmigration in particular, seems to be found today within the European (but also universal, UN-based) human rights protection systems. These practices result in multiple violations of human rights and should be considered as non-compliance with states' obligations arising from human rights protection treaties. Holding states accountable may eventually lead to ending the policy of othering in law and through law. Thus, all methods of enforcing this accountability should be involved. In particular, and as the example of Roma rights prove, strategic litigation in front of the European and universal human rights judicial bodies can serve as a helpful tool of establishing legal standards concerning practices and policies of states vis a vis individuals belonging to the most fragile minority groups, undocumented migrants and refugees being a prime example. Additionally, and on another level, more scholarly work and literature should engage in the phenomenon of crimmigration and governmental xenophobia, building the core analytical structure for counteracting human rights violating behaviour of those in power. The present article should be seen as just a modest attempt to achieve this goal.

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‘Barbarians’ and ‘Radicals’ against the Legitimate Community? Cultural Othering through Discourses on Legitimacy of Human Rights

Dorota Gozdecka*

This article focuses on the mutations of rights from instruments of inclusion to instruments of exclusion. It focuses on multiple exclusionary interpretations of legitimacy of international human rights law that create and propagate otherness. The text analyses the understanding and role of ‘legitimate community of rights’ in contemporary crises of recognition and critically evaluates how this notion excludes those deemed too different to belong. The article does so primarily in light of managing religious difference and argues that European human rights regimes have created two distinct categories of dissidents seen as subversive and *a priori* excluded from the protection of rights – the ‘barbarians’ and the ‘radicals’. This analysis begins with a discussion of the theoretical notions of rights and legal legitimacy and their application in contemporary human rights case-law. It subsequently theorises the consequences of legitimising a homogenously constructed ‘community’ as the ultimate authority and its impact on reversal of the emancipatory potential of rights.

* Senior Lecturer, Australian National University.

1. Introduction

A Europe bound by a common set of rights and inclusive of all communities and identities seemed to be the ultimate objective of European integration processes (TEU, Preamble; ECHR, Preamble). Rights and principles of inclusion have been expanding rapidly to become overarching principles of constitutional regimes, European human rights law and European Union (EU) law. The jurisprudence of the European Court of Human Rights (ECtHR) within the framework of the Council of Europe (CoE) and the ultimate inclusion of rights in the Treaty of Lisbon promised a seemingly mighty weapon in protection of diversity.

Yet, to the disillusionment of many, these legal developments have not prevented the emergence of new forms of cultural racism (Lentin & Titley 2011, 49–84), the crisis of recognition discourse also known as so-called 'post-multiculturalism' (Kymlicka 2010; Vertovec 2010; Gozdecka, Kmak & Ercan 2015) and new forms of othering (Gozdecka 2015). Developments such as minaret bans, face-covering bans or the recent burkini bans have shaped a picture of constant crisis rather than a strengthened commitment to diversity. In this crisis, discourses and discussions of the legitimacy of contemporary international and supranational rights regimes have unexpectedly contributed to cultural othering. While the legitimacy of rights is an issue of great importance, constant preoccupation with who has the right to decide about our rights propelled the emergence of tensions leading to a struggle between different notions of a legitimate community of rights. This in turn resulted in the reversal of the logic of rights leading to multiple exclusionary legal developments restricting the rights of some communities (Gozdecka 2015, 2015a). These legal changes reflected the discussion on who is the most legitimate community to legislate and enjoy rights.

This article analyses the understanding and role of legitimacy discourses in contemporary crises of recognition visible in European rights regimes and critically evaluates the development of emerging homogenising notions of a community authorised to legislate rights. It further draws on the idea of paradigm and excluded subjects developed in my earlier work (Gozdecka 2015) and expands it to argue that fixation with legitimacy led to creation of otherising tools allowing for cultural marginalisation of groups and identities deemed unworthy. These othering tools resulted in the creation of two distinct categories of dissidents seen as subversive and dangerous to the legitimate community of rights – the 'barbarians' and the 'radicals'. I argue that instead of guaranteeing legitimacy of rights, these discourses have served as a defence of established cultural hegemonies, *a priori* excluding some subjects from protection of rights. My analysis begins with a discussion of the theoretical notions of legal legitimacy of rights

and the role of the community in legitimating processes and subsequently moves on to discuss their application in the contemporary human rights case-law of the ECtHR. It then critically evaluates the construction of legitimacy of rights derived from the idea of a homogenously constructed 'community'. Further it illustrates the impact of these discourses on the reversal of the emancipatory potential of rights in judicial decisions concerning culturally sensitive questions of freedom of religion. Finally it engages in an effort to suggest an alternative form of legitimacy focused not on the community but on the emancipatory potential of rights. This alternative, drawing on Levinasian ethics, suggests that reconstructing the emancipatory potential of rights is possible with a focus on responsibility for alterity and emancipation rather than a homogenously defined legitimate community.

2. The expanding rights regimes of Europe and the problem of legitimacy

From the drafting of the European Convention on Human Rights (ECHR) to the inclusion of rights in the jurisprudence of the European Court of Justice (ECJ, later the Court of Justice of the European Union – CJEU) and the ultimate recognition of the Charter of Fundamental Rights of the European Union (Charter) rights have taken their place as a cornerstone of European democracies and the foundations of democratic communities. Since adoption of the Treaty of Lisbon, rights have become legally affirmed as values that Europeans share in common:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail (TEU, Article 2).

The expansion of the overarching idea of rights and their importance for Europe and Europeans has unsurprisingly resulted in a rich debate on their legitimacy and relationship in domestic, international and European legal systems. Famously and on many occasions Jürgen Habermas has discussed the legitimacy of rights and their role for the community, both local and international. In a Habermasian model rights are legitimate only if they are the outcome of public deliberation by all who could possibly be affected by them and could express their consent and opinion in the process of their creation (Habermas 1993). But at the same time rights as deeper values provide a basis of legitimacy for the politics of the international community. Having said that,

Habermas sees rights as expanding beyond the immediate polity and, drawing his theory of rights on the idea of Kantian peace, he conceives of them as a legitimate basis for international peace. The legitimacy of rights at international level is conceived of as an extension and a logical consequence of the constitutional rule of law (Habermas 1998, 199). In this supranational model, power politics are curtailed by judicial powers operating in a functional global public sphere bound by a set of human rights (Habermas 2009, 124). It is not only that international human rights are legitimate as an extension of domestic deliberation processes but at the same time they also serve as legitimating tools conceived of in deliberative processes on an international level.

Having gradually acquired the role of legal fundamental principles, the question of legitimacy of rights has been rephrased to the question of their role as the very tools of legitimation (e.g. Dworkin, 1978). For instance Kaarlo Tuori's three-level model of law (Tuori 2002, 193–194) sees rights as deep legitimating sources of changeable legal norms. Rights belong to the deepest structure of law and are seen as the most basic categories among other fundamental principles. At that deepest level Tuori envisions that rights are similar in a majority of legal systems and may play an important role in legitimating surface level norms in a process called legitimacy by justifiability (Tuori 2002, 245). Law on the surface level, according to Tuori, is normatively legitimate if and only if it can be legitimated through principles from the subsurface (middle or deep) levels.

But emphasis on the legitimating role of rights has not stopped the debate on the mutual relationship between different legal regimes securing rights and the respective communities responsible for those regimes. The discussion of this relationship has been polarised ranging from the vision of different rights regimes as a structure of mutually reinforcing legal orders (Pernice 2008) to the vision of rights as existing in a potential state of conflict (Sweet 2009, 245). The emphasis on possible conflict that might include issues of incompatible rights and diverse protected interests propelled the search for another potential source of legitimacy. After all, legal contestation in problematic cases could lead to a situation where domestic, international and European judicial organs become a battlefield of influences (Lasser, 2009). The resolution models for these conflicts have focused on the role of courts and international mechanisms of judicial enforcement (Sweet 2009, 245) but were not always able to resolve the possibility of a far-reaching conflict of interest. The search for legitimacy has therefore led scholarly discourse further into scrutiny of the role of the political community in legitimating rights.

3. What rights for which community?

In the diverse landscape of possibly conflicting rights regimes, inquiry revolves around the central question: 'who constitutes the community best legitimising rights regimes'? While the discussion on the community and rights is complex and involves multiple tensions between liberalism (e.g. Rawls 1993), communitarianism (e.g. Walzer 1990) and other theories attempting to preserve the emancipatory potential of rights for those marginalised (e.g. Douzinas 2000), the European discussion went in a slightly different direction: considering the impact of rights for a post-national community. Models of European post-national cosmopolitanism, seeing rights as quintessentially legitimating sources, ascribe to them the role of unifying moral values capable of binding different members of the European body in spite of their differences and creating a feeling of common awareness and belonging to a post-national community. Jürgen Habermas in his famous 'Why Europe needs a Constitution', written at the time of the failed debates concerning the European Constitution project, assigned just such a role to the Charter of Fundamental Rights, arguing that:

> This new awareness of what Europeans have in common has found an admirable expression in the EU Charter of Basic Rights (...) The Charter goes beyond the limited view [of market integration] articulating a social vision of the European project. It also shows what Europeans link together normatively (Habermas 2004, 27).

But this vision does not solve the possibility of conflict between different rights regimes. It also risks being overtly Eurocentric and based on universalising and exclusive notions (Delanty 2002, 349) consequently disregarding basic societal disagreements concerning law and notions of rights (Delanty 2002, 248).

The thin nature of the international community has been also challenged as lacking the appropriate legitimacy for independent delineation of rights (Besson 2011; 2006). Perceiving the international community as incapable of appropriate legitimacy has shifted conceptualisations of a legitimate community to a domestic level. For instance, according to Samantha Besson rights can be legitimate only if in a minimal way they match an existing set of domestic human rights (Besson 2011). Likewise, according to Joseph Weiler the definition of human rights often differs from polity to polity. Since these differences reflect fundamental societal choices and are formative for different communal identities, rights must have their own distinct 'flavour' (Weiler 2009, 74). Not unlike Besson and Weiler, Bellamy has also frequently insisted that European citizens need to have a say in defining their rights (Bellamy 2008; 2006). The European public sphere, according to Bellamy, is not yet operative and thus cannot reflect rights

adequately. For rights to acquire appropriate legitimacy people must take part in decision-making processes that determine their rights (Bellamy 2008, 607).

Seeing the immediate political community as the only legitimate legislator of rights was not of course meant to construct any exclusionary notions of a community. Yet, as with any search for essence, the unfortunate side effect of these discourses has been the ultimate narrowing and homogenisation of the idea of a community. The notion of a political community seen as the only legitimate source of rights risks was not conceptualised in the vein of those who sought a definition of a community based on an expression of reciprocal power sharing and fair minimisation of exclusion by virtue of birth, cultural or religious belonging (Benhabib 2002, 148). Instead, the essentialisation of community that occurred replaced this diverse vision with a vision of an entity focused on homogeneity and preoccupied with unconditional power to decide whom to include and whom to exclude from the community and what follows from protection of rights (Gozdecka 2015, 339–340).

Lentin and Titley call this type of community domocentric (from *domos*, a place of home) and identifying it as a homogenising body politic based on a distinction between 'us' and 'them' and emphasising a place of 'natural belonging' (Lentin & Titley 2011, 206). The domocentric community is a democratic community in its narrowest understanding based on the sheer numerical majority. While the rule of the majority is one of the defining features of democracy, multiple scholars have attempted to add nuance to this narrow understanding by focusing on protection of minorities (Kymlicka 1995; Patton 2005) or construing the idea of a community which defies essentialist approaches (Nancy 1991; Agamben 1993). The domocentric community, however, ignores any such nuances and is preoccupied with constructing a coherent version of 'us' that can be contrasted with many other communities and identities. In its search for essential definition, the domocentric community positions itself against any other entity endangering its essence, be it the European community, cultural or religious minorities, migrants, or even some individuals. What follows notions of rights legitimated by a domocentric community are likewise based on exclusive and narrow notions. When coupled with a homogenous sense of domocentric community and its identity, 'legitimate' rights can be used as tools for framing certain lives as more or less worthy of protection, a process observed in another context by Butler (Butler 2009, 7). Bringing rights 'closer' to their respective communities has often resulted in protection of the cultural 'essence' of a community and deployed rights-based notions to 'exclude and stratify the less desirable' (Lentin & Titley 2011, 206). The resurgence of the domocentric national community has invaded the discourse on legitimacy and found an expression in multiple exclusionary developments within and beyond the strict domain of

rights (Gozdecka 2015). The less desirable is framed as the Other in the delineation between 'us' and 'them'. While the visibly different become the first target in this process, the delineation does not stop there. The excluded foreignness mutates and I argue that it can take on two dimensions.

Most frequently the Other continues to be symbolised by those traditionally perceived as 'barbarians' (Brown 2008, 149–175; Douzinas 2013, 56) – communities and identities whose claims are presented in terms of culture that possesses 'them' rather than culture that is controlled by 'them' (Brown 2008, 187). The notion of a barbarian echoes the historical barbarian invasions and operates with the logic of defending the 'civilised' from unwanted intrusion by those considered a threat to it. The domocentric community focuses first on drawing a distinction between the 'civilised' and the 'barbarian' but it does not stop there. As the process of identifying the essence continues, the contemporary exclusion from protection of rights eventually expands beyond the simple contrast of 'civilised' liberalism and 'barbaric' cultures. In the end it is driven by a perception of conflict and danger to the domocentric community coming from any side, including the inside. Those excluded may come from cultures framed as 'barbaric' or may be of foreign origin, but they may also be those parts of the community who appeal to cosmopolitan notions legitimating rights and supranational visions of community (Gozdecka 2015, 337–339). Those who appeal to cosmopolitan notions of rights in their struggle with 'tradition' or the 'moral views' of the majority are seen as another type of threat – one from the inside. Those who cannot be classified as barbarians are instead seen as 'radicals'. Radicals are not obviously foreign, but the danger they represent for the domus lies in their lack of attachment to the essentially defined values of the domocentric and homogenously constructed community. In some sense this danger is even more serious than that coming from the side of the 'barbarians' for radicals are typically the foreshadowers of revolutions (e.g. Calhoun 1982; Meyerson 1995). Radicals announce a break from the *status quo* and a need for a drastic departure from the familiar and the known in which the domocentric community finds comfort. The danger of the radical lies in their capacity to appeal to various non-domestic values, including values of transnational formations, to challenge the imagined homogeneity of a narrow notion of political community (Brown 2008, 187). However, contemporary notions of the domocentric community legitimating rights are so narrow that they leave no room for either culturalised 'barbarians' or community-breaking 'radicals'.

The 'radicals' and 'barbarians' of today are those put in opposition to 'paradigm subjects' (Gozdecka 2015) of a liberal nation state constituting the most legitimate form of domocentric community. Constructed as a threat to the values, security, laws and rights of a liberal nation state, 'radicals' and 'barbarians' must unconditionally yield

before an exclusive reading of 'constitutional tradition', 'moral views', or even 'equality'. The emerging exclusive competence of the domocentric community to regulate areas of cultural conflict leads to otherisation imposed on the basis of 'unexamined prejudices, ancient battles, historical injustices and sheer administrative fiat' (Benhabib 2004, 178). As a result, 'radicals' and 'barbarians' must all yield before the homogeneous and domocentric national community and stand in an uneven position *vis-à-vis* the state.

Unconditional protection of the interest of domocentric communities reverses the idea of legitimacy based on unity in difference, common history or rights. Contrary to hopes for the emergence of an ethos of pluralisation (Delanty 2002) or unity in rights (Habermas 2004), bringing rights closer to their respective communities began an era of otherisation through the discourse of legitimacy. In this discourse, 'barbarians' and 'radicals' remain perpetually excluded from the realm of rights whereas the 'legitimate' community whose boundaries are continually narrowing remains both the bearer and the sole source of rights. In the following section I illustrate how these notions have entered the jurisprudence of the ECtHR and how the Court has employed the notions of legitimacy and community in an otherising and homogenising manner.

4. The fusion of othering and legitimacy discourse in judicial practice of rights

Not surprisingly, the attention given to the legitimate community has become focal in cases dealing with culturally contested issues. In its jurisprudence concerning such cases, the European Court of Human Rights (ECtHR), as the most prominent European judicial organ dealing with issues of rights, quickly demonstrated a shift acknowledging the strong position of the traditionally understood community.

Cases that have directed the reasoning of the Court into the path of discussing the legitimacy of the community through majoritarian notions have dealt with a range of culturally contested issues, among others a face-covering ban (*S.A.S. v. France* 2001), access to abortion (*A, B and C v. Ireland* 2010) and IVF (*S.H. and Others v. Austria* 2011), the display of crucifixes in public schools (*Lautsi* 2009) or publication of faith-related posters (*Mouvement raëlien suisse v. Switzerland* 2012). While seemingly different, these cases were selected due to their strong emphasis on the entitlements of a legitimate community and strong otherisation of those seen as excluded from it. While the margin of appreciation doctrine employed in these cases is familiar (see e.g. Yourow 1996) and has been used in multiple earlier cases such as those related to morality or blasphemy (*Handyside* 1976; *Otto-Preminger Institut* 1994) three main differences can be distinguished between the

earlier cases and the recent ones. Firstly, the cases come after strong emphasis on religious and cultural pluralism expressed both by the Council of Europe and the ECtHR, each emphasising that this pluralism is a value that is an important asset not only for the majority but also for minorities (*Buscarini* 1999; *Grzelak* 2002; *Zengin* 2007). Furthermore in current cases emphasis on the privileges of the community has been presented through a lens of a conflict of rights that channelled judicial argumentation towards differentiation between 'legitimate' organs capable of deciding about core majoritarian views and 'illegitimate' minoritarian views. Certainly, not all views and lifestyles are protected under the articles contested in all these cases, and the balancing of appropriate delineation often happens while weighing what is 'necessary in a democratic society' or which rights of others were infringed because of the applicant's views or their manifestation (see more: Kratochvil 2011). In these selected cases, however, another distinguishing feature is their speculative and unclear explanation of which rights, beyond the core majoritarian values of the perceived 'legitimate' community, were at risk by allowing these different practices to continue. In most of these recent cases the ECtHR created an area for its own non-interference with the competences of national authorities as representatives of the legitimate community in different cultural conflicts[1]. The Court also created the categories that I earlier called 'radicals' and 'barbarians'.

While more complex and harder to identify, the figure of the radical features prominently in the cases of *Lautsi*, *S.H.* and *A.B. and C*. Meanwhile, it is easier to distinguish the presence of the figure of a 'barbarian', as has been observed in many earlier cases (Gozdecka 2015; 2015a; Jackson & Gozdecka 2013). The *S.A.S.* case analysed here is chosen to illustrate the most recent refinement of this category. The last case illustrates a fusion between both figures and shows how speculative evidence can be used in reasoning, distancing the applicants from their community. Since the category of barbarians has frequently been explored (Brown 2008; Jackson & Gozdecka 2012). I will begin the analysis with the cases that construct the radical – a figure harder to pinpoint and more difficult to understand when considering otherising practices.

In the famous case of *Lautsi v. Italy*, dealing with the obligatory display of crucifixes in all state schools in Italy, the reversed judgment focused little on the requirements of pluralism but instead focused on

[1] This focus noticeably modified the Court's reasoning and approximated it to the reasoning characteristic of another European judicial body, namely the CJEU. The CJEU, being traditionally the ground for contestation between conflicting legal regimes, has in the past engaged in considerations on the appropriate regime for legitimating rights. The cases of *Lautsi v. Italy A.B. and C. v. Ireland*(*A, B and C v. Ireland*, 2010) and *S.H. v Austria* (*S.H. and Others v. Austria*, 2011) explicitly focused on competences, equating them with legitimacy. In these culturally loaded cases the margin evolved from a tool allowing a certain leniency towards Member States in determining local understandings of rights to a tool delineating areas of exclusivity of state competences.

the ECtHR's legitimacy to judge in these culturally sensitive cases. In not so many words, the Court underlined its own lack of legitimacy to judge on these matters as an organ of the international community and shifted the responsibility back to the local community by stating that '[i]n principle it is not for the Court to rule on such questions, as the solutions may legitimately vary according to the country and the era' (*Lautsi* [Grand Chamber] 2011, para. 68). However, it was the famous concurring opinion of Judge Bonello that revealed the full otherising potential of this approach to legitimacy. Bonello emphasised among others that '[i]t is for the Italian authorities, not for this Court, to enforce secularism if they believe it forms part, or should form part, of the Italian constitutional architecture' (para. 2.9). Certainly this approach would not differ from others in similar cases if the judge did not turn the applicant herself into the 'illegitimate' other who attacked the very heart of the legitimate community:

> May it please Ms Lautsi, in her own name and on behalf of secularism, not to enlist the services of this Court to ensure the suppression of the Italian school calendar, another Christian-cultural heritage that has survived the centuries without any evidence of irreparable harm to the progress of freedom, emancipation, democracy and civilisation (para. 1.6).

The cultural other was framed as a radical not entitled to protection of her beliefs under the principles of pluralism. The mere action she took in defence of her beliefs was seen as inherently illegitimate and violating the cultural core of the community she lived in (Gozdecka 2015, 337). This turn towards prioritising the morals and traditions of the community found clear expression in the Court's 'view that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State' (*Lautsi* [Grand Chamber] 2011, para. 68). The majoritarian tradition itself became the source of legitimacy, allowing disapproval of action taken by a *status quo*-breaking 'radical'. As is evident from Judge Bonello's opinion, the focus remained solely on what the other can do to the majoritarian tradition and how this danger impacts the legitimate mandate of the community to delineate rights for all. The inclusion of difference or the rights of the applicant were hardly a consideration when this approach to legitimacy prevailed in the Grand Chamber's reasoning.

The Court approached legitimacy similarly in the case of *S.H. v. Austria*, dealing with access to assisted procreation. Through fear of creating 'illegitimate' and 'cosmopolitan' notions of rights, the Court emphasised that its 'task is not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating matters of artificial procreation.'(*S.H. and Others v. Austria* 2011, para. 92). The homogenising vision of the legitimate community

was, on the other hand, expressed through a focus on the national authorities' mandate 'to give an opinion, (...) "on the exact content of the requirements of morals" in their country' (*S.H. and Others v. Austria* 2011, para. 94). This view unnaturally presented the community as a domocentric and internally homogenous moral space. Plurality of moral views, on the other hand was dismissed by reference to the legitimate authorities, presented as the sole custodians of 'morals' in their country. The action by the applicants was again not seen as a matter of their rights but as a matter of the legitimacy of their local community to define and narrow rights in accordance with the morals defined by them.

The fusion of the legitimacy discourse with the discourse of morals of a national community was also refined in the case of A.B. and C. v Ireland, where the Court acknowledged the role of the 'profound moral views of the majority of the Irish people' (*A, B and C v. Ireland* 2010, para. 241) in limiting access to abortion. These 'views' have very recently turned out to be, in fact, contrary to that assumption (McDonald, Graham-Harrison & Baker 2018). In this decision, however, the Court referred back to legitimacy grounded in protection of those presumed majoritarian moral views on abortion. The alleged existence of those views was construed as a legitimate aim in a democratic society and evaluated as striking a fair balance between diverse moral views in a pluralistic society. Even the fact of a growing European consensus on access to abortion was found insufficient to minimise the state's margin of appreciation in the case of protecting the 'profound moral views' of the majority. Again, the legitimate authorities became custodians of the moral core of the community defended against community-breaking 'radicals'. These three cases clearly delineated the protected core of a domocentric community and shielded it from radical cosmopolitan notions of rights. The applicants became illegitimate 'radicals' appealing for the protection of illegitimate cosmopolitan notions and contrasted with legitimate subjects of rights – those adhering to the majoritarian moral views constituting the core of the community.

In contrast to 'radicals' the case of S.A.S. v France (S.A.S. v. France, 2014) refined the long existing category of 'barbarians'[2]. S.A.S. is the most recent case in a long saga of cases concerning religious head covering before the ECtHR (e.g. McGoldrick 2006). In the previous cases the Court construed 'barbarity' in diverse ways, including the applicants' alleged disrespect for women's rights. This framing was particularly strong in Dahlab v. Switzerland (Jackson & Gozdecka 2012) where the applicant was informed that the decision to wear Islamic

[2] *Dahlab v. Switzerland,* European Court of Human Rights, Decision, Application no. 42393/98, 15 February 2001; *Sąhin v Turkey,* European Court of Human Rights, Grand Chamber Judgment, Application no. 44774/98, 10 November 2005; *Şefika Köse and 93 Others v Turkey*, European Court of Human Rights, Decision, Application no. 26625/02, 24 January 2006; *Dogru v France*, European Court of Human Rights, Judgment, Application no. 27058/05, 4 March 2009.

covering was 'hard to square with the principle of gender equality (Dahlab v. Switzerland 2001, p. 13). In contrast, the Court in S.A.S. abstained from the simplistic contrasting of the practice of covering with gender equality and emphasised that 'a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant' (S.A.S. v France 2014, para. 119). Despite this sudden change in approach, the decision nonetheless maintained the category of the 'barbarian' by employing another type of othering discourse. Given the growing entitlements of the domocentric community, the Court strengthened the mandate of the legitimate community by linking it with the comfort of the majority. As a result the S.A.S. case created a new exclusionary tool that can be employed in the discourse of the legitimate community and the 'barbarians' within – the 'requirement of living together'. Despite acknowledging that wearing a face covering may have legitimate objectives under freedom of expression and freedom of religion (S.A.S. v. France 2014, para. 119), the very final statements of the judgment dismiss these objectives and expand the mandate of the legitimate community to decide whether certain clothing creates discomfort, thus impacting the conditions of 'living together'. In other words the legitimate community, in regulating the practice of veiling, can decide whether the practice discomforts the majority. The mere discomfort of being exposed to cultural difference suffices to restrain the practice of the minority. The category of 'living together' (S.A.S. v. France 2014, para. 142) while presumably meant to be 'neutral' created another strong entitlement of the majority to create norms for the 'barbarian' other and prevent practices that disrupt core majoritarian morals. The legitimacy and homogeneous understanding of community morals once more merged in an effort to erase otherness and secure the cultural hegemony of the majority to decide about the shape of protected rights. The alleged social discomfort caused by dealing with a person who covers her face not only fails to embody a legally protected right that would justify the limitation under the Convention but is also highly speculative.

The last case selected here is the most problematic as it fuses the figures of the 'barbarian' and the 'radical' into one. While distanced from the legitimate community, these two blend into one and present the same danger to a domocentric cultural core. In the case of *Mouvement raëlien suisse v. Switzerland* (*Mouvement raëlien suisse v. Switzerland* 2012) the applicants – whose community of faith takes as its objective establishing contact with extraterrestrial life – published a range of posters with large yellow characters on a dark blue background with extraterrestrial faces stating 'The Message from Extraterrestrials' and the address of the Raelian Movement's website. Below another phrase claimed that 'Science at last replaces religion'. Due to its classification as a 'sect' the Movement was refused authorization to place the posters on the streets. The main objection from the police was the fact that the

Raelian Movement in principle rejects democracy but advocates government by the most intelligent ('geniocracy') and that potentially and theoretically some of the passages from the writings of the founder Raël could advocate paedophilia by saying that children are sensual beings. While the last objection appears to be serious and in contrast to the 'discomfort of the majority', giving potential grounds for limitation of rights, the police objection was based on passages rejected by the movement itself. Raelians also emphasized they were running an anti-pedophilia association devoted to fighting pedophilia in the Catholic Church – Nopedo – and had a strict policy of rejecting all members on the slightest suspicion of any intention to abuse minors. The objection was thus entirely hypothetical and based on the police opinion that certain passages speaking of children as sensual beings could potentially and theoretically lead some potential adults to commit acts of child abuse. While these adults would be unlikely to join the movement due to its strict denouncement of abuse of minors, the authorities nonetheless prevented publication of the posters.

In its final judgment the ECtHR once more framed the margin of appreciation doctrine as a matter of competence, underlining that:

> In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied upon (para. 60).

The Court averred that states enjoy a broad margin of appreciation in 'matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion' (para. 61) and found the posters to only incidentally refer to social or political ideas, where such a margin would according to the Court be narrower (para. 62).

Once more developing the doctrine of the margin in the direction of legitimate competences of a community, the Court insisted that states are in a better position to assess the situation due to 'continuous contact with the vital forces of their countries' (para. 63) and declined its own competence to evaluate and 'interfere with the choices of the national and local authorities, which are closer to the realities of their country' (para. 64). The Court declined to 'substitute its own assessment' for that of national authorities (para. 66). In assessing proportionality the Court referred to the domestic courts' findings and raised a moral objection to the teachings of the Raelian Movement, which according to the Court include 'offensive' (para 5.6) ideas such as 'promotion of human cloning, the advocating of 'geniocracy' and the possibility that the Raelian Movement's literature and ideas might lead to sexual abuse of children' (para. 71). While the movement's strong anti-paedophilia position was not addressed, the reference to ideas that 'might' lead to abuse

immediately positioned the applicant as an uncivilised 'barbarian' dangerous to the legitimate community. The Court also ambiguously stated that 'a distinction must be drawn between the aim of the association and the means that it uses to achieve that aim' as if implying that the Raelian movement was indeed contributing to possible child abuse. Other ideas, while departing from the community's attachment to democracy and the legal ban on cloning, were on the other hand seen as too 'radical' and community-breaking. The dual 'barbarian-radical' fusion justified the limitation on posters for the protection of the 'morals and rights of others' (para. 72) and for 'pressing social need'. Classifying the Raelians as a sect and as the Other allowed for dismissal of the organisation's defence and limiting its rather benign form of self-promotion to protect the local community from political ideas deemed too dangerous (para. 74).

5. The asymmetric relationship between the dissident and the community of rights

The Court's abstention from examining national laws addresses the problem of legitimacy by placing rights closer to their respective local communities. However, as illustrated above, the Court also redefined the local community as entitled to exclude difference for reasons of protecting its cultural core. Even though the local 'legitimate' community was placed as close to defining rights as possible, the exclusionary focus expressed the core of 'domopolitics' (Lentin & Titley 2011) signifying the emergence of cohering practices leading to affirmation of a place of 'natural belonging'(Lentin & Titley 2011, 206). The site of a domus is protected from risks coming from sources both internal and external. The emphasis on cultural certainty of 'moral views', 'traditions' or 'requirements of living together' marks a protectionist attitude against both those deemed too radical as well as those deemed too barbaric to fit in. As evident particularly in the IVF and abortion cases, the adapted notion of 'community' holding legitimacy to decide about rights does not reflect the diversity of the actual local community but instead reincarnates the traditional notion of an undiversified national political community. It echoes the Schmittian emphasis on the unity of social multiplicity as the foundation of the nation state (Schmitt 1999, 201). This unity in the Schmittian account would depend on the existence of a community based on homogeneity and guaranteeing an identity link between the governed and the governing (Schmitt 1999). If that account of community is taken as a foundation in the search for legitimacy, rights regimes 'exclude what is alien and other. Community as communion accepts human rights only to the extent that they help submerge the I into the We (...)' (Douzinas 2013, 59).

When the validity of a claim challenging the cultural *status quo* is questioned on the basis of legitimacy, the otherised barbarian or radical is positioned in striking asymmetry *vis-à-vis* the legal system. This framing conceals 'the deep roots of strife and domination' and presents the conflict in terms of 'law and rights themselves' (Douzinas 2013, 61). The denial of ability to challenge the cultural hegemony presents law and rights as a sphere beyond contestation. Whereas 'radicals' and 'barbarians' must always justify why they wish to do something different from the majority, the majoritarian system in question is always legitimate and freed from that expectation (Simmons 2011, 70–71) in such a vision of a 'legitimate' community of rights. When the very existence of legal regulation serves as a means of silencing the rights claims of 'radicals' and 'barbarians' and when law is presented as a place beyond contestation, cultural hegemony can never be successfully challenged. When appeals to the cultural rights of these dissidents are seen as an attack on the fundamentals of law rather than a simple challenge to the essentialist vision of a domocentric community, the individual is no longer a bearer of rights. Instead it is the state and its values that are protected from the dissident in the name of 'tradition', 'moral views' or 'secularism' or 'requirements of living together'. This asymmetric position of the dissident *vis-à-vis* quasi-rights of the domocentric community (Gozdecka 2015) transforms rights regimes from 'relative defence from power to modality of its operations' (Douzinas 2013, 51).

6. The domocentric community as an extension of the self

As the contemporary rights case-law illustrates, a domocentric community can be defined by self-referential and exclusionary definitions leading to exclusivity of rights. This capacity of a community as a collective to exclude and self-define mirrors the relationship between the Self and the Other lying at the foundations of Western philosophy (Cornell 1986). While development of self-understanding and self-evaluation has been understood as allowing the egocentric individual to adopt a position vis-à-vis the other (Benhabib 1992, 72), the legitimacy mechanism illustrated above mirrors this egocentrism of the individual. A domocentric community focusing on self-referential notions of rights mirrors the egocentricity of the self and creates limits of itself by excluding otherness in a very similar way to that described by Derrida – by drawing the boundary of what the self is not (Derrida 1998, 197). When human rights law and jurisprudence act as a system drawing limits and excluding the other in the very same way, as does the self, then rights must exclude by definition. A narrow reading of community and its 'identity' parallels the individual's egoistic need to reaffirm their authenticity (Taylor 1992, 50). Whereas in the act of self-definition individualism 'forgets that every person is a world and comes into existence in common with others' (Douzinas 2013, 59), reliance on a self-

referential definition of community compels the other to merge into the common essence. By assuming self-referential and exclusionary definitions, the community can erase the 'individuality and concrete identity of the Other' (Benhabib 1992, 158) in the same way an egocentric self does. In contrast to the individual, the community constructs the other in opposition to the community's self-proclaimed characteristics and expels every identity that does not fall within the self-definition.

Therefore the state's employment of rights in the name of a domocentric community will 'interpret and apply them, if at all, according to local legal procedures and moral principles, making the universal the handmaiden of the particular' (Douzinas 2013, 60). Reference to particular national, cultural or economic groups most often translates these groups into elements of a dominant majority (Patton 2010, 69). This paradoxical employment of the notion of a community may lead to what Balibar calls the absolutisation of the community (Balibar 2013, 24). In an absolutised domocentric community, rights become merely competing claims prone to be employed in the interest of the existing model of the community and serving no more than rejection of the possibility of resistance (Balibar 2013, 24–25). When the concept of a 'community' is employed to suppress multiplicity in the name of cultural or national essence, the legitimising nature of a community disappears. The 'community' which submerges difference into homogeneity can no longer legitimise. The legitimising process is a process aimed at preventing abuses of power. A 'community' whose central aim is to protect itself from otherness signifies the modality of the operations of power, not a counterbalance to power. Rights employed in defence of the homogeneity of the 'community', on the other hand, become tools curtailing the possibility of emancipation and resistance. As a consequence, rights mutate and result in reversal of their original idea: from emancipation to domination and from liberation to exclusion and fear.

7. Can the emancipatory potential of rights be reconstructed?

Employing rights in cultural battles and the tendency of rights to retaliate against themselves may lead to pessimistic conclusions. But must human rights be of no more than symbolic value? (Zizek 2005) If human rights remain mere tools in struggles for power, (Zizek 2005) those struggling for recognition are left without alternative legal means of contestation. As Benhabib recalls, the critical project of postmodernism can be instructive about political traps and roads that lead foundational thinking astray, but it should not lead to retreat from Utopia altogether (Benhabib 1992, 230). Therefore, following Simmons, I would argue for constantly rethinking and constantly identifying roads

leading astray rather than abandoning the road in the face of the current crisis of rights (Simmons 2011, 28). Instead of abandonment, rethinking what has been identified as the potential of rights for empowerment (Kinley 2012) appears a useful solution, albeit certainly to some degree Utopian. Any possible reconstruction of that potential must focus on the notions of emancipation and resistance.

As pointed out by Levinasian-inclined thinkers, (Douzinas 2000; Simmons 2011, Gozdecka 2016) rebuilding the emancipatory potential of rights can be founded on the idea of responsibility and answerability. This rebuilding process can meaningfully respond to the problem of the exclusionary potential of rights based on the self and its self-definition (Lévinas 1994, 96). If we base the idea of a right on the Levinasian understanding of answerability, the right ceases to be seen as a privilege for Levinas asserts that instead of a privilege rights should be seen as a 'duty to the other for which I am answerable' (Lévinas 1994, 98). If the idea of an interest is replaced with the idea of a duty, the set of relevant questions changes. Rather than asking 'Who am I? What is my community?' and 'What is our interest' the first consideration is 'What am I answerable for?' This idea of rights puts the other before the self in an act of inexhaustible responsibility (Lévinas 1994, 98). The responsibility-based reading of Lévinas is almost contrary to the Gerin Report's reading of the philosopher, where face-covering was discussed at length by the French Parliament in reference to Levinasian theory (Gerin Report 2010). Despite explicit references to Lévinas, the understanding of the face – used by Lévinas as the source of responsibility – was reduced to the visibility of the face to the Self with little or no regard to responsibility for the other. The other was instead accused of withholding communication and violating the Self (Gerin Report 2010, 116), something rather contrary to what Lévinas meant while discussing the importance of the face. For Lévinas, the first duty is responsibility for the other, even the other that the Self may not be able to understand, rather than the centrality – or preventing the discomfort of – the Self. The act of defining who I am or what our cultural tradition is becomes perhaps not entirely irrelevant, but certainly secondary. Rights seen as duties relieve the binary tension between the self and the other and the community and its Other. A community based on answerability instead of drawing limits for itself and its interest appears to have a more promising potential for legitimating rights.

It is nonetheless important to bear in mind that the act of responsibility can be fulfilled only in the presence of a third person (Lévinas 1991). If the Self or the community becomes responsible and answerable for the rights of the other, the central difficulty remains: how can we reconcile responsibility for the rights of all the others? How can responsibility respond to the marginalisation of some – but not all – others? Relying solely on the notion of responsibility leaves us with this central ambiguity of Levinasian theory. Criticised for its ethical and

purely philosophical focus, Levinasian theory on its own may lack the potential to effectively translate answerability into the realm of the political (Badiou 2001; Simmons 2011, 90). Can ethical philosophy provide the answer to the question how to respond to diversity? (Smith 2009, 68–71.)

The first problem to solve is translation of the abstract ontological focus of the self and the other to the domain of rights and politics. Remaining on an abstract and general level, ethics challenges modernity but lacks the potential to respond to the demands of real life (Smith 2009, 71). While Levinasian reformulations focus on the generalised Self and the Generalised other, the sole idea of a right as a duty rather than a privilege can be translated to the concrete Self and the concrete Other. The shift from the abstract to the concrete allows for true contextualisation of rights in the context of difference (Benhabib 1992, 159). This standpoint of the concrete Other is necessary for a community to understand whose voices have been marginalised. Without this realisation 'the other cannot interrogate the original violence of the system's institutions' (Simmons 2011, 124).

The second difficulty is the relational nature of responsibility. After all, even the standpoint of a particular Other does not offer a sufficiently illuminating and effective tool in the realm of the political. The central dilemma remains the unsolvable nature of responsibility towards a third person. Even a duty to be responsible for the rights of the concrete Other requires an answer to the question how to be responsible for all the concrete others. The end result of responsibility for all the Others may be identical to that of equal freedom for all. Equal responsibility – just as equal freedom – may lead to the emergence of incompatible claims and 'possible war' (Lévinas 1994, 95) between different responsibilities. Consequently responsibility as the foundation of rights, just like freedom, may lead to the impossibility of emancipation.

8. Responsibility for emancipation as a form of legitimacy

Simmons asserts that, to prevent hegemonic developments, democracy must be at the service of the other and so must human rights institutions (Simmons 2011). But due to the difficulties noted above with translating the ethical to the political, taking the viewpoint of the other requires defining hegemony and emancipation. Rebuilding the emancipatory logic of rights in the sphere of the political requires complementing the responsibility-based understanding of rights by elaborating the notion of emancipation.

The tendency of rights to exclude and the danger of 'wars' between freedoms or responsibilities necessitates consideration of a minoritarian premise in the jurisprudence of rights. Minoritarian notions of emancipation from hegemony range from the focus of a revolutionary

event, through freedom from racial hegemony to dissent of those marginalised (Hewlett 2010, 1–3). Yet in the contemporary world hegemony no longer signifies single-axis relations of power (Balibar 2013, 22). Hegemonising discourses may stem from systemic structures, political concerns of legitimacy, new forms of cultural racism as well as from other sources as yet unidentified. Thus for responsibility towards the other to be a meaningful reconstructive effort, it is essential to adopt a notion of emancipation responding to the changing and often diffused structures of power that may marginalise the other in diverse ways. Balibar suggests that tentatively the answer to who is the one to be emancipated must depend on the local situation, the cases considered, the type of issue and the choices made by the agents themselves (Balibar 2013, 22).

In this diffused landscape of emancipatory calls, the value protected must be the freedom to think or act differently. Rosa Luxemburg's understanding of freedom and the nature of revolutionary events provides us with a useful guideline on how to contextualise an emancipatory call in a setting of diverse hegemonic powers:

> Freedom is always and exclusively freedom for the one who thinks differently. Not because of any fanatical concept of 'justice' but because all that is instructive, wholesome and purifying in political freedom depends on this essential characteristic, and its effectiveness vanishes when 'freedom' becomes a special privilege (Luxemburg, 1918, 69).

Only freedom from hegemonic power of those in a minority has true emancipatory potential. Emancipation is thus the freedom of a minority[3] that seeks to break the constraints of a system that marginalises and oppresses it. The established 'freedom' of those in power is not a value requiring protection. Its emancipatory potential vanishes in the instant when majoritarian norms become institutionalised. The freedom of the majority in all circumstance has achieved its goal and can no longer be realised. It cannot emancipate because it has become translated into the dominant system. As if parallel to the Levinasian account, the freedom of the majority is no longer a freedom but a privilege for the 'I' and for the 'we'.

Thus the effort to reconstruct the emancipatory logic of rights requires framing rights as a responsibility towards the Other for the possibility of emancipation (Gozdecka 2015b). This notion of rights holds a promise of curtailing exclusionary battles between different communities and offers inclusive rather than exclusive discussions of rights legitimacy. Rights as a responsibility rather than a privilege and

[3] Deleuze and Guattari's understanding of minority is particularly illuminating in this context. A minority is not necessarily numerical but may instead be a numerical majority yet rendered less dominant. (Deleuze & Guattari 1980)

emancipation rather than establishment of achieved freedom promise effective entry to discussions on the polity or judicial organ best able to protect rights. In contrast, established freedom fossilises rights and prevents dynamic approaches. Instead of being a space for renegotiation, a domocentric and homogenous community becomes a static and stagnant structure upholding diverse forms of domination. This structure lacks the capacity to legitimate due to its inability to curtail power.

Rights understood as a responsibility for emancipating the other offer an alternative form of legitimacy. If we base rights on responsibility towards the Other for the possibility of emancipation, determining which polity, judicial system or institution is most legitimate need no longer to be based on potentially exclusive notions. Securing the most democratic source and remedy in the area of rights will depend on determining which polity, institution or judicial organ is best able to respond and prevent marginalising forces of diverse structures of domination. The organ, structure or system that will allow the voice of the other to be heard and best respond to the other's call for emancipation will be the best suited for legitimate intervention. Abstract notions of a legitimate community, collective identity or the position of rights between different legal regimes will never suffice to effectively respond to the call for emancipation. The legitimacy of rights is thus relational and requires full contextualisation of the agents and powers involved and a response to the question whose emancipation we are responsible for.

9. Conclusions

The analysis above does not aim to dismiss concerns over legitimacy altogether. Quite the contrary, its objective is to secure the democratic legitimacy of rights so that the dialogue between different communities occurs without recourse to antagonistic struggles and exclusive notions. These antagonisms result in no more than homogenising notions of a community and exclusion of those selectively framed as standing outside. These same antagonisms also silence dissent and fossilise communities into non-negotiable structures of hegemony. A homogeneous and domocentric community necessarily turns rights against those framed as a 'danger'. Legitimacy of rights should therefore be understood differently from mere privileges to decide on the shape of rights. The notion of a right based on the idea of a privilege will always necessarily result in the entanglement of rights with 'powers of the state' (Lévinas 1994, 96) and exclusive notions of a community. Therefore rebuilding the logic of rights is imperative for a discussion on their most 'appropriate' sources. Only rights understood as responsibility towards the other for the possibility of emancipation can result in legitimate

construction, application and adjudication of rights. The ontological question on the nature of a political community and its legitimacy must be preceded by the notion of responsibility and the role of rights as emancipatory tools. With these notions at the foundation, the question of legitimacy appears more complex than simple questions of competences and requires examination of who is best suited to respond to the emancipatory call of the Other.

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Othering through Human Dignity

Ukri Soirila*

1. Introduction

The concept of human dignity is rapidly assuming more influence in international, constitutional and human rights law. Although it is mentioned in the ILO's 1944 Declaration of Philadelphia and in the preambles of the key post-World-War-II documents, references to human dignity have recently multiplied in international, regional and national contexts. The Universal Declaration on Bioethics and Human Rights, for example, abounds with such references; [1] the EU makes it clear in its foundational documents that it is built on the value of human dignity;[2] the European Court of Human Rights (ECtHR) has confirmed that 'the very essence' of the European Convention is 'respect for human dignity and human freedom';[3] and constitutions adopted since 2000 tend to refer to it 'emphatically and repeatedly' (Daly 2013, 101, fn 1 at 206). Furthermore, human dignity is now commonly presented as the basis and ultimate aim of human rights (Habermas 2010, 464; Andorno 2009, 223; de Gaay Fortman 2014; Kleinig & Evans 2013, 539), and also features prominently in non-legal contexts such as faith-based ethical discourse (Rosen 2012, 3) and bioethics (Fenton & Arras 2009, 127–29). Given all this, it would seem, at least at first sight, that the language of human dignity could have increasing potential to counter some of the forms of 'othering' discussed in this Special Issue.

* Doctoral Candidate, University of Helsinki.

[1] Universal Declaration on Bioethics and Human Rights, UNESCO, 33rd Session of the General Conference, 19 October 2005.

[2] Art. 2, Consolidated version of the Treaty on European Union, OJ 2010 C 83/01; Art. 1, Charter of Fundamental Rights of the European Union, OJ 2010 C 83/02.

[3] *SW v. United Kingdom*, 21 EHRR (1995) 363, at para. 44.

Yet, the prevalence of the concept has also met with criticism. In particular, critics have argued that human dignity is a hopelessly vague concept, and as such is useless in terms of decision-making. My aim in this article, however, is to provide a rather different critique that does not focus on its potential inefficiency. I rather argue that the use of the concept may result in 'othering', despite the best intentions of those employing it. In so doing I attempt to go against the grain of most academic work done on the concept of human dignity: I do not ask what human dignity is, but rather what the concept *does* – or what is done with it – and what it produces. My primary argument is that it is best understood as a decision-making apparatus that can be used to connect various discourses, forces, and sentiments and direct them to achieve concrete purposes. As such, human dignity is an important and useful concept, but also potentially dangerous – especially from the perspective of this Special Issue – if it is approached uncritically. As I argue, those wielding the apparatus of human dignity must either assume some notion of an ideal human, thus excluding other forms of life, or try to do away with difference altogether, thus ignoring human particularities. In either case, the apparatus of human dignity implies its 'others'. Although this is true of most, if not all, legal concepts, I believe the effect is emphasized in the case of human dignity, given its abstract yet fundamental, almost theological nature and specifically the idea that not only it is the same always and everywhere, it is also superior to other legal concepts and principles.

The remaining sections of this article are structured as follows. Section 2 addresses the opposing arguments that human dignity is a useless concept and that is has a legally unambiguous meaning, the aim being to counter them by introducing the idea that human dignity is best seen as an apparatus. Sections 3 and 4 flesh out my argument that using the apparatus of human dignity almost inevitably results in 'othering'. Section 3 provides a brief genealogy of the concept and makes the case that even in its most contemporary usage it has not managed to shrug off the inherently hierarchical character of the archaic notion of *dignitas*, an early form of dignity. I argue in Section 4 that this hierarchical nature may result in 'othering', regardless of whether human dignity is used in an exclusive or an inclusive manner: in either case the 'othering' is probably an unintended by-product of well-meaning uses of the apparatus, although I would not be surprised to learn of cases in which it is used strategically to discipline populations through 'othering'. Section 5 concludes the article.

2. Human dignity as an apparatus

The fact that there are different usages of human dignity has sometimes been taken to mean that as a concept it is useless. Philosopher and bioethicist Ruth Macklin, for example, published an editorial in 2002

entitled ‘Human Dignity is a Useless Concept’ in which she argues that ‘appeals to dignity are either vague restatements of other, more precise notions or mere slogans that add nothing to the understanding of the topic’ (Macklin 2003). In a similar vein, Bagaric and Allan state that as ‘a legal or philosophical concept [dignity] is without bounds and ultimately is one incapable of explaining or justifying any narrower interests’, and as such ‘cannot do the work nonconsequentialist rights adherents demand of it’ (Bagaric and Allan 2006, 260). Others, such as Aharon Barak, defend human dignity, arguing that what might be unclear and vague to philosophers and other scholars might not be so among practising jurists, and especially judges. As he reminds his readers, judges do not enjoy the same kind of discretion that philosophers do, but ‘live in a legal framework, which determines rules on whose opinion is decisive and whose is not’ (Barak 2015, 10).

In my opinion, neither view gets it quite right. Where I do agree with the critics is that human dignity is an *indeterminate* concept, especially in regional, international and transnational contexts in which different legal cultures collide. Nevertheless, I do believe it is useful as a concept – at least for the decision makers who are able to employ the indeterminacy as well as the energy and hopes vested in it to help them legitimate their decisions. In contrast, then, to those who claim that human dignity is a useless concept, I would like to suggest that it is best seen as an apparatus (*dispositif*), more or less as that term is used in continental philosophy. I am aware of the philosophical discussion on the correct use and translation of the term, and wish to make it clear from the outset that I hope to avoid that debate as much as possible in this article: I do not make claims based on what precisely authors such as Foucault, Deleuze and Agamben mean with the term for example, or on which of these usages should be privileged over the others (Agamben 2009; Legg 2011; Bussolini 2010). What I do contend, however, is that describing human dignity as an apparatus opens useful perspectives on the functioning of the concept, even if I use the term only *roughly* in its ‘precise’ meaning.

A short introduction of the term apparatus is nevertheless in order. In an interview dating from 1977, Foucault gave what was perhaps his clearest definition, which he used in various contexts and in varying senses, but that nevertheless formed an important element of his thought throughout his work:

> What I'm trying to single out with this term is, first and foremost, a thoroughly heterogeneous set consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral, and philanthropic propositions – in short, the said as much as the unsaid. Such are the elements of the apparatus. The apparatus itself is the network that can be established between these elements [...9 by

> the term 'apparatus' I mean a kind of a formation, so to speak, that at a given historical moment has as its major function the response to an urgency. The apparatus therefore has a dominant strategic function [...] I said that the nature of an apparatus is essentially strategic, which means that we are speaking about a certain manipulation of relations of forces, of a rational and concrete intervention in the relations of forces, either so as to develop them in a particular direction, or to block them, to stabilize them, and to utilize them. The apparatus is thus always inscribed into a play of power, but it is also always linked to certain limits of knowledge that arise from it and, to an equal degree, condition it. The apparatus is precisely this: a set of strategies of the relations of forces supporting, and supported by, certain types of knowledge (Foucault 1980, 194–96).

Taking this excerpt as his basis, Giorgio Agamben helpfully summarizes Foucault's usage of the term 'apparatus' in the following three points:

> 1. It is a 'heterogeneous set that includes virtually anything linguistic and nonlinguistic [...] the apparatus itself is the network that is established between these elements'.
>
> 2. It always has a 'concrete strategic function and is located in a power relation'.
>
> 3. It 'appears at the intersection of power relations and relations of knowledge'(Agamben 2009, 2–3).

This, then, is more or less the sense in which I employ the concept of apparatus in my attempt to understand how the concept of human dignity functions. In other words, the former concept helps to foster in me the conception that, even though human dignity means nothing in the abstract, it is exactly because of this that it can collect together, or capture, a wide array of forces drawn from different discourses and practices, connect them and direct them to accomplish concrete results in concrete cases (Datta 2008, 296). Therefore, when I refer to the concept of human dignity as an apparatus, I aim most of all to highlight the fact that it has the power to make diffused, manifold, often contradictory forces and sentiments – especially sentiments – become operative, and to use them to accomplish strategic functions. In so doing, it not only reflects existing power relations, but also draws from and produces knowledge, in particular in the form of truths about 'the human'.

This capacity of human dignity to function as a decision-making apparatus is highlighted on the international level. Although some domestic legal systems already have rather crystallized ways of using the concept, the situation is completely different internationally given the collision among traditions and the lack of criteria determining which of them to apply, apart from particular preferences. This much becomes

clear, for instance, from the commonly cited distinction between autonomy-based and obligation-creating approaches to human dignity.

Autonomy-based usage is expressed clearly, for example, in two excerpts from the Israeli Supreme Court. It is stated in *Veckselbum v. The Defence Minister* that '[a]t the base of this concept [of human dignity] stands the recognition that man is a free creature who develops his body and mind as he sees fit',[4] and in *The Movement for Quality Government in Israel v. The Knesset* that: '[at] the center of human dignity are the sanctity and liberty of life. At its foundation are the autonomy of the individual will, the freedom of choice, and the freedom of man to act as a free creature.'[5] Such usage is also visible in the United States Supreme Court case of *Rice v. Cayetano*, for example, in which Kennedy J stated that an affirmative action measure was unconstitutional because it demeaned 'the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities',[6] as well as in a Slovenian case in which the Court held that forced medication constituted 'a most humiliating act and a degradation of the human being as a person, as it constitutes a deprivation of liberty or a deprivation of the right to decide about oneself.'[7] A further illustrative example is the Canadian Supreme Court's decision in *Sauvé v. Canada*, in which Justice Gonthier referred to the link between human dignity and autonomy as the basis of the entire criminal-law system: as he argued, 'it could be said that the notion of punishment is predicated on the dignity of the individual: it recognizes serious criminals as rational, autonomous individuals, who have made choices.'[8] Possibly the most paradigmatic example, however, is the US Supreme Court case of *Planned Parenthood v. Casey*, in which Kennedy, O'Connor and Souter JJ framed the abortion decision as one in which human dignity requires the abstention of the state thus:

> Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[...] Our precedents "have respected the private realm of family life which the state cannot enter."[...] These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of

[4] HCJ 5688/92, *Veckselbum v. The Defence Minister* [1993] IsrSC 47(2) 812, 830.
[5] HCJ 6427/02, The Movement for Quality Government in Israel v. The Knesset [2006] IsrSC 61(1) 619, 685.
[6] Cited in McCrudden 2008, 700.
[7] U-I-60/03-4-12-2003, Official Gazette RS, No. 131/2003 and OdlUS XII, 93 at para. 1, cited in Daly 2013.
[8] *Sauvé v. Canada* (Chief Electoral Officer), (2002) 3 SCR 519; 2002 SCC 68 (Gonthier J., dissenting at para. 73), cited in Daly 2013, p. 108.

> meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[9]

The autonomy-based approach to human dignity is therefore founded on the notion of humans as rational, autonomous beings in full possession of their bodies. The aim is to help the 'individual to take control over his life without any interference, or indeed any help, from others or from the state', and therefore 'surrounds the individual in a sort of protective sphere, and thus isolates individuals from each other' (Dupré 2003, 125).

By way of contrast, obligation-creating usage conceives of human dignity as something objective and independent of the desires of individuals. This is illustrated in the *Life Imprisonment Case*, for example, in which the German Constitutional Court stated that the freedoms guaranteed in the constitution were not those 'of an isolated and self-regarding individual but rather of a person related to and bound by the community', and the individual must therefore 'allow those limits on his freedom of action that the legislature deems necessary in the interest of the community's social life.'[10] Another well-known case that illustrates the non-subjective, obligation-founding character of the German approach to human dignity is the *Peep Show* decision:[11] the Federal Administrative Tribunal denied a licence for a peep-show on the basis that the show would violate human dignity, irrespective of the fact that the women acting in it had given their consent. In explaining its decision the Court held that because the significance of human dignity was beyond the scope of an individual, it must be protected even against the contrary wishes of the women performing in the shows, in that the will of those women differed from the objective value of human dignity. As Susanne Baer comments, the Court

> never asked the women why they were there; what they did, wanted, or had to do; or how they felt about it. The Court never inquired into the existence or nature of the activity, instead attributing what it perceived as harm. This harm was, then, a violation of specific morals rather than economic deprivation or sexual violence, both well-documented as aspects of prostitution. Thus, the Court used the notion of dignity to regulate rather than to liberate the women involved (Baer 2009, 458–59).

[9] *Planned Parenthood v Casey*, 505 U.S. 833 (1992).
[10] 45 BVerfGE 187 (1977). Cited in McCrudden 2008, p. 700.
[11] BVerfGE 64, 274 (1981), BVerfGE 84, 314 (1990).

A similar approach to sexual self-determination has also been taken by the Israeli Supreme Court regarding pornography,[12] and by the Constitutional Court of South Africa regarding prostitution. In deciding in the *Jordan* case that the prohibition of prostitution was not unconstitutional, Judges O'Reagan and Sachs JJ of the latter Court explained that "[e]ven though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished ... by their engaging in commercial sex work."[13] Finally, a French court held in the *Senanayake* case, dealing with blood transfusion, that

> The French understanding of autonomy is much narrower than the Anglo-Saxon one [...] it is the capacity to define and respect universal duties, laws, towards others as well as towards oneself as members of Humanity. [...] It encompasses an objective dimension, founded in the belonging of the individual to humanity, and leads to giving a greater importance, whenever a human value is at stake, to the universal standard over singular preferences.[14]

These examples imply that the concept of human dignity is indeed sufficiently indeterminate and empty to be filled with very different contents: it is not unheard of that both parties to the same case refer to opposing notions of human dignity (Möllers 2013).[15] However, this indeterminacy does not make the concept useless: it rather makes it flexible enough to be useful to decision makers for the legitimation of their decisions – decisions that have very concrete outcomes: a woman becomes or does not become a mother, an affirmative action programme is struck down, an individual loses her job, and so on.

The German Abortion decisions are particularly illustrative as an example of how human dignity can be used to legitimate difficult decisions. In 1974 West Germany passed a law that decriminalized abortion for women who agreed to take part in abortion-dissuasive counselling. A year later the German Constitutional Court had to give its decision in the *First Abortion Case* on the constitutionality of the law. Holding that the law was unconstitutional, the Court referred to the emphasis that German Basic Law puts on the protection of life and human dignity:

> developing life also enjoys the protection which Article 1(1) accords to the dignity of man. Wherever human life exists it merits human dignity; whether the subject of this dignity is conscious of it and knows how to safeguard it is not of decisive moment. The potential

[12] HCJ 5432/03, Shin v. Council for Cable TV and Satellite Broadcasting [2004] IsrSC 58(3) 65.

[13] *Jordan v. The State*, 2002 (6) SA 642 (CC), cited in McCrudden 2008, 706.

[14] M. Heers, conclusions, C.A.A. Paris, 9 June 1998 (1998) 6 Revue francaise de droit administratif, 1231-42, cited in Hennette-Vauchez, 2007, 202–203.

[15] See also Section 4 below.

> capabilities inherent in human existence from its inception are adequate to establish human dignity.[16]

Human dignity was therefore strongly linked to the interest of life, which the State had the duty to protect: the Constitutional Court stated that human life 'is the vital basis of human dignity and the prerequisite of all other basic rights'. As Chrisopher McCrudden aptly points out, '[b]y combining dignity with the state's duty to protect life, dignity became a technique whereby the court was able to apply stricter scrutiny to derogations from the state's duty to protect life and consequently restrict the rights of the mother' (McCrudden 2008, 716). The consequence was that once 'dignity entered the balancing calculus on the side of the life interest, the conclusion that the protection of the foetus's life must receive priority over the women's freedom was inevitable' (McCrudden 2008, 718–19). By only invoking the human dignity of the foetus, the Court was able to restrict the mother's self-determination.

Much changed, however, between the mid-1970s and the mid-1990s, when the Constitutional Court was supposed to deliver its decision in the *Second Abortion Case*.[17] The strict criminalization of abortion no longer matched social reality and public opinion. Nevertheless, the Court could not withdraw the priority given to life and human dignity, which it has declared time and time again to form the basis of the German legal system. The solution was twofold. First, human dignity was now attributed to both sides of the rights-balancing equation, with the result that the conflict became one between human dignity as the free development of (the woman's) personality and the human dignity of foetal life. Second, it was now stated that counselling was more effective in protecting life than strict criminalization could ever be. It was this combination that allowed the Court to depart from its earlier view. By dealing human dignity differently than previously between the parties to the case, the Court could arrive at a diametrically opposite judgment without departing from the priorities it had set for itself and for the whole German legal order (McCrudden 2008, 718–19).

3. Human dignity and hierarchy: a brief genealogy

My critique of human dignity is not that it can be used as a decision-making and legitimation technique, however. In this sense it is only a tool that facilitates the achievement of myriad outcomes, both desirable and undesirable depending on the context and the preferences of the commentator. I am rather concerned with the usually (but not always) unwanted and unintended consequences of using the apparatus – its by-products – and the effects of human dignity on knowledge production.

[16] Abortion Case, 39 BverfGE R 1 (1975), cited in McCrudden (n 13) 709.
[17] BverfGE 88, 208 (1993).

Given the abstract nature of human dignity on the one hand, and its symbolic weight on the other, any use of the concept tends to rely on 'some substantive ideal of what it is to be human, and what therefore counts as diminishing or degrading that humanness' (Phillips 2015, 80). As mentioned above, not only does it rely on some 'truths' about the human being, it also produces and reinforces them.

The cases mentioned above also support the claim that those applying the apparatus of human dignity also produce their own notion of what an ideal human is like and impose it on others. Indeed, what perhaps emerges most strongly from the cases is the creation of two different subjects of law (see also Urueña 2010, 106), or two images of a human being: one is individualistic, rational, always in control and clearly distinguishable from and immunized against other individuals and the society in his or her protective bubble; the other is more communal, first and foremost a member of his or her society and species, even to the extent of becoming completely enmeshed in and inseparable from the norms of the majority. The flipside of this kind of subject creation is that it also implies its 'other', that is to say it either implies a hierarchy between different forms of life or excludes some of those forms of life from the sphere of human dignity altogether. In this sense, the apparatus of human dignity is an apparatus of othering.

Drawing from both historical and theoretical perspectives, I aim in this section to provide a basis for the argument – which I flesh out in further detail in the next one – that the apparatus of human dignity often acts as an apparatus of othering. More specifically, my focus is on how the concept of human dignity has been used throughout its history, and I seek to extrapolate from that history certain theoretical points supporting the notion that human dignity can function as an apparatus of othering. The key point in the section is that all notions of human dignity comprise a certain hierarchical element that was characteristic of the ancient notion of *dignitas*. In making this point, I lean heavily on the work of Whitman and Waldron on the one hand, and that of Hennete-Vauchez, on the other (Whitman 2003; Waldron 2007, 2012; Hennette-Vauchez 2011). Whereas Whitman and Waldron argue that human dignity has undergone a 'leveling up' process, through which the once exclusionary concept now applies to everyone equally, its hierarchical nature tamed although not eradicated, Hennette-Vauchez counter-proposes that contemporary uses of human dignity, in fact, have more in common with its archaic forms than Whitman and Waldron would like to admit.

Dignity has been an openly hierarchical concept for much of its history. Its roots can be traced to ancient Rome and the aristocratic notion of *dignitas*. Roman social life was strongly based on honour, which was linked to the office that an individual held. Hence, *dignitas*, which derives from the office and not from the individual human being, was perceived to mean 'elevated position or rank' (Iglesias 2001, 120–

21). It was therefore not attributed equally to everyone, and was rather used as a term of distinction and applied only to the few. Used in this way, *dignitas* was not intrinsic and inalienable, but could be gained and lost. It was a relational concept that not only conferred certain powers but also entailed certain duties to behave according to one's rank (Van Der Graaf & Van Delden 2009, 155; Ober 2014). As Oliver Sensen writes, 'the sense in which something is elevated over something else [had] to be specified with each usage of dignity' (Sensen 2011, 75–76).

The concept of human dignity has gone through several transformations since ancient Rome. Even Cicero sought to universalize *dignitas* to apply to all human beings by using it 'to express the idea of human beings' elevated place in the universe' (Sensen 2011, 76). Nevertheless, while Cicero's definition of *dignitas* is certainly a step in a more egalitarian direction, it too relies ultimately on a hierarchy, namely the superiority of human beings over animals. Furthermore, given that human nature derives from reason, not every human being was equally 'human' (Sensen 2011, 78).

The same applies to Kant, who is sometimes hailed as the creator of a contemporary, universal notion of human dignity. Kant posits that human beings are superior to the rest of nature in possessing free will, and that the Categorical Imperative, the supreme principle of morality, commands one to universalize one's maxims by following its dictates - not because of some ulterior motive but because it is right. He refers to this prerogative over the rest of nature as 'dignity'. As he writes, 'this dignity [...] he has over all merely natural beings [...] brings with it that he must always take his maxims from the point of view of himself, and likewise every other rational being' (Kant 2002, Ak 4:438). Dignity is therefore dependent not only on reason, but also on its correct use. Kant, like the ancient Romans, associated dignity with duties – duties entailing being conscious of one's dignity and acting so as not to violate it (Sensen 2011, 81). Human beings enjoy dignity only if they fulfil these duties: 'morality, and humanity insofar as it is capable of morality, is that which alone has dignity' (Kant 2002, Ak 4:435).

More recently, many authors have claimed that we now have an egalitarian version of human dignity that is also fundamentally different from the Kantian vision. According to Sensen, the contemporary version is based on the notion that 'human beings possess the objective and inherent value property called "dignity", and because of this they can make rights claims on others.' Human dignity is thus a non-relational property, meaning that it cannot change or disappear depending on the situation in which human beings find themselves: each human being has an intrinsic and objective value that is higher than other values (Sensen 2011, 72).

The claim that human dignity is now completely egalitarian can be challenged, however. As demonstrated above, it is far from clear exactly what human dignity means when applied in practice, in situations in

which competing claims collide. It is therefore not surprising that it has proven very difficult to construct a truly universal, non-hierarchical basis of human dignity.

Indeed, even most of the authors who would declare that human dignity belongs to everyone have to assume some sort of hierarchy. For example, although J.Q. Whitman argues that contemporary dignity is egalitarian and universal, in contrast to former versions, he still identifies a clear link between them, arguing that the aristocratic notion of dignity was transformed to the contemporary one through a 'levelling process' that generalized the exclusive *dignitas* so that it now applies universally and equally to every human being. As Whitman writes, 'human dignity for everybody, as it existed at the end of the 20th century, means definitive admission to high social status for everybody' (Whitman 2003, 426).

Similarly, as Jeremy Waldron suggests, 'when we attribute rights to people in virtue of their dignity, we do so on account of some high rank we hold them to have.' However, this rank should not be that of some over others. Instead, we 'may be talking about rank of humans generally in the great chain of being. [...] Presumably in this ranking, plants are in turn inferior in dignity to beasts, and beasts are inferior to humans, and humans are inferior to angels, and all of them of course are inferior in dignity to God.' The main implication behind this kind of traditional conception of rank is that '*within* each rank, everything is equal'. Thus, Waldron purports to use the idea of rank 'to articulate an aggressively egalitarian position', in which humans 'are basically one another's equals, because denial of equality in this fundamental sense would relegate some to the status of animals or elevate some to the status of gods' (Waldron 2007, 216–18). Indeed, Waldron argues that there are still traces of the old notion of dignity in contemporary usage – traces that could help in building a coherent philosophical basis for the application of human rights and human dignity in law. Drawing from the work of Gregory Vlastos, Waldron points out that we still 'organize ourselves like a caste society but with just one caste, or like an aristocratic society but with just one rank (and a pretty high rank at that) for all of us'. He goes on to suggest that 'there may be a useful connection between the independent meaning of dignity, associated with high or noble rank, and the egalitarian claims about human dignity that we make in human rights discourse' (Waldron 2007, 221–22, 2012, 34–35).

Waldron's argument is characteristically sophisticated, and his emphasis on equality is very attractive. However, his curious ignorance of all things related to aristocracy that we should try very hard to abolish, instead of extending them to everyone, is less appealing (Herzog 2012, 114). This is however, in my opinion, not so much a fault in Waldron's argument as evidence of the fundamentally hierarchical nature of the concept of human dignity. Hennette-Vauchez has persuasively argued that even contemporary uses of human dignity tend to operate in the

mode of ancient *dignitas*: in the same way as the relation between the individual and *dignitas* was once mediated by the office that an individual could hold, the relation between the individual and human dignity is now mediated through the concept of humanity – or alternatively personhood, I would add. Hence, the fundamentally hierarchical nature of *dignitas* has not disappeared in the move to human dignity: on the contrary, its two key characteristics are retained in many instances. In other words, it can be gained and lost, and it imposes duties on those included in its sphere (Hennette-Vauchez 2011).

4. Othering

These two key characteristics also represent the two ways in which human dignity can operate as an apparatus of othering: it can be used to 'other' or may inadvertently cause othering by excluding some forms of life from within its sphere or by disciplining those who are included in it. It is worth emphasizing, however, that although these two forms of othering are separated here for the sake of illustration, they are in fact closely intertwined and derive from the same source.

The former form – othering through exclusion – is the more straightforward of the two. As argued above, whatever approach is taken to the concept of human dignity, its operation must, in practice, rely on an at least an implicit idea of its essence, be it reason, humanity, personhood or something else, and this notion of essence must imply its other, which is seen as somehow less dignified. This 'other' could be another species, but regardless of whether or not one holds on to the requirement of species neutrality and equality between species, the distinction may well not be easy to make – one could think of beginning- and end-of-life situations and some bioethical issues, for example. In most cases this peculiar construction, in which human dignity is mediated through another apparatus, hardly matters, and indeed remains securely hidden. Nevertheless, it starts to reveal its problematic face in limit-situations when the construction is pushed to its edge. Zones of indistinguishability tend to form in such situations, in which decisions ultimately rely on an exclusionary logic – decisions have to be made on who counts as a (legal) person and entail pushing others over the edge of thingness (Soirila 2016; see also Esposito 2012, 2015). In most cases this is an unwanted by-product of the operation of the apparatus of human dignity. Nevertheless, I would not be surprised to hear that in some cases it is also used strategically, to discipline and normalize the population (see Hennette-Vauchez 2007).

The second, interlinked, form of othering derives from the other key characteristic of *dignitas*. The archaic form of dignity did not differ from the ideal egalitarian notion of human dignity merely in excluding those who did not hold a certain office from the sphere of *dignitas*: it also imposed certain strict obligations on those included. It is indeed the

latter difference that Hennette-Vauchez particularly emphasizes when she formulates her argument that many contemporary uses of human dignity still operate in the mode of *dignitas*. Mediated through the apparatus of humanity, this 'mode of reasoning invariably unfolds as follows: every human being is a repository (but not a proprietor) of a parcel of humanity, in the name of which she may be subjected to a number of obligations that have to do with this parcel's preservation at all times and in all places' (Hennette-Vauchez 2011, 43).

This kind of disciplining or normalization of those included within the sphere of human dignity may lead to another type of othering – by way of forcing us to deny some essential part of ourselves. As Anne Phillips points out, we lose an important part of ourselves if we have to present ourselves as disembodied abstractions in order to claim our equality: we 'should not have to pretend away key aspects of ourselves, ask forbearance in the face of our particularities, or appeal to people to see who and what we are "beyond" our gender, skin colour, sexuality, or disability' (Phillips 2015, 86). Hence, even if human dignity is used in an explicitly inclusive way, it still tends to produce 'othering' by forcing us to hide our particularities in aspiring to reach out to some common notion of humanity. Yet, as Phillips writes, we 'are not human instead of but *as*...women, men, black, white, gay, lesbian, heterosexual, and so on' (Phillips 2015, 133). Forcing us to pretend otherwise is simply another way of 'othering', regardless of how good the intentions are.

Here one could no doubt point out that this argument may be extended to any legal concept and therefore amounts to little else than splitting hairs. I would rebut that argument, however, submitting that although there is some truth in it, the issue is emphasized when it comes to human dignity given the aim to reach some essential, if not transcendent, element of humanity. My argument against human dignity is therefore a matter of scale or degree. Indeed, even the closest possible reference point, human rights, is much more formalistic, and relies less on assumptions about the essence of humanity. Spelled out into long lists of specific rights, tailored sometimes to specific contexts, and coming with exceptions, the application of human rights is more constrained and legalized than in the case of human dignity, which is more abstract and must therefore rely more explicitly on some presumed notion of shared humanity. Moreover, the symbolic effect of declaring some action a violation or a non-violation of human dignity is much greater than finding that some act violates or does not violate human rights. There is a difference in my mind, for example, between arguing over whether certain sadomasochistic sexual practices fall within the protection of private and family life, and whether the state can intervene in the interest of public health, on the one hand, and

arguing whether such practices are an affront to human dignity, always and everywhere, on the other.[18]

Some of these problematic aspects of human dignity are well-illustrated in the complex and well-known case of Manuel Wackenheim, sometimes referred to as the 'French dwarf-throwing case'. As its moniker suggests, it concerns an activity during which a person, classified as a dwarf, is clothed in padded attire and a helmet, and is thrown around during various events. The applicant concerned, Mr. Wackenheim, had been taking part in these dwarf-throwing events since July 1991. They were organized by a company called Société Fun-Productions, with a view to entertaining the clients of discotheques by allowing them to throw the applicant onto an air bed. At the end of October 1991 the mayor of Morsang-sur-Orge imposed a ban on dwarf-tossing events scheduled to take place at the local discotheque in the interests of public order and safety. There was an appeal against the order, which was eventually annulled by the Administrative Court of Versailles. However, the persistent mayor lodged a further appeal to the Conseil d'État, successfully invoking the concept of human dignity. Instead of closely scrutinizing the specificities of the local circumstances, as it had previously done, the Court elevated human dignity to be an element of public order, which public authorities could legitimately protect regardless of the particular circumstances. Hence, in that dwarf-throwing events infringed 'the dignity of the human person in its very objective', the Mayor was acting within his powers in banning the activity. The same applied with a similar ban issued by the mayor of Aix-en-Provence on 20 March 1992.[19] The decisions of the Conseil d'État, in which it emphasized that these considerations of human dignity were not tied to particular local circumstances, but were applied generally, meant that other mayors were also allowed to ban dwarf-throwing activities, and this quickly led to the end of the practice altogether. Finding himself unemployed, Mr. Wackenheim applied to the Human Rights Committee, arguing that France had discriminated against him and violated his rights to freedom, employment, respect for his private life, and an adequate standard of living. He claimed that, in fact, it was the *banning* of dwarf-throwing that violated his human dignity, not the activity itself: he argued that human dignity was built on the right to make autonomous decisions about one's life, and the right to work in a profession one has chosen for oneself.[20] The Committee did not hold

[18] I have in mind here the case of *Laskey, Jaggard and Brown v. United Kingdom*, 24 EHRR (1997) 39, decided on the national level as *R v Brown* [1993] 2 All ER 75. For a discussion, see (Beyleveld and Brownsword 2002, 35).

[19] Conseil d'État, ass., 27 October 1995, Commune de Morsang-Sur-Orge, Dalloz Jur. 1995, p. 257; Conseil d´ètat, ass. 27 October 1995, Ville d'Aix-en-Provence, Rec. C.E., p. 372; Dalloz Jur. 1996, p. 177.

[20] Manuel Wackenheim v. France, Human Rights Committee, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002), paras 2.1-3.

that France had violated Mr. Wackenheim's rights, however, finding that 'the bans had been necessary in order to protect public order, which brings into play considerations of human dignity that are compatible with the objectives of the Covenant [on Civil and Political Rights].'[21]

At the heart of the case was the question of Wackenheim's dignity and what it entailed. In Wackenheim's view, protecting his dignity meant being given the autonomy freely to make decisions about his life, as well as the right to work. In the view of the French authorities, on the other hand, it meant protecting him, fellow dwarves and the whole human race from exploitation and humiliation – or what is deemed as such by an 'objective' third party. It is not difficult to agree with the French authorities and the Human Rights Committee that 'dwarf-throwing' is an activity worth banning. Moreover, the French Comissaire du Gouvernment, Patrick Frydman, may well have had a point in arguing that the appeal of the events derived from the perverse need of the spectators – who were the ones doing the throwing – to feel superior to those with 'abnormalities', although he no doubt went too far when he went on to hint at Nazi Untermenschen thinking.[22]

My protest, then, is not against the outcome of the decision as such – although it was indeed most unfortunate for Mr Wackenheim, who argued that he had trouble getting other employment and had taken great pride in finally being able to sustain himself financially. I rather bring up the case to demonstrate some of the problems related to the language of human dignity. Framing the issue as a matter of human dignity implies not only that we can somehow deprive ourselves of our dignity through our life choices, posing questions of self-determination and consequently of belonging, but also that the acts of some can diminish the esteem of another individual, a group, or even the whole of humanity (Rosen 2012, 91). Moreover, it makes the case rely on some fixed assumptions of what it is to be a human and implicitly creates a hierarchy between different forms of life and their dignity. In some strange way, arguing that the tossing of the dwarf – as opposed, for example, to an average-sized acrobat – was a violation of human dignity as such, even though he did not agree, seems to imply that it *was* a bit less human because he was a dwarf. This, of course, was not at all what the public authorities intended when they took measures to ban the activity. But my point is precisely that such problematic unintended implications could have been mitigated to some extent by employing other legal concepts that would achieve the same legal result without invoking the same kinds of almost metaphysical problems, thus leading to othering. Finally, the language of human dignity draws attention away

[21] Manuel Wackenheim v. France, Human Rights Committee, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002), para. 7.4.

[22] The opinion of Patrick Frydman, Comissaire du Gouvernment, available at https://fiches.dallozetudiant.fr/fileadmin/contenu_fiches/Public/La_police_administrative/RFDA_1995.1204.pdf (accessed 17 May 2018).

from the background inequalities and structural forms of discrimination that no doubt played a role in convincing the applicant to start working in the events and protecting his trade so persistently. In this there is a link between contemporary uses of human dignity and 'those early Catholic notions of human dignity, where being told that your way of life was replete with dignity became a coded way of saying you should therefore not bother your head with equality' (Phillips 2015, 133).

5. Concluding remarks

I have argued in this article against the view that human dignity is a useless concept. I have maintained, instead, that it is a dangerous one. My argument is based on the notion of human dignity as an apparatus, which can be wielded by decision makers to achieve concrete results in concrete cases – but which, most importantly, tends to result in 'othering' as its by-product (and perhaps sometimes as its strategically selected main product). This, I maintain, it does when those wielding the apparatus assume some ideal notion of the human in applying it, but also when they try to do away with difference altogether.

Taking this effect of othering into consideration, I am not very enthusiastic about the recent advances of human dignity in legal discussion and practice – and obviously not about its potential to counter 'othering'. Writing more from the perspective of philosophy and political theory, Anne Phillips recently argued that we should replace the discourse of human dignity with that of equality, the latter always being *claimed*, whereas dignity is a matter of philosophical, and sometimes even theological pondering. I completely agree with Phillips, although in a legal context I might also settle for the more legalized concept of human rights. Curiously, it seems to me that much of the recent acclaim of human dignity derives from a loss of faith in human rights, which have – entirely correctly – been found to be indeterminate, full of exceptions and requiring complicated balancing acts (on the indeterminacy of human rights see, for example, Koskenniemi 2001; Petman 2006). Indeed, the assumption behind its ascendancy seems to be that we can finally solve these problems of balancing once we give priority to considerations of human dignity. However, if we are looking for precision, it seems to me that human dignity is a step in the wrong direction, and what is more relevant to this article, it is a step towards stronger forms of 'othering'. Whereas the issue of othering also applies to human rights, which also tend to rely on some idea of the human, as codified legal rules they are less abstract and philosophical, and more formal than human dignity. Moreover, they retain some aspects of being claimed, as Phillips emphasizes regarding equality (see, for example, Rancière 2004; Douzinas 2000). This is not so say that there are not cases that almost everyone would agree constitute a violation of human dignity – as problematic as that expression might be in itself. However,

it seems to me unlikely that such events would not be captured within more established legal categories as well, without the need to involve human dignity with all the heavy philosophical, almost theological baggage it carries.

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Book Review

Mónica López Lerma & Julen Etxabe (eds): *Rancière and Law*, Routledge, London 2018

Kristian Klockars*

Rancière and Law brings together legal scholars, theorists and philosophers that have found in the French philosopher Jacques Rancière (born 1940) conceptual openings towards a rethinking of law. As such the volume is unique for previous writings that tackle the place of law in Rancière mostly pay primary attention to the nature of agonistic politics (see, for example, Schaap 2009).

Although Rancière does not work out an explicit conception of law, there are sufficient indications in his conception of politics to trigger an interest in law. In Disagreement Rancière renames the political order of a society a police order (Rancière 1999, 28), thereby also indicating a place for law as part of this policing order. Rancière, like Foucault before him (Foucault 1988 and 2000), rehabilitates 17th- and 18th-century usages of the notion of police to indicate the wider sense of a general ordering of society, including for example meanings and norms connected with health, education, justice and security, and legislation. Police order is made real through a hegemonic distribution of the sensible that distributes meanings and norms in terms of their being relevant-irrelevant, good-bad, just-unjust, etc. In sections of Hatred of Democracy (2006), Dissensus (2010) and Moments politiques (2014)

* Lecturer in Practical Philosophy, University of Helsinki.

Rancière links this basic theoretical framework with legal issues, such as human rights, education and the position of immigrants.

Initially, law belongs to the policing order. But the contributors to Rancière and Law all point out that other, more active, political and democratizing dimensions of law can be sifted out from Rancière's framework, and they especially seek aspects of law that function to destabilize the policing order and thus add a more dynamic dimension to law (López Lerma & Etxabe 2018, 1). Judges, citizens and other human beings also act in relation to the law, and these acts form an integral part concerning the intelligibility of law as part of society.

In this volume, two particular aspects open the route to what several authors call a Rancièrian dramaturgy of law. First, the distribution of the sensible implies a hierarchical distribution of meanings, for example concerning the norms that frame our thinking, reasoning and acting in society. Legislation contributes to creating and upholding this distribution. This means that legislation, through its policing effects, inhabits a political dimension. Second, Rancière's conception of politics is agonistic, which in his case means that politics is mainly a disruptive, interruptive and dissenting force in constant conflict with the police order. In addition, Rancière specifies and limits politics to acts that raise demands of equality in relation to the given hierarchy of the police order.

Rancière thus defines politics as the acts of dissensus that interrupt the smooth reign of the police order (Rancière 1999, 13; 2010, 27). This implies that our acts in relation to law and court procedures may either simply succumb to the given order or disrupt and dissent against it. The latter possibility aligns acts of law with politics.

In the opening article Julen Etxabe attempts to develop such a dramaturgy of law (2018, 19-21). Etxabe construes a tripartite account of the intelligibility of law that utilizes Rancière's framework. Dramaturgy in this context means that the given is viewed as a kind of stage on which different acts can be performed. The acts take up standpoints both in relation to the stage itself and creates routes in relation to the more specific issue tackled. In action we may either just reproduce the given setting, for example through the decision of the judge to follow standard procedures and the routines of law courts, or alternatively invent new forms of action that in part may dissent against certain given settings, perhaps even attempting to restructure the settings and change the set-up of the rule of law.

Etxabe distinguishes between a dramaturgy *in* law and a dramaturgy *of* law. While a dramaturgy in law stays within the realms of the juridical sphere, a dramaturgy of law transgresses the pre-staged borderlines between jurisdiction and politics. Etxabe names *legalism* the law as police order or 'a set of procedures for the aggregation of consent, the organization of powers, the distribution of places and roles, and the system of legitimizing that distribution' (Etxabe 2018, 23). Law as legalism is also a political staging by prescribing specific places for legal

subjects, defining meanings and distributing power positions, such as those between judges, citizens and non-citizens.

Extabe invites us to consider what he calls a *jurisgenerative* level of action. Jurisgenerative action interrupts the smooth running of legalism, for example by questioning pre-given meanings and roles and bringing into view the policing aspects of the legal system. Jurisgenerative acts may emerge from many different sources. Etxabe gives the example of a judge in Spain during a crisis in mortgage payments. The housing market collapsed in 2014 and many homeowners were unable to make their payments. The judge in question, assessing that the legislation put absurd demands on people, refused to enforce the law and appealed to the current situation in society as justification for his dissent The basic claim is thus that a judge is faced with two possibilities and that the choice between them is an act that generates a position towards the law: the easy route of succumbing to legalism or including issues that reveal the political aspects of law.

Etxabe's explication of the intelligibility of law adds a third dimension. Both legalism and jurisgenerative action refer to the existence of a common frame of intelligibility that stages the situation (Etxabe 2018, 36). Etxabe calls this the legal scene. It forms a necessary context for both legalism and jurisgenerative action and makes it possible for anyone anywhere to appeal to and dissent against the political staging that is intertwined with law. Through these new discourses on meaning, justice may be made part of the situation. The final result may in the end be the same, but also in each case the result will be sensed differently: 'a critical dramaturgy makes "the stakes and powers of the scene felt"' (Etxabe 2018, 36).

In Rancière's terminology jurisgenerative action may be seen as an example of political subjectivity. By political subjectivity Rancière means an act of turning oneself, individually or in a group, into a political subject, that is to say a subject that carries out disruptive and dissenting acts (Rancière 2010, 29-39). Rancière emphasizes that it is we ourselves that must voluntarily engage in such action and thus that political subjectivity is not something given. From Rancière's writings two particular accounts of such political subjectivity emerge: the more straightforwardly political form of raising claims against the status quo (doing politics) and more subtle interventions in the distribution of the sensible internally connected with this order (aesthetic intervention).

The articles by Susanna Lindroos-Hovinheimo, Ari Hirvonen, Petr Agha and Mónica López Lerma all engage in issues of political subjectivity. Whereas Lindroos-Hovinheimo and Hirvonen mainly discuss legal-political subjects, Agha and López Lerma reflect on street art and film as examples of intervention in the distribution of the sensible.

According to Lindroos-Hovinheimo, the possibility of becoming a legal subject should be conceptualized as active and as not being pre-

determined by legislation. Anyone anywhere, whether a full-blown citizen or not, can make themselves into a legal subject, for example by acting as if a specific legislation on equality concerns them and by raising claims of equality in relation to a specific legal situation. In this part of the dramaturgy the construction of a subject is simultaneously legal and political. The act invents a scene, and this invention will force the legalistic system to react in some way. It may of course react with ignorance, thus not recognizing the subject as a legal subject. Ignorance, however, will surely be experienced as an act by the legal system, and thus recognized as at least an act of political dissensus. It is in fact enough to invent a new scene to become a legal subject: 'When disagreements arise about who counts as a legal subject, politics necessarily steps in [...] To become a subject whose equality is recognized, one needs to demonstrate dissensus to somebody by inventing a scene' (Lindroos-Hovinheimo 2018, 84).

Hirvonen discusses the status of refugees in the recent refugee crisis in Europe. The crisis re-actualizes Arendt's claims concerning human rights (Hirvonen 2018, 55). In line with Arendt's arguments, refugees lack rights since they no longer belong to any specific political community, although they are the ones most in need of human rights. Arendt's well-known solution would be to demand the right of refugees to become members of some political community. As Hirvonen observes, a particular problem with this solution is that refugees and immigrants are in an in-between state, having left one political community and on the move towards hopefully joining another. In this in-between state of existence how should human rights be understood?

The Rancièrian answer discussed by Hirvonen is the possibility for refugees to turn themselves into political subjects, wherever they happen to be and in relation to whichever legal system they happen to encounter. Anyone anywhere and anytime may decide to create themselves into a political and legal subject, for example by raising claims to be treated as equals and as beings having rights that the law must take into account. Hirvonen supports this with actual cases of refugee groups going to court to defend their rights for proper treatment as human rights bearers.

Hirvonen's claim is that such acts simultaneously dissent against the existing law and the given consensus of the political community. He emphasizes the importance of refugees organizing themselves and turning themselves into political agents and of the possibilities of other agents emerging onto the scene: 'in refugee protests where rights claims are made, the refugee acts neither as legal subject nor as bare human being but as political subject ... Human rights are the rights of those who make something out of these inscriptions' (Hirvonen 2018, 60). This Rancièrian emphasis on our own responsibility to turn ourselves into subjects puts pressure on the refugees' own activity and this of course raises questions: What is the responsibility of the legal system to act in

advance to defuse such situations of crisis, for example through pro-active human rights policies?

Petr Agha focuses on the second mode of political subjectivity: intervening in the distribution of the sensible that structures the police order. Agha discusses street art. Although 'street art is not capable of producing direct political effects' in the sense of 'solutions, normative frameworks, and new legal regulations' (Agha 2018, 161), it may disrupt the space of intelligibility that stages the police order, including law. Agha discusses the example of the Lennon Wall in Prague. By painting an image of John Lennon on a wall in Prague in the 1980's a public message conveying a longing for freedom became part of community life. Although the wall was quickly painted over by the authorities, in the public eye the wall become associated with the message of freedom. In this sense, even a short-lived act manages to make real a challenge to the distribution of the sensible of the current regime.

Street art, and art in general, may thus succeed in being dynamic in a different sense than in a direct construction of a subject. It may open up spaces and communicate a dissensus: 'Thanks to the dynamic nature of the space opened by street art, the community it creates is a 'community structured by disconnection' (Agha 2018, 160). In due time such a dissenting political success may be turned into a monument that is representative of a new regime. This happened with the Lennon Wall after the Velvet Revolution. In 2016 it led artists in Prague once again to paint over the wall with white paint, adding the text 'The Wall is Over', thus once more creating a disruption in the public imaginary.

López Lerma's focus is on the sensory configuration of security and justice after 9/11. She approaches the issue through a study of a film dealing with the terror attacks in Europe 2004: Enrique Urbizu's No Peace for the Wicked (2011). The film is fictional but 'evokes the places, methods and strategies behind the 2004 Madrid bombings' (López Lerma 2018, 188).

López Lerma claims that while the narrative of the film seems to abide to the more standard view on security and justice in relation to terrorism, 'at the level of aesthetics the film disturbs and reconfigures the frames within which [the ideological] discourses are to be understood' (López Lerma 2018, 188). Thus, while superficially it may appear that the film portrays our ordinary scheme of understanding terrorism, it adds disturbances and disruption to this picture. For example, the cowboy hero narrative of the lone policeman killing the terrorists is disturbed by aesthetic references to this particular individual as acting in retaliation and as an attempt to save his own skin. In this sense the aesthetics of a film may intervene in our distribution of the sensible.

Especially persons with a similar allegiance to democratic political action as Rancière with probably associate the notion of police order with repression. Rancière, however, adds that there is nothing in itself

bad about a police order and that some police orders are better than others (Rancière 1999, 31; 2006, 72). But how are we actually to understand this relationship and on what basis can some police orders be deemed better than others?

The contributions of Tom Frost, Eric Heinze, Panu Minkkinen and Wayne Morrison all in their own way pose this issue. Frost wonders whether it is at all possible to distinguish between good and bad political actors in Rancière's scheme. If politics is defined as dissensus with the police order, then all such action may appear good, including the racist or totalitarian actions that, for example, dissent against the strong position of equality in law. Without any form of pre-judgement concerning what forms of actions and actors qualify as good forms of dissensus, for example only egalitarian and pro-democracy ones, totalitarian movements would also fulfil the criteria of being dissent and raise new claims of equality (the equality of totalitarian views): 'in this political community, the excluded is a conflictual actor, an actor who includes himself as a supplementary political subject, carrying a right not yet recognized or witnessing an injustice in the existing state of right' (Frost 2018, 97. But as Rancière himself indicates, this conflictual actor may be anyone and can stand for any aim imaginable.

Frost is right that Rancière leaves this highly important question without a satisfactory answer. By defining the only 'genuine' form of politics as being democratic politics, the possibility and reality of anti-democratic politics is brushed away as the obvious enemy of politics. Rancière in fact defines politics in several different ways, and these definitions are not always connected. For example, when claiming that politics is defined as 'conflict over the existence of a common stage and over the existence and status of those present on it' (Rancière 1999, 26—27), this opens up space for forms of politics that are non-democratic in their aims. Frost thus claims that what is lacking in Rancière is a conception of political judgement that would allow us to differentiate between mere inclusion and the normativity of being in favour of equality and against inequality.

Heinze also reflects upon the place of encounter between the police order and politics. In a Habermasian vein he suggests that the meeting point between action and police order should be conceptualized as public discourse. We should understand public discourse in a broad manner as including all those actions that enter the public sphere of meaning, and not reduce public discourse to speech acts. Leaning on both Plato and Habermas, Heinze claims that the sphere of public discourse forms the foundational constitution, the Urverfassung, of democratic public life: 'Ironically, it is precisely that element before and beyond government, identified here as public discourse, which itself constitutes government as legitimate. In other words, public discourse supplies democracy's Urverfassung' (Heinze 2018, 124).

Heinze claims that the police order and its law is what makes possible the existence of a public arena where conflictual claims may meet: 'it is precisely there, on the outside, yet within a sphere of public discourse necessarily safeguarded by the state, that the only ultimately legitimate foundation for any democratic constitution is to be found' (Heinze 2018, 124). This sphere of law may also provide safeguards against the emergence of more deeply divisive antagonisms: 'It is through a sphere of public discourse necessarily preserved by government that the disjunction between citizens and government can never be total' (Heinze 2018, 112)

Heinze admits that this is not in line with what Rancière actually claims, thus his contribution forms a critique of Rancière that brings back a more positive emphasis on the role of the police order and legislation. A better police order is one that enables public discourse and thereby also democratic acts of dissensus. Rancière could surely here respond by claiming that political subjectivity by inventing new scenes constantly moulds this constitutional aspect and thus sets the staging of the public sphere of discourse in motion.

Minkkinen likewise focuses on the antagonistic features of the meeting point, mainly through a comparison of Carl Schmitt and Rancière. In his critique of Schmitt, Rancière emphasizes the centrality of the normative thematic of equality in contrast with Schmitt's neutral focus on political antagonism as that between friend and enemy (Minkkinen 2018, 129).

Translated into Rancièrean terms, political antagonism as defined by Schmitt is a feature of the police order that sets up the boundaries of that order. The police order, in order to maintain its unity and identity is always threatened by the outside, either by another police order or by an internal political enemy. Schmitt's conception thus forms a political ontology: the being of the political police order is antagonistic in nature. Rancière does not, however, follow Schmitt into such ontological claims. The police order indeed constructs and upholds itself through an internal consensus with its own specific exclusions. But politics consists in the dissenting actions that disturb this order, otherwise politics lacks ontological status.

Minkkinen criticizes Rancière for thereby neglecting to study more closely the qualitative differences between police orders. The police order remains enemy-like and political action should never be content only with improving the police order. This makes Rancière a partisan of the revolutionary form of politics, in contrast to Schmitt's political conservatism, whose main focus is on understanding and defending the police order.

Morrison, for his part, investigates how the Nuremberg trial came to form part of the setting up of a new police order: modern international criminal law. Besides creating a system for the punishment of war criminals, the Nuremberg trial functioned to deal with a problem with

law that had emerged through Nazism and aimed to solve this problem through an invention in law. Nazism revealed a lacuna in the modern state system that triggered a need for change. Nazism was lawful, through its own legislation, but it was a rule of law that rendered possible a human disaster. Thus, the classical belief in our distribution of the sensible that law is educative and strengthens society was torn asunder. Nazism revealed, even to ordinary citizens, and even in a modern state, that law itself might be potentially disastrous. Thus, a function of the Nuremberg trial was to invent a new dimension to criminal law and thus to the police order: crimes against humanity and international law. Through this new dimension a new step might be achieved in motivating citizens to abide by the law and put their trust even in laws one does not necessarily understand: 'its real function was to render the modern state system immune from disaster and to reinforce our belief in the civilizing function of law' (Morrison 2018, 170

All in all, the collection *Rancière and Law* poses many of the most central issues concerning law that are opened up from within Rancière's framework. Rancière's lack of interest in analysing in more detail the political police order is here turned into an interest in dwelling on the multidimensionality of law. Law both forms part of the police order, thus creating a distribution of the sensible that we all relate to and that forms how we think. It also opens up possibilities to act in dissensus with the law while employing means made available for action by the law itself, the inclusion of symbolic values such as human rights and equality within the law being clear examples.

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