
The Citizenship Lottery

A Review of Moritz Jesse (ed.), *European Societies, Migration, and the Law: The 'Others' amongst 'Us'*, Cambridge University Press, 2021. 433 pp. £27.99 (PB). ISBN: 978-1-108-72079-3

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Introduction

What are the fundamental distinctions or markers of difference that enable individuals or groups to be placed inside or outside - or in an ambivalent place in-between - a community and its legal order? In the not too distant past we might have concluded that the various boundaries which are erected and closures that are enforced are essentially a product of the distinction between the 'citizen' and 'non-citizen'. However, in recent years - during which, among other things, the stability of the citizenship category has been undermined by actions of States - the idea that 'the fundamental form of the inside/outside distinction' (Lindahl 2014: 42) can be represented in the opposition between a 'national' and 'non-national' has increasingly been subjected to critical scrutiny. *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* is a volume of essays which sits within this more recent orientation in migration and citizenship studies. Whilst its premise is that migrant status is the ultimate sign of 'otherness', the locus of the chapters is within the European Union (EU). Inevitably, therefore, the authors are drawn into a discussion of how to account for the "internal articulations of 'otherness'...differentiations between 'core' Europeans and 'other' Europeans..." (Van Der Woude 2022: 71) within a polity that purports to have "...disrupted the binary logic of [national] and [foreigner]" (Idriz 2022: 130). The "...plurality of boundaries and levels of (non-)membership..." (Hamenstadt 2022: 189) evident within the EU indicate that there are ways of conceiving the 'other' that exceed 'foreignness', but in relation to which 'foreignness' often acts as proxy.

About the Book

Arranged in five parts, *European Societies, Migration, and the Law* explores how EU Member States, the legislative institutions of the EU and the Court of Justice of the European Union (CJEU) have responded to asylum claims and to the movement and settlement of EU citizens and their family members. Whilst noting the occasions when Member States within the EU have taken steps to

ensure that constitutional rights extend to individuals on the basis of ‘human personality’ alone, (Murphy 2022: 107-129), the overall tenor of the chapters is that - as one author expresses it - “[t]he conditions for ‘othering’ are embedded in the EU and in the instruments said to ‘govern’ the principle of free movement” (Van Der Woude 2022: 78).

For some authors, ‘othering’ practices are associated with migrant status *per se*. In the context of the EU, these chapters argue that it is migration status that ultimately determines how intensely an individual or group is placed at the fringes of a society and its laws. Jesse attributes this to the fact that, as a consequence of the colonial histories that EU Member States share, “...there is no coherent acceptance of immigration as a natural phenomenon” (Jesse 2022: 368). The perspective that ‘othering’ practices are intimately and almost exclusively associated with the ‘foreigner’ is especially evident in those chapters that examine the situation of the category of migrants against whom the exclusionary tendencies of the EU legal order are most directed - the refugee in search of territorial asylum. One form in which Member States impose boundaries between who is to be included and who is not is through the deliberate construction of hierarchies within refugee groups. Speaking in the context of family reunion policies, Idriz observes that, within the EU legal order, “[e]ach status category has its own sub-category of the [other]” (Idriz 2022: 130). That this applies to the refugee category is demonstrated by the chapters which contrast the treatment of refugees received through resettlement programmes with that accorded to so-called ‘spontaneous arrivals’ (Morano-Foadi, Della Croce and Lugosi 2022: 247-264). Whilst both groups were found to be subject to “...ways of ‘othering’ *within* the group of refugee [others]” (Welfens and Pisarevskaya 2022: 81), in contrast to the majority of refugees - housed in Camps and thus “...perceived as homogenous groups...not able to partake in the host society” (Segarra 2022: 223), resettled refugees are more likely than spontaneous arrivals to be integrated into the host society - having been previously screened and selected - not simply on the grounds of their “...vulnerabilities and protection needs, but also on their estimated assimilability and security profile” (Welfens and Pisarevskaya 2022: 103). Van Harten draws attention to “the absence of policies supporting integration [leading] to exclusion and ‘othering’ [and] often resulting in onward movement...” (Van Harten 2022: 231).

Other chapters, however, encourage readers to reflect on whether the citizen/non-citizen distinction is the fundamental criterion for inclusion/exclusion (see generally Thym 2022: 323-355). De Vries offers to readers some explanation of why the citizen/non-citizen distinction has gained such a tenacious hold for academics and others writing on positions of dominance, when noting that “...nationality is not commonly recognised as a suspect discrimination ground inviting strict scrutiny of the reasons supporting any difference in treatment between groups or individuals” (DeVries 2022: 193). That nationality discrimination is still tolerated is largely due to the still wide-spread adherence to the principle of state sovereignty - on which the concepts of citizen/non-citizen are grafted.

Indeed, in spite of its claim to have transcended ideas of sovereignty in favour of the more muted/nuanced concept of supremacy “...other than for EU citizens, EU law does not recognise nationality as being a prohibited discrimination ground” (De Vries 2022: 199). Another reason for the persistence of the opposition between citizen and non-citizen as an explanation behind exclusionary practices, and the ‘othering’ processes that sustain them, is that migrant status often intersects with other signs indicative of groups that, historically, suffer exclusion or enjoy inclusion, “...such as race, origin, religion, culture, nationality or wealth” (Jesse 2022: 20). The regularity with which exclusionary practices are first visited on migrants and then extended to other marginalised populations, and sometimes to the general population, is not overlooked by the authors. As Hofmannova and Repa opine “...the denial of humanity endangers not only the position of immigrants themselves; it also has a fundamental impact on all other individuals...because human dignity represents the liberal pre-normative universal equalisation of all human beings. Thus, denying the dignity of ‘others’ constitutes a denial of the human condition of everyone” (Hofmannova and Repa 2022: 58).

To a significant extent, the salience of the citizen/non-citizen distinction rests on the idea that citizenship, once acquired, would endure and that the status would guarantee access to all manner of public goods. It is the chapters in the volume that reveal EU citizenship to be a highly volatile concept that most directly interrogate the idea that ‘otherness’ is synonymous with ‘foreignness’.

What we might refer to as the ‘citizenship lottery’ in the EU is displayed in the volume in three ways. First, in the contrasting treatment of Eastern European and Western European EU citizens. Particularly during the near three year period during which the UK sought to exit the EU, Eastern Europeans were “...depicted as poor criminals who cannot live in the UK without posing a threat to the native population. The same group of people, dominant in their own states of origin was, simultaneously, part of the out-group and segregated as ‘European other’ in a different setting elsewhere in the EU” (Jesse 2022: 21). Second, in the resurgence of the economic citizen - marked by some high-profile and highly contentious decisions of the CJEU. Whilst proof of economic activity has always been a key criterion of inclusion within the EU legal order, the consequence of recent CJEU decisions is that “...at least legally speaking, there are more persons considered to be economically inactive than is factually the case” (Carter 2022: 315). Such a situation will inevitably lead to “... changing attitudes relating to the value and status of those engaged in insecure and precarious work in society, as well as the system of free movement in the EU” (Carter 2022: 317). Third, in the ways and means through which previously lawful residents have been constructed as potentially illegal migrants. Within the EU, this has occurred not only through increasing use of denaturalisation processes “...so that former nationals become deportable outsiders” ((Hamenstadt 2022: 173), but also through the “...arbitrary loss of EU citizenship rights...”

(Kostakopoulou 2022: 268) which was a consequence of the UK's decision to leave the EU. One possible additional consequence of the CJEU decisions relating to the requirement of economic activity, mentioned above, is the creation of "...a class of EU citizens that are 'illegal' or 'irregular' immigrants" (Jesse and Carter 2022: 287).

Conclusion

As Thym observes, the concept of the 'third-country national' was an invention of the EU (Thym 2022: 347). Undoubtedly then, the 'foreign other' is a crucial element of the EU's identity. The primary objective of *European Societies, Migration, and the Law* is to demonstrate that "...restrictive bordering and other practices as well as...anti-immigrant sentiments..." (Van Der Woude 2022: 80) are endemic in the EU, and its exclusionary practices "... [target]...the descendants of immigrants who may well be citizens of the country in which they reside" (Kolbasi-Muyan 2022: 152). At the same time, by drawing attention to the fact that "[i]t is not only 'TCN others' that are 'othered'. EU law has created a hierarchy of statuses within every category..." (Idriz 2022: 149), the various contributions to the volume raise the question of whether in today's "...environment of interdependent legal orders, where [one] might simultaneously be an insider in one legal system and an outsider in another" (Hamenstadt 2022: 174), new tools and frameworks of analysis are called for.

Reference

Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*, Oxford University Press, 2013.